ADVISORY COMMITTEE
ON
EVIDENCE RULES

Charleston, South Carolina
November 20, 2009

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Charleston, S.C.

November 20, 2009

I. Opening Business

Opening business includes approval of the minutes of the Fall, 2009 meeting; and a report on the June 2009 meeting of the Standing Committee.

II. Restyled Evidence Rules Issued for Public Comment

The restyled Evidence Rules have been released for public comment. Some suggestions for change have been made from a number of sources. The agenda book contains a memorandum discussing the suggested changes. The restyled rules are included behind the memorandum.

III. Possible Amendments to the Evidence Rules in Response to Melendez-Diaz v. Massachusetts

The Supreme Court's decision in *Melendez-Diaz v. Massachusetts* — holding that certificates of forensic testing prepared for trial are testimonial under the Confrontation Clause — raises questions about some of the Federal Rules hearsay exceptions and authentication provisions that are related to records. The agenda book contains a memorandum from the Reporter discussing the implications of *Melendez-Diaz* and analyzing whether it is advisable to propose any amendments to the Evidence Rules in light of that decision.

IV. Crawford Outline

The updated outline on federal cases on confrontation after *Crawford v. Washington* is included in the agenda book.

V. Physician Interest Group Proposals to Amend the Evidence Rules

A physicians' interest group has proposed a package of changes to the Evidence Rules. The Reporter's memorandum addressing those proposals is included in the agenda book. The proposals from the physicians' interest group are included behind the Reporter's memorandum.

VI. Circuit Court Split on Rule 804(b)(1)

The agenda book includes a memorandum from the Reporter analyzing a split in the circuits on the admissibility — under the hearsay exception for prior testimony — of grand jury testimony that is favorable to the accused.

VII. Possible Amendment of the Three-Day Rule in Civil Rule 6(d)

The Civil Rules Committee is considering a possible amendment to Civil Rule 6(d), which adds three days to any time specified to act after service when that service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. The agenda book includes a copy of the Civil Rules agenda item on Rule 6(d) that was discussed at that Committee's October 2009 meeting, and excerpt draft minutes of the discussion.

The Civil Rules Committee welcomes comments from any other advisory committee on whether this is a useful project that should be advanced promptly.

VIII. Next Meeting

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:	**Reporter:**
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717 Phone 850-521-3601 Fax 850-521-3610 <robert_hinkle@flnd.uscourts.gov>	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023 Phone 212-636-6855 Fax 212-636-6899 <dcapra@law.fordham.edu>
Members:	
Honorable Joseph F. Anderson, Jr. Chief Judge, United States District Court Matthew J. Perry, Jr. United States Courthouse 901 Richland Street Columbia, SC 29201 Phone 803-765-5136 Fax 803-253-3246 <gail_hayden@scd.uscourts.gov>	Honorable Anita B. Brody United States District Court 7613 James A. Byrne United States Courthouse 601 Market Street Philadelphia, PA 19106-1797 Phone 267-299-7431 Fax 215-580-2356 Chambers_of_Judge_Anita_B_Brody@PAED.USCOURTS.GOV
Honorable John Cruden Acting Assistant Attorney General Environment and Natural Resources Div. Department of Justice, Room 2139 950 Pennsylvania Avenue, N.W. Washington, DC 20530 Phone 202-514-2701 Fax 202-307-0097 <John.Cruden@usdoj.gov>	Honorable Joan N. Ericksen United States District Judge United States District Court 12W United States Courthouse 300 South Fourth Street Minneapolis, MN 55415 Phone 612-664-5890 Fax 612-664-5897 <jnericksen@mnd.uscourts.gov> <sheri_frette@mnd.uscourts.gov>
William T. Hangley, Esquire Hangley, Aronchick, Segal & Pudin, P.C. One Logan Square, 27th Floor Philadelphia, PA 19103-6933 Phone 215-568-6200 Fax 215-568-0300 <whangley@hangley.com> <kboyle@hangley.com>	Honorable Andrew D. Hurwitz Justice Supreme Court of Arizona Suite 431 1501 West Washington Phoenix, AZ 85007 Phone 602-452-3532 Fax 602-452-3481 AHurwitz@courts.az.gov sgonzale@courts.az.gov

ADVISORY COMMITTEE ON EVIDENCE RULES (CONT'D.)

Marjorie A. Meyers Federal Public Defender 310 The Lyric Center 440 Louisiana Street Houston, TX 77002-1634 Phone 713-718-4600 Fax 713-718-4610 <margy_meyers@fd.org>	Elizabeth J. Shapiro AD, Federal Programs Branch U. S. Dept. of Justice – Civil Division 20 Massachusetts Ave., N.W., Room 7152 Washington, DC 20530 Phone 202-514-5302 Fax 202-616-8470 <Elizabeth.Shapiro@usdoj.gov>
William W. Taylor, III, Esquire Zuckerman Spaeder LLP 1800 M Street, N.W. Washington, DC 20036-5802 Phone 202-778-1810 Fax 202-822-8106 <wwtaylor@zuckerman.com>	
Liaison Members: Honorable Michael M. Baylson United States District Judge United States District Court 4001 James A. Byrne U.S. Courthouse 601 Market Street Philadelphia, PA 19106 Phone 267-299-7520 Fax 267-299-5078 <Michael_Baylson@paed.uscourts.gov>	 Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101 Phone 619-557-6016 Fax 619-702-9922 <Marilyn_L_Huff@CASD.uscourts.gov>
Honorable John F. Keenan United States District Court 1930 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312 Phone 212-805-0220 Fax 212-805-7911 <John_F_Keenan@NYSD.USCOURTS.GOV>	Honorable Judith H. Wizmur Chief Judge United States Bankruptcy Court Mitchell H. Cohen U. S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570 Phone 856-757-5126 Fax 856-757-5052 <Judge_Judith_Wizmur@njb.uscourts.gov>
Consultants: Professor Kenneth S. Broun University of North Carolina School of Law CB #3380, Van Hecke-Wettach Hall Chapel Hill, NC 27599 Phone 919-962-4112 Fax: 919-962-1277 ksbroun@email.unc.edu	 Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933 Phone 517-371-5140 ext. 2601 Fax 517-334-5781 <kimblej@cooley.edu>

ADVISORY COMMITTEE ON EVIDENCE RULES (CONT'D.)

Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Peter_McCabe@ao.uscourts.gov>	

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <John_Rabiej@ao.uscourts.gov>	James N. Ishida Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <James_Ishida@ao.uscourts.gov>
Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Jeffrey_Barr@ao.uscourts.gov>	Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Gale_Mitchell@ao.uscourts.gov>
Ms. Amaya Bassett Staff Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Amaya_Hain@ao.uscourts.gov>	Ms. Maggie Moore Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Margaret_Moore@ao.uscourts.gov>
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1900 Fax 202-502-1988 <James_Wannamaker@ao.uscourts.gov>	Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1900 Fax 202-502-1988 <Scott_Myers@ao.uscourts.gov>

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4084 Fax 202-502-4199 <jcecil@fjc.gov>	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 <mleary@fjc.gov>
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4074 Fax 202-502-4199 <bniemic@fjc.gov>	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4049 Fax 202-502-4199 <twillgin@fjc.gov>
Laura L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 <lhooper@fjc.gov>	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4097 Fax 202-502-4199 <treagan@fjc.gov>

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 23-24, 2009

Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 23rd and 24th in Washington, D.C..

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. James A. Teilborg, Chair of the Standing Committee's Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Judith H. Wiznur, Liaison from the Bankruptcy Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Standing Committee's Style Subcommittee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Thomas E. Willging, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of the ABA Section on Criminal Justice

Alan Rudlin, Esq., Representative of the ABA Section of Litigation

Opening Business

Judge Hinkle welcomed the members and other participants to the meeting.

The Committee approved the minutes of the Spring 2008 meeting.

Judge Hinkle reported on developments since the last meeting. At its January 2009 meeting, the Standing Committee approved for publication the proposed amendment to the proposed restyled Rules 501-706. He noted that the Standing Committee amended the proposed Rules 501 and 601 from the restyled version approved by the Advisory Committee. The Standing Committee determined that the restyled language in both rules may have made a change in the substantive law on the applicability of state laws of privilege in cases where both federal and state claims are brought. Most federal courts have applied federal law to both state and federal claims in this situation, and the Standing Committee determined that the rules as restyled by the Evidence Rules Committee could be read to require that state law would govern both claims.

Judge Hinkle also reported that two members of the Standing Committee dissented from the vote to approve Rules 501-706 for public comment. Those members expressed concern with some of the style conventions, but were not opposed in principle to the restyling project.

Finally, Judge Hinkle informed the Committee that the Standing Committee has established a Subcommittee on Privacy, chaired by Judge Reena Raggi. The Privacy Subcommittee will investigate problems and developments arising since the enactment of the e-government rules, which require redaction of certain information from court filings. Each Advisory Committee has designated one member to serve on the Subcommittee. Judge Hinkle is the representative from the Evidence Rules Committee. Professor Capra has been appointed Reporter to the Privacy Subcommittee.

I. Restyling Project

A. Introduction

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee approved the restyled Rules 101-415; the Standing Committee authorized those rules to be released for public comment, but publication will be delayed until all the Evidence Rules are restyled. The Committee approved Restyled Rules 501-706 at its Fall 2008 meeting, and as discussed above, the Standing Committee approved release for publication, with a minor amendment to two Rules.

At the Spring 2009 meeting the Committee reviewed a draft of restyled Rules 801-1103. The draft had been prepared in the following steps: 1) Professor Kimble prepared a first draft, which was reviewed by the Reporter; 2) Professor Kimble made some changes in response to the Reporter's comment; 3) the revised draft was reviewed by the Evidence Rules Committee, and Professor Kimble made some further revisions in light of Committee comments; 4) the Style Subcommittee reviewed the draft and implemented changes, resolving most of the open questions left in the draft. The Advisory Committee reviewed the Style Subcommittee's approved version at the Spring 2009 meeting.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change should not be implemented. The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be considered by the Style Subcommittee of the Standing Committee.

After considering possible changes of both substance and style, the Committee unanimously voted to refer the Restyled Rules 801-1103 to the Standing Committee, with the recommendation that they be released for public comment.

In order to assure consistency throughout the Restyled Rules, Professor Kimble made a number of suggested changes to Rules 101-706, which had previously been approved for public comment. The Committee reviewed these changes and, as discussed below, most were approved, some were rejected and some were modified. **The Committee then voted unanimously to refer the entire package of Restyled Rules to the Standing Committee with the recommendation that they be approved for release for public comment in August, 2009.**

What follows is a description of the Committee's determinations, rule by rule. **It should be noted that a number of the rules required no discussion because any drafting questions in those rules had already been resolved in the extensive vetting process described above.**

The Committee also noted that it might be necessary to make minor changes to the Rules as approved by the Committee, in order to assure internal consistency, correct typographical errors and the like. The Committee gave the Chair, the Reporter and the Style Consultant the authority to make these minor changes.

B. Rules 801-1103

Many of these Rules are essentially a independent rules placed under one rule number.

Accordingly, the Committee reviewed some of these rules subdivision by subdivision, and others as a single rule. These minutes reflect that delineation.

Rule 801(a)-(c)

Rule 801(a)-(c) currently provides as follows:

> **Rule 801. Definitions**
>
> The following definitions apply under this article:
>
> **(a) Statement.** A ``statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> **(b) Declarant**. A ``declarant'' is a person who makes a statement.
>
> **(c) Hearsay.** ``Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The restyled version of Rule 801(a)-(c), reviewed by the Committee at the meeting, provides as follows:

> **(a) Statement.** "Statement" means:
>
> (1) a person's oral or written assertion; or
>
> (2) a person's nonverbal conduct, if the person intended it as an assertion.
>
> **(b) Declarant.** "Declarant" means the person who made the statement.
>
> (**c) Hearsay.** "Hearsay" means a prior statement — one not made by someone while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant.

Committee Discussion:

1. Committee members observed that the reference to "one not made by someone" was vague. Because the rule already defines the one who makes the statement as the "declarant," it would be more precise to refer explicitly to the declarant as opposed to "someone."

2. Professor Kimble and the Style Subcommittee agreed with the change from "one not made

by someone" to "the declarant."

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 801(a)-(c) be released for public comment, with the substitution of "the declarant" for "one not made by someone."

Rule 801(d)(1)

Rule 801(d)(1) currently provides as follows:

> **(d) Statements which are not hearsay.** A statement is not hearsay if-
>
> **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

The restyled version of Rule 801(d)(1), reviewed by the Committee at the meeting, provides as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> **(1) A Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about the statement, and the statement:
>
> (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
>
> (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from an improper influence or motive in so testifying; or
>
> (C) identifies a person as someone the declarant perceived earlier.

Committee Discussion:

1. Professor Kimble proposed two minor changes to the rule as approved by the Style Subcommittee — both intended to clarify that the hearsay statement offered is that of the witness: first, changing the heading to "A *Declarant-Witness's* Prior Statement"; second, to refer to "cross-examination about the *prior* statement." The Committee agreed with both clarifications.

2. Judge Hinkle observed that the restyled provision on prior consistent statements made a substantive change because the requirement of recency is made to apply only to fabrication and not to improper influence or motive. The substantive law requires that the "recency" requirement applies to both kinds of attacks on the witness. **The Committee unanimously agreed that the restyled version made a substantive change to Rule 801(d)(1)(B). The Committee unanimously adopted the following change:**

> is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a *recent*, improper influence or motive in so testifying

3. The Style Subcommittee agreed with the change.

Committee Vote

The Committee unanimously approved the restyled version of Rule 801(d)(1), as modified by the stylistic changes proposed by Professor Kimble, and with the addition of the term *recent* before "improper influence or motive.".

Rule 801(d)(2) — Title

The restyling changed the title of Rule 801(d)(2) from "Admission by Party-Opponent" to "An Opposing Party's Statement." Some Committee members argued that a change from the term "admissions" would be jarring to lawyers and courts, as that term has been used to describe hearsay statements made by a party, and offered against that party, for more than 30 years. But other members of the Committee found the change to be very useful. They noted that many lawyers are confused by the term "admissions" — thinking that such statements must "admit" something to qualify the statement; and others confuse admissions with declarations against interest.

After discussion, the Committee unanimously approved the restyled heading to Rule 801(d)(2). It also unanimously approved a Committee Note to the change, describing the motivation for the change and stating that there is no intent to change substantive law. (See discussion on Committee Notes later in these Minutes).

Rule 801(d)(2)(A)

Rule 801(d)(2)(A) currently provides as follows:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or

The restyled version of Rule 801(d)(2)(A), reviewed by the Committee at the meeting, provides as follows:

> The statement is offered against an opposing party and:
>
> (A) was made by the party in an individual or representative capacity;

.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 801(d)(2)(A).

Rule 801(d)(2)(B)

Rule 801(d)(2)(B) currently provides as follows:

> (B) a statement of which the party has manifested an adoption or belief in its truth, or

The restyled version of Rule 801(d)(2)(B), reviewed by the Committee at the meeting, provides as follows:

> (B) is one that the party adopted or the party accepted as true;

Committee Discussion:

1. Members expressed a concern about the change from "manifested an adoption or belief"

to "that the party adopted or the party accepted as true." Members believed that the change was substantive because deleting the word "manifested" could persuade a court that adoption should be found more easily than previously. One member noted that in a criminal case, admitting an accusation because it was adopted raised confrontation questions. Consequently, any change that could be interpreted to find adoptions more easily was extremely problematic. **The Committee voted unanimously that the proposed change would effectuate a substantive change.**

2. Professor Kimble prepared several alternatives for restyling Rule 801(d)(2)(B) in a different way. He noted that the word "manifested" was awkward and that any attempt to include it would result in a poorly styled rule. After discussion, the Committee agreed on the following language for Rule 801(d)(2)(B):

"is one that the party appeared to adopt or to accept as true;"

Committee Vote

The Committee voted unanimously to approve an amendment to Rule 801(2)(B), stating that the hearsay exemption applies to a statement "that the party appeared to adopt or to accept as true."

Rules 801(d)(2)(C) and (D)

Rules 801(d)(2)(C) and (D) currently provide as follows:

> or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

The restyled version of Rules 801(d)(2)(C) and (D), reviewed by the Committee at the meeting, provide as follows:

> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

Committee Vote:

The Committee voted unanimously to approve Rules 801(d)(2)(C) and (D) as restyled.

Rule 801(d)(2)(E)

Rule 801(d)(2)(E) currently provides as follows:

> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The restyled version of Rules 801(d)(2)(C) and (D), reviewed by the Committee at the meeting, provide as follows:

> (E) was made by the party's co-conspirator during the conspiracy and to further it.

Committee Discussion:

1. Some Committee members thought the phrase "during the course and in furtherance of the conspiracy" was a so-called "sacred phrase" that cannot be restyled. It was observed that the language was taken from the substantive law of conspiracy, which Rule 801(d)(2)(E) was designed to track. Others disagreed.

2. After substantial discussion, the Committee determined that changing "during the course of" to "during" could never result in a difference in result in applying the coconspirator exception.

3. **In contrast, Committee members concluded that substituting "to further it" for "in furtherance of" could be interpreted as a substantive change.** The "in furtherance of" requirement, as applied in the cases, is relatively mild. The more assertive phrase "to further it" could be interpreted to require more in the way of intent and action than is the case under the current law.

Committee Vote:

A motion was made to retain "during the course and in furtherance of the conspiracy" as a substantively required phrase. That vote failed by a vote of 6 to 3.

Thereafter, the Committee unanimously agreed that the change of the "in furtherance of" language was substantive. It unanimously approved the following language for Rule 801(d)(2)(E):

> "was made by the party's co-conspirator during and in furtherance of the conspiracy."

Rule 801(d)(2), last sentence

The last sentence Rule 801(d)(2) currently provides as follows:

> The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

The restyled version of the last sentence of Rule 801(d)(2) is set out as an independent paragraph, and provides as follows:

> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Vote:

The Committee voted unanimously to approve the restyled version of the last sentence of Rule 801(d)(2)(E).

Rule 802

Rule 802 currently provides as follows:

> **Rule 802. Hearsay Rule**
>
> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

The restyled version of Rule 802, reviewed by the Committee at the meeting, provides as follows:

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Committee Discussion:

Professor Kimble and the Reporter noted that the reference to Supreme Court rules as being under "statutory authority" had been eliminated from the Rule, but not as a substantive change. Rather, the new definitions section would define Supreme Court rules as those being prescribed under statutory authority. The definitions section was considered later at the meeting. (See below).

Committee Vote:

The Committee unanimously approved the restyled version of Rule 802.

Rule 803, Structure

The Style Subcommittee and Professor Kimble proposed to restructure Rule 803 so that the hearsay exceptions would be set forth under a new subdivision (a), and a new subdivision (b) would define "record" for purposes of some Rule 803 exceptions as including a memorandum, report or data compilation in any form. The rationale for the restructuring is that the existing Rule follows a number (803) with another number — whereas the proper structure is to follow a number with a letter, with a number, and so forth. Professor Kimble also argued that the new subdivision (b) would streamline the records-based exceptions under Rule 803, by eliminating the need to repeat "memorandum, data compilation" etc. in all those rules.

Committee members were generally opposed to restructuring Rule 803 because it would disrupt electronic searches and impose transaction costs that far outweighed any benefit. Members argued that it made little sense to define "record" only in Rule 803 when the word "record" appears throughout the Evidence Rules. **Indeed it would be a substantive change to define "record" in Rule 803 differently from any other rule.** The Committee determined that it would make much more sense to define "record" in the general definitions section (see below), and retain the existing, albeit idiosyncratic, structure of Rule 803.

Committee Vote

The Committee voted unanimously to retain the existing structure of Rule 803, and to move the proposed definition of "record" to the general definitions section in the proposed restyling. The Style Subcommittee agreed with and implemented this suggestion.

Rule 803(1)

Rule 803(1) currently provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

The restyled version of Rule 803(1), reviewed by the Committee at the meeting, provides as follows:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> **(1) Present Sense Impression**. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(1).

Rule 803(2)

Rule 803(2) currently provides as follows:

> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The restyled version of Rule 803(2), reviewed by the Committee at the meeting, provides as follows:

(2) Excited Utterance. A statement related to a startling event or condition, made while the declarant was under the stress or excitement that it caused.

Committee Discussion:

Committee members believed that the change from "relating to" to "related to" could substantively alter the scope of the exception. The term "relating to" has been construed to cover statements that are not necessarily "related" in terms of subject matter, but rather are part of the same transaction as the startling event.

Committee Vote:

The Committee voted unanimously that the change from "relating to" to "related to" was substantive. The Style Committee agreed to restore the term "relating to." As so modified, the Committee voted unanimously to approve the restyled Rule 803(2).

Rule 803(3)

Rule 803(3) currently provides as follows:

(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 restyled version of Rule 803(3), reviewed by the Committee at the meeting, provides as follows:

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Committee Vote:

The Committee voted unanimously to approve the restyled Rule 803(3).

Rule 803(4)

Rule 803(4) currently provides as follows:

> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The restyled version of Rule 803(4), reviewed by the Committee at the meeting, provides as follows:

> (4) Statement Made for Medical Diagnosis or Treatment. A statement that:
>
> (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
>
> (B) describes medical history; past or present symptoms or sensations; or the inception or general character of their cause.

Committee Discussion:

Two Committee members objected to the deletion of the word "pain" from the rule. They contended that most of the cases under this exception involve statements about the declarant's pain, and that "pain" is an evocative word to describe the kinds of statements covered by the exception. But other members argued that the word "pain" is unnecessary because it is covered by the words "symptoms" and "sensations." The Reporter noted that Professor Broun had surveyed the case law and found no indication that deletion of the word "pain" would lead to any substantive change.

Committee Vote:

The Committee voted 7 to 2 to approve the restyled version of Rule 803(4).

Rule 803(5)

Rule 803(5) currently provides as follows:

> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The restyled version of Rule 803(5), reviewed by the Committee at the meeting, provides as follows:

> **(5) Recorded Recollection.** A record that:
>
> **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
>
> **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and
>
> **(C)** accurately reflects the witness's knowledge.
>
> If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Committee Vote:

The Committee voted unanimously to approve the restyled Rule 803(5).

Rule 803(6)

Rule 803(6) currently provides as follows:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ‘‘business’’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The restyled version of Rule 803(6), reviewed by the Committee at the meeting, provides as follows:

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted business activity;

(C) making the record was a regular practice of that business activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

“Business” in this paragraph (6) includes any kind of organization, occupation, or calling, whether or not conducted for profit.

Committee Discussion:

1. The Reporter noted that the proposed restyling provided a helpful clarification that if the basic admissibility requirements of regularly conducted activity, regularly recorded are met, then

it is the opponent that has the burden of showing that the record is untrustworthy despite fitting those requirements. Unfortunately, a recent case stated in passing that it is the proponent who has the burden of showing, essentially, lack of untrustworthiness. **Accordingly, under the style protocol, any explicit allocation of the burden of proof on the untrustworthiness factor would be a substantive change because it would change the case law in at least one circuit.** Professor Kimble suggested that the untrustworthiness clause be altered to provide that Rule 803(6) "does not apply" if the source of information, etc., indicate a lack of trustworthiness. The Committee agreed with this solution. The question then was where to put the language. The problem was that it does not fit in the list of admissibility requirements, and so cannot really be placed as its own subdivision. Various solutions were discussed. Eventually the Committee decided that the best place to put the trustworthiness clause was as a dangling sentence at the end of the rule. (See below).

2. Professor Kimble proposed a change in which the last sentence of the restyled Rule 803(6)— the definition of "business" — would be moved up in the rule. The goal of this move would be to eliminate a dangling sentence at the end of the rule — and this would seem especially required because the trustworthiness clause had to be moved from being an admissibility requirement, essentially to retain the lack of clarity over which party had the burden of proof on that point. The problem with the move of the "business" definition is that it could not be placed as a freestanding admissibility requirement, because it is simply a definition. Some Committee members argued that the move raised the risk of an inadvertent change in the meaning and application of the rule — a cost that outweighed any benefit of eliminating a dangling sentence. But other members thought that the definition could be moved in a way that would make the rule more compact and understandable.

Committee Vote:

The Committee voted 6 to 3 in favor of adopting the following restyled version of Rule 803(6) (with the three dissenters objecting to moving the definition of "business" into the body of the rule):

> **(6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
>
> **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;
>
> **(B)** the record was kept in the course of a regularly conducted business activity, including the regular activity of any kind of organization, occupation, or calling, whether or not for profit;
>
> **(C)** making the record was a regular practice of that activity; and

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification.

But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Rule 803(7)

Rule 803(7) currently provides as follows:

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

The restyled version of Rule 803(7), reviewed by the Committee at the meeting, provides as follows:

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6), if:

(A) the evidence is offered to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

Committee Discussion:

1. Committee members observed that the trustworthiness clause of Rule 803(7) needed to be consistent with the same clause that was changed in 803(6). That is, it could not explicitly allocate the burden of proof of showing untrustworthiness, because courts have not been clear in allocating that burden. Consequently, the Committee determined that the clause would have to be placed as a dangling sentence at the end of the rule.

2. Committee members observed that the language "the evidence is offered to prove" is problematic because admissibility is not determined by an offer. It is determined by whether the judge finds that the admissibility requirements are met. **Thus the use of the word "offered" is substantively inaccurate.** The Committee agreed that the word should be changed to "admitted" to reflect the judge's decision on admissibility.

Committee Vote:

The Committee unanimously approved the following version of Rule 803(7):

> **(7) Absence a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:
>
> **(A)** the evidence is admitted to prove that the matter did not occur or exist; and
>
> **(B)** a record was regularly kept for a matter of that kind.
>
> But this exception does not apply if the possible source of the information or other circumstances indicate a lack of trustworthiness.

The Style Subcommittee approved the version adopted by the Committee.

Rule 803(8)

Rule 803(8) currently provides as follows:

> (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 restyled version of Rule 803(8), reviewed by the Committee at the meeting, provides as follows:

(8) Public Records. A record of a public office or agency setting out:

(A) the office's or agency's activities;

(B) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by someone officially engaged in law-enforcement; or

(C) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

But the record is not admissible if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness.

Committee Discussion:

1. As with Rule 803(6) and 803(7), the Committee determined that the explicit allocation of the burden as to untrustworthiness had to be changed, because the case law is not clear on that allocation.

2. Members expressed concern about changing "police officers and other law enforcement personnel" in subdivision (B) to "someone officially engaged in law enforcement." **The change could result in a substantive limitation on the existing exclusion.** For example, a report of an undercover informant or cooperating witness would undoubtedly be excluded under the existing rule, but it might not be excluded under the restyled rule because such a person might not be considered as a person "officially engaged in law-enforcement." The Committee decided that it was necessary to retain the reference to "law enforcement personnel" — though it was not necessary to retain the reference to police officers, because they are stated in the rule as a subset of law enforcement personnel and so the reference is superfluous.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 803(8) — amended from the restyled draft in order to avoid any substantive change to the Rule:

(8) Public Records. A record of a public office setting out:

(A) the office's or agency's activities;

(B) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(C) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.

The Style Committee also approved this version of the rule.

Rule 803(9)

Rule 803(9) currently provides as follows:

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

The restyled version of Rule 803(9), reviewed by the Committee at the meeting, provides as follows:

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office or agency in accordance with a legal duty.

Committee Discussion:

1. Committee members noted that the term "data compilations in any form" had been deleted, but also noted that the term "record" will be defined — in the general rule on definitions — as including data compilations in any form. So the deletion is not a substantive change.

2. Professor Kimble noted that the reference to "public office or agency" was one that arose throughout the rules. The proposed definitions section would define "public office" as including "agency." Accordingly, the Committee agreed that the words "or agency" should be deleted from the restyled rule.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(9), with the modification that the words "or agency" will be deleted.

Rule 803(10)

Rule 803(10) currently provides as follows:

> (10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

The restyled version of Rule 803(10), reviewed by the Committee at the meeting, provides as follows:

> **(10) Absence of a Public Record or an Entry in a Public Record.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record, or an entry in one, if the testimony or certification is offered to prove that:
>
> (A) the record or entry does not exist; or
>
> (B) a matter did not occur or exist, even though a public office or agency regularly kept a record for a matter of that kind.

Committee Discussion:

1. Professor Kimble suggested that all the references to "an entry" in a public record could be deleted. The Reporter researched the matter and determined that there was no distinction between the absence of "an entry" in a public record and an absence of a public record. Put another way, the absence of an entry is itself the absence of a public record. The Committee unanimously agreed that deleting references to "an entry" would not constitute a substantive change.

2. The Committee agreed to delete the words "or agency" as the rule on definitions will define public office as including agencies.

3. The Committee agreed to change all references to "offered to prove" throughout Rule 803 to "admitted to prove." For reasons discussed previously, admissibility requirements under the hearsay exceptions are for the judge and are not dependent on the party's offer.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 803(10):

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that:

(A) the record does not exist; or

(B) a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.

Rules 803(11), (12), (13) and (14)

Rules 803(11), (12), (13) and (14) currently provide as follows:

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original

recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

The restyled version of Rules 803(11)-(14), reviewed by the Committee at the meeting, provides as follows:

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is offered to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

Committee Vote:

The Committee unanimously approved the style changes to Rules 803(11)-(14).

Rule 803(15)

Rule 803(15) currently provides as follows:

> (15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

The restyled version of Rule 803(15), reviewed by the Committee at the meeting, provides as follows:

> **(15) Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if:
>
> (A) the matter stated was relevant to the document's purpose; and
>
> (B) the opponent does not show that later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

Committee Discussion:

The existing Rule 803(15) has an "unless" clause similar to that in Rules 803(6) and 803(8). As with those earlier clauses, the Style Subcommittee changed the clause to an affirmative admissibility requirement, with the burden of showing untrustworthiness on the opponent. This resulted in a substantive change because the case law does not uniformly impose that burden on the opponent. Because the restylings in Rules 803(6) and 803(8) had to be changed, it was important, for purposes of consistency, to make a similar change to Rule 803(15).

Committee Vote:

The Committee unanimously approved the following restyled version of Rule 803(15):

> **(15) Statements in Documents That Affect an Interest in Property.** A statement in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

The Style Subcommittee also approved this version of Rule 803(15).

Rule 803(16)

Rules 803(16) currently provides as follows:

> (16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

Restyled Rule 803(16), as reviewed by the Committee at the meeting, provides as follows:

> **(16) Statements in Ancient Documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

Committee Discussion:

Judge Hinkle sought assurance that the restyling had provided consistent treatment of the term "document." Professor Kimble and the Reporter responded that the term "document" was not included in the definitions section, and that the restyling had left the term "document" unchanged from the existing rules. Thus there was no danger of a substantive change with respect to the use of the term "document."

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(16).

Rule 803(17)

Rule 803(17) currently provides as follows:

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

The restyled version of Rule 803(17), reviewed by the Committee at the meeting, provided as follows:

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations — published in any form — generally relied on by the public or by persons in particular occupations.

Committee Discussion:

Professor Kimble suggested that the reference to "published in any form" — which was intended to cover information in electronic form — should be deleted, because the new rule on definitions (discussed below) defines any written material as including electronically stored information. The Committee agreed with Professor Kimble's suggestion.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 803(17), with the modification of deleting the phrase "published in any form."

Rule 803(18)

Rule 803(18) currently provides as follows:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Restyled Rule 803(18), reviewed by the Committee at the meeting, provided as follows:

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet — published in any form — if the publication

is:

> (A) called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
>
> (B) established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

Committee Discussion:

1. The Reporter noted that the restyled version made a substantive change by deleting the limitation in the original rule that the treatise is only admissible to the extent called to the attention of the witness. Under the proposed restyling, an entire treatise could be admissible if generally called to the attention of the expert. This is contrary to the existing rule which limits admissibility to those portions of the treatise called to the attention of the expert. **The Committee unanimously agreed that the deletion of the "to the extent" language resulted in a substantive change.** After extensive discussion, the Committee determined that the proposal could be fixed by limiting admissibility to the statements in the treatise that are called to the attention of the expert.

2. As with other rules, Professor Kimble noted that the provision on publication "in any form" should be deleted as the newly proposed rule on definitions provides that any written material includes electronically stored information.

Committee Vote:

The Committee voted unanimously to adopt the following version of Rule 803(18):

> **(18) Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement in a treatise, periodical, or pamphlet if:
>
> > **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
> >
> > **(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
>
> If admitted, the statement may be read into evidence but not received as an exhibit.

Rules 803(19)-(21)

Rules 803(19)-(22) currently provide as follows:

> (19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.
>
> (20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.
>
> (21) Reputation as to character. Reputation of a person's character among associates or in the community.

The restyled version of Rules 803(19)-(21), reviewed by the Committee at the meeting, provides as follows:

> **(19) Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
>
> **(20) Reputation Concerning Boundaries or General History.** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or about general historical events important to that community, state, or nation.
>
> **(21) Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rules 803(19)-(21).

Rule 803(22)

Rule 803(22) currently provides as follows:

> (22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

The restyled version of Rule 803(22), as reviewed by the Committee at the meeting, provided as follows:

> **(22) Judgment of a Previous Conviction.** Evidence of a final judgment of conviction — even one on appeal — if:
>
> (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
>
> (B) the judgment was for a crime punishable by death or by imprisonment for more than a year;
>
> (C) the evidence is intended to prove any fact essential to the judgment; and
>
> (D) when offered by the government in a criminal prosecution for a purpose other than impeachment, the judgment was against the defendant.
>
> The opponent may show that an appeal is pending.

Committee Discussion:

1. Professor Kimble and the Committee discussed ways in which the final (dangling) sentence might be moved up into the body of the rule. One problem with the restyled version was that it separated the admissibility of a conviction on appeal with the fact that the opponent can tell the jury that the conviction is on appeal. Efforts to combine both concepts in a single place — other

than a dangling sentence — did not seem workable, because the rule is set out as a series of admissibility requirements, and the two substantive points about convictions on appeal are not intended to be admissibility requirements for every proffered conviction. Professor Kimble and the Committee eventually decided to return to the original rule, and to place the provisions about appeal in a single sentence at the end of the rule.

2. Professor Saltzburg noted that the admissibility requirement that "the evidence is intended to prove any fact essential to the judgment" constituted a substantive change. Some courts have held that under Rule 803(22) the judge must find, under Rule 104(a), that the conviction proves a fact essential to the judgment. The phrase "intended to prove" is not accurate in these courts, because the requirement would simply be met by the proffering party's declaration that it is offering the conviction with the intent to prove a fact essential to the judgment. **The Committee unanimously agreed that the use of the term "intended to prove" was a substantive change.** After much discussion, the Committee unanimously decided to substitute the phrase "the evidence is admitted to prove any fact essential to the judgment" — thus recognizing that the trial judge may have a factfinding role in determining admissibility.

3. Committee members suggested a stylistic change from "government in a criminal prosecution" to "prosecutor in a criminal case." Professor Kimble and the Style Committee agreed with that suggestion.

Committee Vote:

The Committee voted unanimously to approve the following restyled version of Rule 803(22):

> **(22) Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:
>
> > **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
> >
> > **(B)** the judgment was for a crime punishable by death or by imprisonment for more than a year;
> >
> > **(C)** the evidence is admitted to prove any fact essential to the judgment; and
> >
> > **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.
> >
> > The pendency of an appeal may be shown but does not affect admissibility.

Rule 803(23)

Rule 803(23) currently provides as follows:

> (23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

The restyled version of Rule 803(23), reviewed by the Committee at the meeting, provides as follows:

> **(23) Judgments Involving Personal, Family, or General History or a Boundary.** A judgment that is offered to prove a matter of personal, family, or general history, or boundaries, if the matter:
>
> (A) was essential to the judgment; and
>
> (B) could be proved by evidence of reputation.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(23).

Rule 803(24)

In 1997 the original Rule 803(24) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 804(b)(5) and transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 803(24) is indicated:

> (24) [Other exceptions.] [Transferred to Rule 807.]

Professor Kimble suggested that, as part of the restyling project, this designation should be deleted. He reasoned that the designation served no purpose and that if the Committee were ever to decide to propose a new hearsay exception under Rule 803, it would have to encounter the problem of enumeration that arose with respect to Rule 804 when a new hearsay exception was promulgated in 1997.

But Committee members argued that it was useful to retain the existing designation for Rule 803(24). First, it would indicate some history about the development of the Evidence Rules for those who study the rules. Second, such designations are also found in the restyled Criminal and Civil Rules, and so it is important to be consistent with those earlier style projects. Finally, it is unlikely that any new hearsay exception would ever be developed under Rule 803, but if that event came to pass, the Committee could deal with any enumeration problem at that time. At this point, there is no "gap" in the enumeration of the Rule 803 exceptions, because Rule 803(24) is at the end.

The Committee voted unanimously to suggest to the Style Subcommittee that the existing designation of Rule 803(24) be retained. The Style Subcommittee and Professor Kimble agreed to adopt this suggestion.

Rule 804(a)

Rule 804(a) currently provides as follows:

> (a) Definition of unavailability. ''Unavailability as a witness'' includes situations in which the declarant—
>
> > (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> >
> > (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
> >
> > (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
> >
> > (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> >
> > (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

The restyled version of Rule 804(a), as reviewed by the Committee at the meeting, provided as follows:

> **(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
>
> (1) is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant's statement;
>
> (2) refuses to testify about the subject matter despite a court order to do so;
>
> (3) testifies to not remembering the subject matter;
>
> (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
>
> (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
>
> (A) the declarant's attendance; or
>
> (B) in the case of a hearsay exception under Rule 804 (b)(2), (3), or (4) below, the declarant's attendance or testimony.
>
> But this subdivision (a) does not apply if the statement's proponent wrongfully caused the declarant to be unavailable in order to prevent the declarant from attending or testifying.

Committee Discussion:

The restyling of the last sentence of the rule took out the reference to absence "due to the procurement or wrongdoing of the proponent." Committee members were concerned that the substituted language — "wrongfully caused" — did not accurately describe the situations in which a party, under existing law, is disentitled from introducing hearsay under Rule 804. For example, a number of courts have held that a party must engage in an affirmative act in order to be disentitled from introducing the hearsay — thus, the government is not barred from introducing hearsay when the ground of unavailability is the declaration of a privilege, and the government's only role is that it refused to immunize the witness. The refusal to act is not "procurement" within the existing rule, but it could be argued to be "wrongful causation" within the restyled version. Then on the other hand, under the existing rule a party might procure the unavailability of the declarant without acting wrongfully, and yet would be disentitled from proffering hearsay. That would not be the case under the restyled version, because it would not be "wrongful conduct."

After extensive discussion of all these concerns, the Committee unanimously concluded that the restyled version of the last sentence of Rule 804(a) would effectuate a substantive change. The Committee proposed as an alternative "procured or wrongfully caused." The Style Subcommittee and Professor Kimble agreed with that proposal.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(a), with the modification of adding "procured or" before "wrongly caused" in the last sentence.

Rule 804(b)(1)

Rule 804(b)(1) currently provides as follows:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The restyled version of Rule 804(b)(1), as reviewed by the Committee at the meeting, provided as follows:

> **(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
>
> > **(1) Former Testimony.** Testimony that:
> >
> > (A) was given as a witness at a trial, hearing, or deposition, whether given during the current proceeding or a different one; and
> >
> > (B) is now offered against a party — or, in a civil case, a predecessor in interest — who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Committee Discussion

1. Some Committee members objected to using the term "the rule against hearsay" in the introduction to Rule 804(b) and in other rules, because it sounds like hearsay is always barred when that is not the case. Professor Kimble argued in response that the existing term — "the hearsay rule" — is not descriptive about what the rule does (unlike, for example, "the rule of lenity" or the "rule against perpetuities"). After discussion, the Committee observed that the objections of some of its members to the use of "the rule against hearsay" had already been considered by the Style Subcommittee. The Committee decided to let the matter rest.

2. The Reporter observed that the restyled version of (b)(1) was substantively inaccurate because, in a civil case, it provided for admissibility if the testimony is "now offered . . . against a predecessor in interest." This is incorrect because the testimony is always offered against a party to the case. The predecessor in interest language is intended to cover situations in which a party in a *prior* case had a motive similar to that of the party in the existing case. **The Committee unanimously concluded that the restyled version was substantively inaccurate.** After discussion, the Committee determined that the error could be fixed by revising the restyled language to provide that the testimony:

> is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive . . .

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(1), with the modification of changing "a predecessor in interest" to "whose predecessor in interest had."

Rule 804(b)(2)

Rule 804(b)(2) currently provides as follows:

> (2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

The restyled version of Rule 804(b)(2), reviewed by the Committee at the meeting, provides as follows:

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Committee Discussion

The Committee noted that the existing rule seems to use the terms "imminent" and "impending" interchangeably. Under the style protocol it is important to provide consistent terminology, and thus the term "imminent" is used throughout. Professor Broun researched the cases and found no substantive difference between "imminent" and "impending." The Committee concluded that the restyled version did not make a substantive change to Rule 804(b)(2).

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(2).

Rule 804(b)(3)

Rule 804(b)(3) currently provides as follows:

(3) Statement against interest. A statement which 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. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The restyled version of Rule 804(b)(3), reviewed by the Committee at the meeting, provides as follows:

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or

criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Committee Discussion:

The Reporter noted that the restyled version intentionally made a substantive change to the rule — it states that the government must provide corroborating circumstances indicating trustworthiness before a declaration against interest can be admitted against an accused. The current rule by its terms requires only the accused to provide corroborating circumstances indicating trustworthiness. But this substantive change is not being made in the context of the restyling project. Rather, it is being made on a separate track in a proposed amendment that has already been released for public comment, and would be scheduled for enactment a year ahead of the restyled rules. (See the discussion of the proposed substantive amendment to Rule 804(b)(3) below.) Under the circumstances, the Reporter concluded that the most efficient procedure would be to restyle the rule under the assumption that the substantive change would already have been made before the restyled rules are adopted. The Committee agreed with this procedure, deferring consideration of the substantive amendment until later in the meeting.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(3).

Rule 804(b)(4)

Rule 804(b)(4) currently provides as follows:

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

The restyled version of Rule 804(b)(4), as reviewed by the Committee at the meeting, provided as

follows:

> **(4) Statement of Personal or Family History.** A statement about:
>
> (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
>
> (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is probably accurate.

Committee Discussion:

The proposed restyling would change "likely to have accurate information" to the "information is probably accurate." **Committee members expressed concern that the change from "likely" to "probably" would be a substantive change — it would raise the threshold of admissibility.** One Committee member contended that there was no substantive difference between "likely" and "probably."

Committee Vote:

The Committee voted, with one dissent, to approve the restyled version, with the modification that "probably accurate" would be changed to "likely to be accurate."

Rule 804(b)(5)

In 1997 the original Rule 804(b)(5) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 803 and transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 804(b)(5) is indicated:

> (5) [Other exceptions.] [Transferred to Rule 807.]

As with Rule 803(24), Professor Kimble suggested that, as part of the restyling project, this designation should be deleted. The difference in the argument is that there is another hearsay exception coming after Rule 804(b)(5), thus creating a gap in enumeration that, in Professor

Kimble's view, should be remedied.

But many Committee members argued that the existence of the hearsay exception in Rule 804(b)(6) was all the more reason to keep Rule 804(b)(5) as a placeholder. Changing what is now Rule 804(b)(6) to Rule 804(b)(5) would be very disruptive to searches. A person searching under Rule 804(b)(5) for cases on forfeiture would also collect all the pre-1997 cases on residual hearsay.

After substantial discussion, the Committee recognized that the retention of Rule 804(b)(5) as a placeholder presented a question of style and not substance. It voted 7 to 2 to recommend to the Style Subcommittee that the existing enumeration of Rule 804(b) be retained. The Style Subcommittee agreed to retain the existing enumeration. Therefore, there is no proposal to change the designation of Rule 804(b)(5) in the official version of the Federal Rules of Evidence.

Rule 804(b)(6)

Rule 804(b)(6) currently provides as follows:

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

The restyled version of Rule 804(b)(6), reviewed by the Committee at the meeting, provides as follows:

> **(6) Statement Offered Against a Party Who Wrongfully Caused the Declarant's Unavailability.** A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant to be unavailable in order to prevent the declarant from attending or testifying.

Committee Discussion:

The Reporter questioned the change from "intended to procure unavailability" to "in order to prevent the declarant from attending or testifying." The requirement of intentionality is important, as the Supreme Court recognized in deciding the constitutional standards of forfeiture in *Giles.* The court must find not only that the party caused unavailability, but also that the act was done with the specific intent to keep the declarant from testifying. The Reporter was not sure that the words "in order to" accurately captured the intentionality requirement. But after discussion, the Committee

concluded that there was no substantive difference between "in order to" and "with the intent to."

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(6).

Rule 805

Rule 805 currently provides as follows:

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

The restyled version of Rule 805, reviewed by the Committee at the meeting, provides as follows:

Rule 805 — Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 805.

Rule 806

Rule 806 currently provides as follows:

Rule 806. Attaching and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if

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

The restyled version of Rule 806, as reviewed by the Committee at the meeting, provided as follows:

Rule 806 — Attacking and Supporting the Declarant's Credibility

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of an inconsistent statement or conduct by the declarant, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Committee Discussion:

Committee members noted that the restyling reference to "an inconsistent statement or conduct by the declarant" is vague on whether the conduct, like the statement, must be inconsistent with the proffered hearsay statement to trigger the exceptions provided in the rule. Professor Kimble agreed that a clarifying change was necessary. After discussion, the Committee agreed on the following language:

The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

The Style Subcommittee and Professor Kimble agreed with this change.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 806, with the modification that the second sentence would be changed to provide that: "The court may admit

evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it."

Rule 807

Rule 807 currently provides as follows:

Rule 807. Residual Exception

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

The restyled version of Rule 807 provides as follows:

Rule 807 — Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) the statement is offered as evidence of a material fact;

(3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting the statement will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and

its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Committee Discussion:

1. A Committee member noted that the restyled version sets out, as independent subdivisions, the requirements of "material fact", "more probative" and "interests of justice/purposes of the rules" — on the same level as the trustworthiness requirement. The current rule separates the trustworthiness requirement from those less important requirements. The Committee member raised the question that the restyled structure might indicate a change of emphasis from the primary focus on trustworthiness. Committee members suggested that the Style Committee take under advisement the suggestion that the rule be structured so that the trustworthiness factor is the most important requirement. The Style Committee, and Professor Kimble, agreed to take the matter under advisement.

2. The Reporter observed that the restyling placed some separation between the reference to Rule 803 and 804 and the words "equivalent circumstantial guarantees of trustworthiness." This might raise the question of what "equivalent" means — with what is the offered hearsay statement to be compared? Committee members determined that the separation between Rules 803/804 and the term "equivalent" raised a question of style, not substance — because there is no frame of reference for an equivalence analysis other than the Rule 803 and 804 exceptions. The Committee suggested that the Style Committee take under advisement the possibility that the term "equivalent circumstantial guarantees of trustworthiness" be placed next to the reference to Rules 803 and 804. The Style Subcommittee, and Professor Kimble, agreed to consider this suggestion.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 807.

Rule 901(a)

Rule 901(a) currently provides as follows:

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

The restyled version of Rule 901(a), as reviewed by the Committee at the meeting, provided as follows:

Rule 901 — Authenticating or Identifying Evidence

(a) In General. When an exhibit or other item must be authenticated or identified in order to have it admitted, the requirement is satisfied by evidence sufficient to support a finding that the item is what its proponent claims.

(Alternative) To authenticate or identify an exhibit or other item in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Committee Discussion:

1. Committee members uniformly expressed the opinion that the use of the term "exhibit or other item" was wrong because it did not cover all the types of evidence that are subject to the authentication requirement. The Committee had on several previous occasions favored using the term "evidence." Professor Kimble responded that the use of the term "evidence" was problematic because the Rule uses that term in another context, i.e., "evidence sufficient to support a finding"; he contended it would be confusing to use the term "evidence" both to indicate what is being qualified and the standard of qualification. Committee members responded that the dual use of the term "evidence" occurs in the *restyled* version of Rule 104(b) — and that it would make sense to be consistent with that Rule, because Rule 901(a) is just a particularized application of the Rule 104(b) test. After substantial discussion, the Committee and Professor Kimble compromised and agreed to use the term "item of evidence." The Style Subcommittee agreed with this resolution.

2. The Reporter observed that the restyled rule created a substantive problem because it implied that authentication of evidence might not always be required. The restyled version states that "*when*" evidence "must be authenticated" then the standard is evidence sufficient to support a finding. In contrast, the existing rule refers to the "requirement" of authentication "as a condition precedent to admissibility." **The Committee agreed that the restyled version of Rule 901(a) would effect a substantive change.** The Committee then focused on whether the alternative proposed by Professor Kimble would solve the problem. That alternative — "To authenticate . . . in order to have it admitted" does fairly imply that authentication is a requirement that must always be met. The Committee voted unanimously to adopt the alternative language.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 901(a):

(a) In General. To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Rule 901(b)

Rule 901(b) currently provide as follows:

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be,

and (C) has been in existence 20 years or more at the time it is offered.
(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

The restyled version of Rule 901(b), reviewed by the Committee at the meeting, provides as follows:

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that the handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Phone Conversation. For a phone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the phone.

(7) Evidence About Public Records. Evidence that:

(A) a record is from the public office where items of this kind are kept; or

(B) a document was lawfully recorded or filed in a public office.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Committee Discussion:

1. The Committee noted that several changes from the existing rule were made in order to conform with the new rule on definitions. For example, the reference to Supreme Court rules "pursuant to statutory authority" was deleted because the definition will encompass that term. Similarly, the reference to records, reports and data compilations in Rule 901(b)(7) was shortened to "record" because that term is defined in the definitions rule to include reports and data compilations.

2. The Style Subcommittee asked the Committee to review whether the term "lawfully recorded" in Rule 901(b)(7) accurately captures the language in the existing rule — "authorized by law to be recorded and filed and in fact recorded." After extensive discussion of a number of hypothetical situations, the Committee concluded that the restyled language accurately captured the original.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 901(b).

Rule 902, Structure

Professor Kimble proposed restructuring Rule 902 to add two lettered subdivisions, (a) and (b). Subdivision (a) would restate the introduction of the current rule, i.e., that the items discussed in the rule are self-authenticating. Subdivision (b) would then include the grounds for self-authentication as numbered subsections, and the beginning text of (b) would read "The following are self-authenticating:"

The justification for lettered subdivisions was the same as that posed for Rule 803 — to correct the asserted anomaly of a numbered rule followed immediately by a numbered subdivision. Committee members noted, however, that the proposed subdivisions in Rule 902 would serve even less a real purpose than those proposed for Rule 803: proposed subdivision (b) would simply restate the terms of proposed subdivision (b). Professor Kimble noted that in light of the fact that the structure of Rule 803 was going to be preserved (see discussion above), it was now acceptable to retain the existing structure of Rule 902. The Style Subcommittee agreed.

The Committee voted unanimously to retain the number-after-number structure of Rule 902.

Rule 902 provisions:

Rule 902 currently provides as follows:

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or

attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

The restyled version of Rule 902, as reviewed by the Committee at the meeting, reviewed by the Committee, provided as follows (with the proposed lettered subdivisions deleted, as discussed

above):

Rule 902 — Items That Are Self-Authenticating

The items described in this rule are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted.

(1) Domestic Public Documents That Are Signed and Sealed. A document that bears:

(A) a signature purporting to be an execution or attestation ; and

(B) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.

(2) Domestic Public Documents That Are Signed But Not Sealed. A document that bears no seal, if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(B); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The 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. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) permit it to be evidenced by an attested summary with or without

final certification.

(4) Certified Copies of Public Records. A copy of an official record, report, data compilation — or a copy of a document that was lawfully recorded or filed in a public office or agency — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902 (1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgements.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court under statutory authority. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil

case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the declaration, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the declaration is signed.

Committee Discussion:

1. As in Rule 901, discussed above, the Committee uniformly objected to use of the term "item" as the controlling term for authenticity. And as with Rule 901 — and for purposes of consistency — the Committee and the Style Subcommittee settled on the term "item of evidence." Therefore, by consent, "item of evidence" replaced "item" in the introductory sentence of the Rule, as well as in the heading.

2. The Committee and the Style Subcommittee agreed that the reference in Rule 902(4) to "record, report," etc. should be shortened to "record" in light of the previous decision to define the term "record" as including reports, etc., in the new rule on definitions.

3. As under Rule 901(b), the Style Subcommittee requested consideration of whether the term "lawfully recorded" accurately captures the existing language of Rule 902(4). After discussion, the Committee determined that the term "lawfully recorded" was accurate.

4. The Reporter questioned whether adding the term "reasonable" before "notice" in Rule 902(11) was necessary. He reasoned that the specific provisions in the notice requirement, in effect, required notice to be reasonable, and therefore adding the term was redundant. Professor Kimble responded that adding the term "reasonable" would make the Rule 902(11) notice requirement more consistent with the notice requirements in other Evidence Rules. The Committee did not object to addition of the term "reasonable."

5. A Committee member pointed out that the notice requirement might be read to be left out of Rule 902(12), which now ties into the admissibility requirements of Rule 902(11). Restyled Rule 902(12) now requires the certificate to meet the requirements of Rule 902(11) with some modifications. But it is not clear that notice is one of the requirements referred to. The Committee voted unanimously to add the following sentence to the end of Rule 902(12):

"The proponent must also meet the notice requirements of Rule 902(11)."

The Style Subcommittee and Professor Kimble agreed with this clarification.

6. The Committee agreed with Professor Kimble's suggestions that the references to "the declaration" in Rule 902(12) should be changed to "the certification."

Committee Vote:

The Committee unanimously approved the restyled version of Rule 902, with the following modifications: substituting "item of evidence" for "item"; referring only to "record" in Rule 902(4); adding a sentence to Rule 902(12) to refer explicitly to the notice requirement; and substituting "the certification" for "the declaration" in Rule 902(12).

Rule 903

Rule 903 currently provides as follows:

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

The restyled version of Rule 903, reviewed by the Committee at the meeting, provides as follows:

Rule 903. Subscribing Witness's Testimony

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Committee Discussion

1. Professor Kimble suggested that the term "subscribing" should be changed to "attesting." But Committee members were concerned that the change in language could result in an inadvertent substantive change, without providing any particular style advantage. Some members noted that the term "subscribing" was a more accurate description of the process. After some discussion, Professor Kimble agreed to drop his suggestion and "subscribing" was retained.

2. Professor Kimble suggested that the term "required by the law of the jurisdiction" should be changed to "required in the jurisdiction." Committee members disagreed with this suggestion because it seemed to refer to a physical location rather than the law of a governing jurisdiction. After some discussion, Professor Kimble agreed to drop his suggestion and "required by the law of the jurisdiction" was retained.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 903.

Rule 1001

Rule 1001 currently provides as follows:

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''.

(4) Duplicate. A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

The restyled version of Rule 1001, as reviewed by the Committee at the meeting, provided as follows:

Rule 1001 – Definitions That Apply to This Article

(a) Writing. "Writing" means any object or medium on which letters, words, numbers, or their equivalent are set down.

(b) Recording. "Recording" means any object or medium on which letters, words, numbers, or their equivalent are recorded.

(c) Photograph. "Photograph" means an image in any form.

(d) Original. An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For data stored in a computer or similar device, "original" means any printout — or other output readable by sight — if it accurately reflects the data. An "original" of a photograph includes the negative or a print from it.

(e) Duplicate. "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Discussion:

1. The Committee engaged in a lengthy and wide-ranging discussion of how and whether to restyle the definitions section of the Best Evidence Rule. One question was how the definitions section would relate to the new definitions rule that would apply to a number of terms (like "record" and written material) that are used throughout the Evidence Rules. Committee members eventually concluded that an independent set of definitions for Article 10 remained justified. None of the terms were defined in the new definitions rule (which, for example, defines "written material" as opposed to "writing") and most of the terms, such as "photograph", "original", and "duplicate" are only used in Article 10. The Committee determined, however, that Rule 1001 should definitely start with text indicating that the definitions only applied to Article 10 — a specification made in the existing rule that was dropped in the restyling. Professor Kimble and the Style Subcommittee agreed with the proposal to restore something like the original introduction to Rule 1001.

2. The Committee discussed in detail the various definitions proposed by the restyling. One of the problems in the existing definition is that "writings" and "recordings" are lumped together, and essentially defined in the same way. Professor Kimble stated that it was essential that each individual term should have its own definition. The Committee then discussed how best to define each of the terms set forth in Rule 1001. This required the Committee to take account of technological advances in photography, recording, etc., without making any substantive changes to the Rule. After much discussion, the Committee, the Style Subcommittee, and Professor Kimble agreed on definitions for the terms specified in Rule 1001. That language is set forth below.

Committee Vote:

The Committee unanimously approved restyled Rule 1001(a) in the following form:

Rule 1001 – Definitions That Apply to This Article

In this article, the following definitions apply:

(a) Writing. A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) Recording. A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) Photograph. "Photograph" means a photographic image or its equivalent stored in any form.

(d) Original. An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) Duplicate. "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002

Rule 1002 currently provides as follows:

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Restyled Rule 1002, reviewed by the Committee, provides as follows:

Rule 1002 – Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1002.

Rule 1003

Rule 1003 currently provides as follows:

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

The restyled version of Rule 1003, reviewed by the Committee at the meeting, provides as follows:

Rule 1003 – Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1003.

Rule 1004

Rule 1004 currently provides as follows:

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

The restyled version of Rule 1004, reviewed by the Committee at the meeting, provides as follows:

Rule 1004 — Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1004.

Rule 1005

Rule 1005 currently provides as follows:

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

The restyled version of Rule 1005, reviewed by the Committee at the meeting, provides as follows:

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record — or of a document that was lawfully recorded or filed in a public office — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Discussion:

As under Rule 901(b) and 902, the Style Subcommittee requested consideration of whether the term "lawfully recorded" accurately captures the existing language of Rule 1005. After discussion, the Committee determined that the term "lawfully recorded" was accurate.

Rule 1006

Rule 1006 currently provides as follows:

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The restyled version of Rule 1006, as reviewed by the Committee at the meeting, provided as follows:

Rule 1006 – Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them.

Committee Discussion:

Committee members observed that the last sentence of the restyled provision reads more like a rule of discovery than a rule of evidence. The point of the rule is that the underlying information must be produced *in court.* **Therefore the last sentence of the restyled provision would effect a substantive change.** The Committee unanimously agreed that the words "in court" should be added to the last sentence of the restyled rule.

Committee Vote:

The Committee unanimously approved the restyled Rule 1006, with the modification that the words "in court" be added at the end of the last sentence in the rule.

Rule 1007

Rule 1007 currently provides as follows:

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

The restyled version of Rule 1007, as reviewed by the Committee at the meeting, provides as follows:

Rule 1007 — Testimony or Admission of a Party to Prove Content

The proponent may use the testimony, deposition, or written admission of the party against whom a writing, recording, or photograph is offered to prove its content. The proponent need not account for the original.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1007.

Rule 1008

Rule 1008 currently provides as follows:

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

The restyled version of Rule 1008, reviewed by the Committee at the meeting, provides as follows:

Rule 1008 – Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1008.

Rule 1101

Rule 1101 currently provides as follows:

Rule 1101. Applicability of Rules

(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms ''judge'' and ''court'' in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally.—These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege.—The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition;

preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled ''An Act to authorize association of producers of agricultural products'' approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled ''An Act authorizing associations of producers of aquatic products'' approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes'', approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the AntiSmuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled ''An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes'', approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

The restyled version of Rule 1101, as reviewed by the Committee at the meeting, provided as follows:

Rule 1101 – Applicability of the Rules

(a) To Courts and Judges. These rules apply to proceedings before:

- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

(b) To Proceedings. These rules apply in:

- civil cases and proceedings, including admiralty and maritime cases;
- criminal cases and proceedings;
- contempt proceedings, except those in which the court may act summarily; and
- cases and proceedings under 11 U.S.C.

(c) Rules on Privilege. The rules on privilege apply to all stages of a case or proceeding.

(d) Exceptions. These rules — except for those on privilege — do not apply to the following:

(1) the court's determination, under Rule 104(a) on a preliminary question of fact governing admissibility;

(2) grand-jury proceedings; and

(3) miscellaneous proceedings such as:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- a preliminary examination in a criminal case;
- sentencing;
- granting or revoking probation or supervised release; and
- considering whether to release on bail or otherwise.

Committee Discussion:

1. Before the meeting, Professor Broun did extensive research on the scope of Rule 1101, particularly on whether some courts should be added to or excluded from Rule 1101(a). Professor Broun concluded that the Territorial Courts should remain included on the list, and that it was unnecessary to include the Court of International Trade on the list (because the Evidence Rules are made applicable to that court by an independent statute, and including that court might result in an inadvertent negative inference about other courts in which the Evidence Rules apply by independent statute). The Committee agreed with Professor Broun's conclusions.

2. The Committee decided that it was appropriate to add "supervised release" to the

reference to proceedings on granting or revoking probation in Rule 1101(d) — this would accord with the existing practice.

3. At the Reporter's suggestion, the restyled version deleted subdivision (e), the laundry list of statutes that alter in some way the applicability of the evidence rules in specific proceedings . The rationales for deleting subdivision (e) are: 1. The list is underinclusive, and in fact could never be accurate because statutory development is dynamic; and 2. The list is unnecessary because the Evidence Rules already allow for statutes to control over the rules, as seen in Rules 301, 502, 501, 802, etc. One Committee member raised the prospect that deleting Rule 1101(e) might be thought to supersede the specified statutory provisions, but the Reporter responded that this would not be the case because of the various Evidence Rules provisions that bow to statutory authority. Another member argued that there should be some place in the Evidence Rules in which a practitioner is warned that the rules are not exclusive, and that reference must often be made to independent statutes that might govern evidentiary admissibility. While no rule could accurately cover all the possibly applicable statutes, Committee members generally agreed that some general provision referring to independent statutory authority was warranted. Ultimately, the Committee agreed that the best solution was to delete the laundry list of statutes in Rule 1101(e), but to provide a single sentence for the subdivision that would read as follows:

> "A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules."

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1101, with the modification that the following sentence would be, in its entirety, subdivision (e):

> **(e) Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

Rule on Definitions

The Style Subcommittee and Professor Kimble proposed a rule on definitions, in order to 1: alleviate the need for constant repetition throughout the rules; and 2. assure that electronic information would be covered by the rules without the need to repeat that point in every rule involving "written" information. During the meeting, the proposed rule on definitions was expanded to include a definition of "record" that would cover analogous terms such as "report" — that provision was transferred, by unanimous vote of the Committee from its original proposed placement as a new subdivision (b) to Rule 803 (see the discussion on the structure of Rule 803 above).

The Style Subcommittee proposed to place the rule on definitions as a new Rule 1102, which would have required changing the numbers of existing Rules 1102 and 1103. The Committee engaged in an extensive discussion of the optimal placement of a new rule on definitions. After that discussion, Committee members unanimously agreed that it would be problematic to place the definitions rule anywhere in Article 11, as it would be unlikely to be found by some, if not many, practitioners. Some members thought that the best placement would be a new Rule 107, but Professor Kimble argued that if a definitions rule is intended to be applicable throughout the rules, then it would be inconsistent with style conventions to put it anywhere other than at the very beginning or the very end of the whole body of rules. Committee members then turned to another solution: amending Rule 101 to include the definitions as a new subdivision (b). Members noted that the Criminal Rules added a definitions section in the restyling of Criminal Rule 1 — thus it was appropriate and consistent with restyling conventions to place the definitions rule in the scope provision of Rule 101.

Finally the Committee turned to the language of the specific definitions. One of the subdivisions proposed to define written material to include electronic information in the following manner:

"a reference to any kind of written material includes the electronic form of the material."

Judge Rosenthal observed that the Civil Rules use the term "electronically stored information", and that term is commonly used by courts and lawyers. She suggested — and the Committee unanimously agreed — that the definition of written material should refer to "electronically stored information."

The Committee voted unanimously to approve Evidence Rule 101, as amended, in the following form:

Rule 101 — Scope; Definitions

(a) Scope. These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation in any form;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and

(6) a reference to any kind of written material includes electronically stored information.

Rule 1102

Rule 1102 currently provides as follows:

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

The restyled version of Rule 1102, reviewed by the Committee at the meeting, provides as follows:

Rule 1102 — Amendments

These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1102.

Rule 1103

Rule 1103 currently provides as follows:

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

The restyled version of Rule 1103, reviewed by the Committee at the meeting, provides as follows:

Rule 1103 – Title

These rules may be cited as the Federal Rules of Evidence.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1103

C. Rules 101-706

The restyled Rules 101-706 were approved for release for public comment at previous meetings. In preparation for this meeting, Professor Kimble reviewed these rules to check for consistency of terminology through all the restyled rules, and to raise any lingering style questions. Professor Kimble proposed some minor changes to some of the previously approved rules. Other than changes in the nature of typos and correcting minor inconsistencies, the Committee considered, and voted on, the following proposals:

1. Rule 101: as discussed immediately above, the Committee unanimously agreed to amend Rule 101 to add a subdivision on definitions.

2. Rule 403: Professor Kimble asked to revisit the rule to determine whether there was some way to effectively categorize the various factors that are listed in the rule, e.g., prejudice, confusion, delay, etc., with some referred to as "dangers" and others as "considerations." *Professor Kimble proposed — and after discussion the Committee unanimously approved, the following restyling of Rule 403*:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

3. Rule 404(b): Professor Kimble proposed adding to the heading, which under the existing restyling reads, in part, "; Notice." Professor Kimble suggested adding "in a Criminal Case" after "Notice." But Committee members determined that adding the reference to a criminal case might lead to a misimpression that Rule 404(b) is only applicable in criminal cases, whereas in fact the rule is applicable to all cases and it is only the notice provision that is limited to criminal cases. *The Committee voted unanimously not to change the existing restyling of Rule 404.*

4. Rule 405: Professor Kimble proposed some minor changes that would make Rule 405 a bit more consistent with Rule 608. One question was whether to delete the term "relevant" in Rule 405 on the ground that all evidence must be relevant to be admissible. But the Committee was cautious about taking out the term "relevant" because it might send some unintended signal. Professor Kimble responded that if "relevant" is going to be retained in Rule 405(a), then it should be added to Rule 405(b) for purposes of consistency, as both subdivisions are referring (though admittedly in different contexts) to specific act evidence. The Committee agreed with the proposal to add "relevant" to Rule 405(b). *After discussion, the Committee unanimously approved the following restyling of Rule 405:*

Rule 405 — Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

5. Rule 406: Professor Kimble suggested that Rule 406 be slightly changed to provide more consistency with the other restyled "relevance rules", e.g., Rules 407-409. *After discussion, the Committee unanimously approved the following restyling of Rule 406:*

Rule 406 — Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

6. Rule 411: Professor Kimble proposed a change to the "exceptions" clause to the Rule that would provide more consistency with Rule 407. *After discussion, the Committee approved the following restyling of Rule 411:*

Rule 411 — Liability Insurance

Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

7. *Rule 412:* Professor Kimble proposed changes to the notice provision of Rule 412 that

would make it more consistent with the notice provisions of Rules 413-15. But the Committee unanimously rejected the proposal. Committee members noted that the notice provision in Rule 412 is designed to protect different interests than those protected by the notice provisions in Rules 413-15. Any change in the notice provisions, in terms of timing or triggering, would be substantive in any case. Therefore the proposal to change the notice provision of Rule 412 was rejected.

8. Rules 501 and 601: Professor Kimble proposed changing the last sentence of these restyled rules: the sentence covering whether state law of privilege/competency applies when state law provides the rule of decision. These sentences were adopted by the Standing Committee at its last meeting; members of the Standing Committee were concerned that the initial restyling might be read to indicate that state law on privilege/competency governs *federal* claims as well as state claims when the claims are brought together in federal court — a result that is inconsistent with most of the case law and therefore substantive. The language for the second sentence, as adopted by the Standing Committee, is as follows:

> But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege.

The Evidence Rules Committee unanimously agreed that it would not consider any change to this language, because 1) it had been adopted by a vote of the Standing Committee; and 2) it successfully avoided the possibility of a substantive change from the existing rule.

9. Rule 502: Professor Kimble proposed changes to Rule 502, which was enacted by Congress in September, 2008. The two changes were: 1) changing the subdivisions by making the introductory language a new subdivision (a) and relettering the rest of the subdivisions; and 2) amending the subdivision on subject matter waiver by changing "ought in fairness to be considered" to "should in fairness be considered" — in order to track the restyling that had occurred in Rule 106, from which Rule 502 took the "ought in fairness" language.

The Committee was unalterably opposed to any word or structure changes to Rule 502. Many members of the Committee (and the Standing Committee) had spent long hours resisting any congressional change to the rule on the ground that it had been restyled in accordance with the style conventions, and that to alter it in any way would make it inconsistent with the other rules. Committee members determined that any attempt to change the rule now would undermine the arguments that members of both the Committee and the Standing Committee had made to Congress.

Professor Kimble responded that Rule 502 was now inconsistent with the restyled Rule 106. The Committee unanimously responded that the solution to the inconsistency was to amend the restyled version of Rule 106, so as to restore the original "ought in fairness" language. *After more discussion, the Committee unanimously voted to reject any word changes to Rule 502, and further voted unanimously to change the restyled version of Rule 106 as follows:*

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

10. Rule 608(a): Professor Kimble proposed changes to Rule 608(a) intended to provide more consistency with Rule 405. *After discussion, the Committee approved a restyled Ruled 608(a) in the following form:*

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

11. Rule 609(b): Professor Kimble proposed changes to Rule 609(b) that would break out and unpack the complicated admissibility requirements in a more user-friendly way. *After discussion, the Committee approved a restyled Rule 609(b) in the following form:*

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

D. Committee Notes to Restyled Rules

1. Basic Committee Note

The Committee resolved to prepare Committee Notes that would be consistent with previous restyling efforts. Accordingly, the Committee approved a basic Committee Note providing a disclaimer that the changes were only stylistic and no substantive changes were intended. *That note, which would be added to the large majority of the restyled rules, was unanimously approved in the following form:*

Committee Note

The language of Rule [ ] has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2. Committee Note to Rule 101:

In addition — and again consistently with other restyling efforts — the Committee approved a Committee Note to Rule 101 that describes the functions and goals of the restyling effort. *The Committee unanimously approved a Committee Note to restyled Rule 101 in the following form:*

Committee Note

The language of Rule 101 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal and Civil Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the Unites States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 103 illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "accused" in many rules to "defendant in a criminal case" in all rules.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers". These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rule does not change their substantive meaning. *See, e.g.*, Rule 103 (changing "interests of justice" to "justice").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. It alters the structure of a rule in a way that creates tension with the approach that courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. It changes a "sacred phrase" — phrases that have become so familiar in practice that to alter them would be unduly disruptive. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

3. More Detailed Notes for Some Restyled Rules

After discussion, the Committee determined that a few of the restyled Evidence Rules warranted a more fulsome statement to indicate the intent of the amendment and to assure the Bench and Bar that no substantive change is being made. The Committee adopted the working principle that if a fair number of members of the Bench and Bar might wonder about the scope of the change, it could warrant a more expansive explanation in the Committee Note. *After discussion, the Committee approved the following Committee Notes (recognizing that further development of Committee Notes might be necessary after public comment):*

Rules 407, 408 and 411

Explanation for Special Treatment:

These rules had always been rules of exclusion. They had never provided a ground of admissibility. The rules stated that certain evidence was inadmissible if offered for certain purposes, but that the preclusion *did not apply* if the evidence were offered for other purposes. The restyling has turned them into positive rules of admissibility. They now state that the court *may admit* the evidence if offered for a permissible purpose. It is possible that in the public comment period there will be some concern that the change in tone and structure substantive (though the Committee has taken a vote and found the changes to be stylistic only).

Approved Committee Note:

The Rule previously provided that evidence was not excluded if offered for a purpose not prohibited by the rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 608(b)

Explanation for Special Treatment

Rule 608 allows specific acts to be inquired into "on cross-examination." But because of Rule 607, impeachment with specific acts may also be permitted on direct examination. The courts have permitted such impeachment on direct in appropriate cases despite the language of Rule 608(b). The restyling makes no change to the language "on cross-examination" on the ground that there is no reason to make a change because courts are already applying the rule properly. A reasonable lawyer might wonder whether the Committee, by keeping the language, intends that it apply the way it is written. (The Civil Rules Committee tried to add a Note if retained language was inconsistent with the practice.)

Approved Committee Note:

The Committee is aware that the Rule's limitation of bad act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

Rules 701, 703, 704 and 705

Explanation for Special Treatment:

These restyled rules cut out all references to an "inference." The Committee determined that the change was stylistic only, but as the term "inference" is often used by lawyers, it is possible that some could think that the change is more important than intended.

Approved Committee Note:

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 801(d)(2)

Explanation for Special Treatment:

The restyled Rule deletes all reference to the term "admission." As that has been a basic – if often misunderstood — term for the hearsay statement of a party, it is an important shift that may raise questions in the public comment.

Approved Committee Note:

Statements falling under this hearsay exemption are no longer referred to as "admissions" in the title to the Rule. The term "admissions" is confusing because not all statements covered by exemption are admissions in the colloquial sense— a statement can be admissible under the exemption even it "admitted" nothing and was not against the party's interest when made. The term also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exemption is intended.

Rule 804(b)(3)

Explanation for Special Treatment:

The Rule provides for a substantive change from the existing rule, in that it extends the corroborating circumstances requirement to declarations against interest offered by the government. But all the Rule does is to track the substantive change that is planned for the rule a year before the restyling is to take effect. The Committee Note can explain the process.

Approved Committee Note:

The amendment provides that the corroborating circumstances requirement applies not only to declarations against penal interest offered by the defendant in a criminal case, but also to such statements offered by the government. The language in the original rule does not so provide, but a proposed amendment to Rule 804(b)(3) — released for public comment in 2008 — explicitly extends the corroborating circumstances requirement to statements offered by the government.

II. Proposed Amendment to Evidence Rule 804(b)(3)

A. Introduction

The proposed amendment to Rule 804(b)(3) would require the government to provide corroborating circumstances indicating trustworthiness before a declaration against penal interest could be admitted in a criminal case. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the meeting, the Committee considered the relatively few public comments that had been received on the Rule. Most of the comments were in the nature of style suggestions that are already being accommodated by the restyling project (e.g., specifying that the corroborating circumstances requirement applies only to statement offered under this exception and not more broadly). Some suggestions had been made about previous proposals to amend Rule 804(b)(3) and had been previously rejected by the Committee — such as a suggestion to add language that would abrogate the Supreme Court's decision in *Williamson v. United States*, and a suggestion to eliminate the corroborating circumstances requirement as applied to the accused.

B. Text of Proposed Amendment

As it had on a number of previous occasions, the Committee (including the Department of Justice representative) unanimously agreed with the substantive result mandated by the amendment, i.e., that the government will have to provide corroborating circumstances before a declaration against penal interest can be admitted by the accused. The Committee's discussion then shifted to how to respond to the stylistic suggestion proposed in the public comment, given that those stylistic suggestions had already been answered in the proposed restyled Rule 804(b)(3). **After substantial debate, the Committee unanimously resolved that the most efficient procedure was to propose that Rule 804(b)(3) be sent to the Judicial Conference in the form in which it had been restyled as part of the restyling project.** That restyled rule contained the substantive amendment that had already gone through the public comment, and it was common practice to implement style changes proposed by the Style Subcommittee after a proposed amendment was issued for public comment.

The Committee voted unanimously to recommend to the Standing Committee that the proposed amendment to Rule 804(b)(3), as restyled, be sent to the Judicial Conference with the recommendation that it be approved and referred to the Supreme Court.

What follows is the proposed amendment, as approved by the Committee, in blackline form:

(3) Statement Against Interest. A statement ~~which~~ that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; ~~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.~~ ; and

(B) ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless~~ is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~ , if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

What follows is the proposed amendment in "clean" form:

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

C. Committee Note

The Committee Note as issued for public comment contained a short discussion of the case law on confrontation. **After discussion, the Committee unanimously determined that the citations to case law should be deleted.** The case law is dynamic, and the Committee note is static. Moreover, the point of the passage in the Committee Note is to indicate that the Committee did not intend to treat constitutional issues. It was enough to state that without referring to case law.

Continuing the discussion of the Committee Note, the Reporter observed that one public comment suggested that the Note address the fact that the credibility of the witness who reports the hearsay in court is irrelevant to the admissibility of the hearsay statement itself. The Reporter noted that some courts had incorrectly excluded hearsay offered under Rule 804(b)(3) on the ground that the in-court witness was untrustworthy — this is a classic error in hearsay analysis, as the trustworthiness of the in-court witness can be assessed by the jury. Finally, the Reporter noted that a similar entry in the Committee Note in a previous iteration of Rule 804(b)(3) had been approved by the Standing Committee.

After discussion, the Committee unanimously approved the following Committee Note to the proposed amendment to Rule 804(b)(3):

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)");*United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest helps to assure both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause, because the requirements of this exception assure that declarations admissible under it will not be testimonial.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

III. Next Meeting

The Fall 2009 meeting of the Committee is scheduled for October in Charleston, S.C.

Respectfully submitted,

Daniel J. Capra
Reporter

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DRAFT - 7/13/07

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 1-2, 2009
Washington, D.C.
Draft Minutes

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure met in Washington, D.C., on Monday and Tuesday, June 1 and 2, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General David Ogden attended part of the meeting for the Department of Justice. The Department was also represented throughout the meeting by Karyn Temple Claggett, Elizabeth Shapiro, and Ted Hirt.

Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble. Professor Nancy J. King, associate reporter to the Advisory Committee on Criminal Rules, participated in part of the meeting by telephone.

Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee, participated in portions of the meeting.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Changes in Committee Membership

Judge Rosenthal noted that several membership changes had taken place since the last meeting. She pointed out that Professor Daniel Meltzer had resigned from the committee to accept an important position in the White House. She emphasized that he had been a superb member and would be sorely missed at committee meetings. She noted, though, that Professor Meltzer had stayed in touch with the committee and would attend its group dinner.

She reported that this was the last official meeting for Judge Hartz and Mr. Beck, whose terms will expire on October 1, 2009. She pointed out that both would be honored at the January 2010 meeting.

In addition, she noted that this was Judge Stewart's last meeting as chair of the Advisory Committee on Appellate Rules. She pointed out that Judge Stewart was truly irreplaceable as a judge, friend, and colleague. She noted that he had been a remarkable chair, and the Chief Justice had extended his term for a year. The new chair, Judge Jeffrey S. Sutton, will represent the advisory committee at the next Standing Committee meeting.

Judge Rosenthal reported, sadly, the recent death of Mark I. Levy, a distinguished attorney member of the Advisory Committee on Appellate Rules. A resolution honoring him had been prepared and would be sent to his widow by Judge Stewart. Judge Rosenthal extended the committee's sympathies and gratitude to his family for his many contributions.

Recent Actions Affecting the Rules

Judge Rosenthal reported that little action at the March 2009 session of the Judicial Conference had directly affected the rules committees, although several items on the Conference's consent calendar indirectly affected the rules. She noted, for example, that the Court Administration and Case Management Committee had recommended that courts provide notice on their dockets of the existence of sealed cases. Also, she said, the Court Administration and Case Management Committee had proposed guidelines for filing and posting transcripts that are designed to safeguard privacy interests, including matters arising during jury voir dire proceedings. She noted that the Standing Committee's privacy subcommittee, chaired by Judge Raggi, would meet to discuss a wide range of privacy and security matters immediately following the committee meeting.

Judge Rosenthal reported that the Supreme Court had approved all the rules recommended by the committee and had sent them to Congress on an expedited basis. She noted that the committee had successfully pursued legislative changes to 28 statutes that specify time limits and would be affected by the time-computation rules. The legislation had just passed both houses of Congress and been enacted into law. The statutory changes will take effect on December 1, 2009, the same time that the new time-computation rules take effect. She added that coordinated efforts were also underway to have all the courts update their local rules by December 1 to harmonize them with the new national time-computation rules.

Judge Rosenthal thanked Judge Thomas W. Thrash, Jr., former committee member, for his assistance in promoting the recent legislation, and Congressman Hank Johnson, who introduced it and was very helpful in shepherding it through Congress**.** On behalf of the committee, Professor Coquillette expressed special thanks to Judge Rosenthal for leading the concerted and challenging efforts to get the legislation enacted.

On behalf of the Executive Committee, Judge Scirica extended his appreciation to the committee for its excellent work. He noted that the Chief Justice continues to praise Judge Rosenthal for her work, including her impressive legislative accomplishments.

Legislative Report

Judge Rosenthal reported that Judge Kravitz would testify again in Congress on behalf of the Judicial Conference in opposition to the proposed Sunshine in Litigation Act. The legislation, she explained, would impose daunting requirements before a judge could issue a protective order under FED. R. CIV. P. 26(c). The judge would have to first find that the proposed protective order would not affect public health or safety – or if it would, that the protection is needed despite the impact on public health and safety. All of this would occur even before discovery begins.

Judge Kravitz noted that the American Bar Association opposed the legislation, and other bar associations were likely to follow. In addition, he said, the hope is that the Department of Justice would formally oppose the legislation. He pointed out that the bill was well-intentioned in trying to protect public health and safety, but the mechanism it uses to do so was not at all practical. He noted that he was the only witness to be invited by the sponsors to testify against the bill.

Judge Rosenthal explained that the Judicial Conference opposes the legislation it would amend the federal rules outside the Rules Enabling Act process. She noted that empirical evidence demonstrates clearly that judges are doing a good job in dealing with protective orders and in balancing private and public interests. The Sunshine in Litigation Act, though, would impose significant burdens on judges, requiring them to make findings when they have little information on which to base those findings.

Judge Kravitz added that if there is a problem in some cases with protective orders, it arises largely at the state level, not in the federal courts. He noted that there is also little understanding by the legislation's sponsors of how the civil litigation process actually works. The thought, he said, that a federal judge would be able to read through all the documents that could be discovered in order to find a smoking gun is truly misguided.

Mr. Rabiej reported that the Judiciary's implementation of the new privacy rules had been questioned by a special-interest group seeking to make all government information available to the public on the Internet without restrictions and without cost. He noted that the group had discovered that some documents filed by parties and posted on the courts' electronic PACER system contained unredacted social security numbers. He added that the privacy subcommittee would consider the matter and address a number of other privacy issues at its upcoming meeting immediately following the Standing Committee meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 12-13, 2009.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of May 8, 2009 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 1

Judge Stewart reported that the proposed amendment to Rule 1 (scope of the rules, definition, and title) was straightforward. It would define "state" for purposes of the appellate rules to include the District of Columbia and any U.S. commonwealth or territory.

Professor Struve added that, after the public comment period had ended, the advisory committee received a letter from an attorney in New Mexico asking it to expand the rule's definition of a "state" to include Native American tribes. She noted that the committee had discussed the request at length at its April 2009 meeting and had decided that the matter merited more time to develop because it implicates a number of different

rules and issues. Accordingly, the matter had been added to the advisory committee's study agenda. At the same time, though, the committee urged immediate approval of the proposed amendment to Rule 1.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. APP. P. 29

Judge Stewart reported that the proposed amendments to Rule 29(a) and (c) (amicus curiae brief) would add a new disclosure requirement on authorship and funding support received by an amicus in preparing its brief. The amendments had been modeled after the Supreme Court's recently revised Rule 37.6, although the advisory committee had to make a few adjustments because of differences in practice between the Supreme Court and the courts of appeals. Professor Struve added that the proposed amendment to Rule 29(a) would simply conform the rule to the proposed new definition of a "state" in Rule 1(b).

She noted that the advisory committee had received seven sets of public comments on the proposed amendments and had also considered the comments that had been submitted when the proposed revision to Supreme Court Rule 37.6 was published for comment. The comments, she said, had been very helpful, and the advisory committee had made two changes in the rule following publication. First, it reordered the subdivisions to place the authorship and disclosure provision in a new paragraph 29(c)(5).

Second, it revised subparagraph 29(c)(5)(C) to remove a possible ambiguity in the published language. The revised language would require an amicus to include in its brief a statement that "indicates whether . . . a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person." The revised language makes it clear that, if no such person has provided financial support for the brief, the amicus must state that fact expressly, rather than simply say nothing about funding. Professor Struve also pointed out that some public comments had suggested imposing a complete ban on funding amicus briefs, rather than merely requiring disclosure. But, she said, other commentators suggested that a ban would raise constitutional issues.

Professor Struve added that a suggestion had been received to delete the words "intended to fund." But, she explained, the advisory committee did not adopt it because the proposed alternative language — "contributed money toward the cost of the brief" — was too broad. Similar breadth in the version of Supreme Court Rule 37.6 published for comment had attracted vigorous opposition. It was later revised by the Court to use "intended to fund." She explained that without the "intended to fund" language, the disclosure requirement could require disclosure of membership dues and other indirect

financial support. Therefore, both the Supreme Court rule and the proposed appellate rule use the words "intended to fund" to make clear that the rule does not cover mere membership dues in an organization. Rather, the funding disclosure applies only when a party or counsel has contributed money with the intention of funding preparation or submission of the brief.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. APP. P. 40

Judge Stewart reported that the proposed amendments to Rule 40 (petition for a panel rehearing) had been presented to the Standing Committee before. They would clarify the time limit for filing a petition for rehearing in a case where an officer or employee of the United States is sued in his or her individual capacity for an act or omission occurring in connection with official duties. Originally, he explained, the Department of Justice had also sought a companion change in Rule 4 (appeal) to clarify the time limit for filing an appeal in a case where an officer or employee is sued individually for acts occurring in connection with official duties.

But, he said, the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), had seriously complicated any attempts to amend Rule 4. In essence, *Bowles* held that appeal time periods established by statute are jurisdictional in nature. Since the 60-day time limit for filing an appeal under Rule 4(a)(1)(B) is also established by statute, 28 § U.S.C. § 2107, there was a question whether the time period should be changed by rulemaking rather than legislation. Therefore, the Department decided to abandon the effort to amend Rule 4.

Rule 40, however, is not covered by statute. So the Department continued to seek the proposed amendments to that rule. Nevertheless, the advisory committee asked the Department to consider whether it preferred to pursue a legislative solution to deal with both situations.

Judge Stewart pointed out that a case currently pending before the Supreme Court raises the question of the application of the Rule 4 deadline in a qui tam action. *United States ex. rel. Eisenstein v. City of New York*, 129 S.Ct. 988 (2009). In view of the pendency of the case, the Department had asked that the Rule 40 proposal be held in abeyance (along with the Rule 4 proposal) to give it time to consider whether a single statutory fix might be a better approach. In addition, the Department was concerned that there could be a trap for the unwary if Rule 40 were to be amended before Rule 4 catches up. Therefore, even though the advisory committee had voted unanimously to proceed with amending Rule 40, it had decided to defer seeking final approval until the Supreme Court has acted in *Eisenstein.*

The committee without objection by voice vote approved remanding the proposed amendment back to the advisory committee.

FORM 4

Judge Stewart reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) would be amended to conform to the new privacy rules that took effect on December 1, 2007, by removing the request for full social security numbers and other personal identifier information. He noted that the Administrative Office had already made interim changes to the version of Form 4 that it posts on the Judiciary's website. Nevertheless, the official form needs to be changed to ratify those interim changes.

A member asked why a court needs all the information now required on Form 4, such as the street address, city, or state of the applicant's legal residence. Some of that information, for example, may be available from other documents, such as the pre-sentence investigation report. Other information, such as the applicant's years of schooling, may be of little use to the court.

Professor Struve explained that the advisory committee at this time was merely attempting to conform the form to the new privacy rules. It had not yet considered matters of substance. In fact, she said, the advisory committee planned to take up these issues later, and it may decide to draft two separate versions of the form to address the requests of judges for both a short version and long version of the form. Judge Stewart added that the advisory committee had a number of questions about the form and had asked its circuit-clerk liaison, Fritz Fulbruge, to survey his clerk colleagues on how the form is used in the courts.

A participant cautioned that the advisory committees should be careful not to let the privacy rules reach too far. At some point, he said, a court needs to have full information about certain matters. Another participant stated that the other parties in a case are entitled to review the petitioner's in forma pauperis application. But the applications are generally not placed in the official case file or posted on the Internet for public viewing.

The committee without objection by voice vote approved the proposed changes in the form for approval by the Judicial Conference.

Informational Items

Judge Stewart reported that the appellate and civil advisory committees had created a joint subcommittee to study a number of issues that intersect or overlap both

sets of rules, including "manufactured finality," the impact of tolling motions, and the impact of the Supreme Court's ruling in *Bowles v. Russell.*

Judge Stewart emphasized the advisory committee's shock and sadness at learning of the death of Mark Levy. He noted that Mark had participated actively in the advisory committee's April 2009 Kansas City meeting and had been responsible for a number of important proposals. He said that the advisory committee will present a resolution of remembrance and gratitude to Mrs. Levy. In addition, he had sent her some photographs that he had taken of Mark at recent advisory committee meetings in Charleston and Kansas City. She, in turn, had sent him a very nice note of appreciation.

Judge Stewart thanked the Standing Committee for its support of him personally and the advisory committee during his four years as chair. He also extended his special thanks to Professor Struve for her tireless, thorough, and uniformly excellent work.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in further detail in Judge Swain's memorandum and attachments of May 11, 2009 (Agenda Item 7).

Amendments for Final Approval

FED. R. BANKR. P. 1007, 1014, 1015, 1018, 1019, 4004, 5009, 5012, 7001, 9001

Professor Gibson reported that the advisory committee was seeking final approval of all but one of the proposed changes it had published for comment in August 2008. The committee, she said, would republish proposed new Rule 1004.2 for further comment because it had made a significant change in response to the first round of comments.

The amendments and proposed new rules, she explained, fall into several categories. Six of the provisions principally implement new chapter 15 of the Bankruptcy Code, governing cross-border insolvencies: FED. R. BANKR. P. 1014 (dismissal and change of venue), FED. R. BANKR. P. 1015 (consolidation or joint administration of cases), FED. R. BANKR. P. 1018 (contested petitions), FED. R. BANKR. P. 5009(c) (closing cases), new FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in chapter 15 cases), and FED. R. BANKR. P. 9001 (general definitions).

Professor Gibson said that amendments to two rules would change the procedure for seeking denial of a discharge on the grounds that the debtor has received a discharge

within the prohibited time period to get a second discharge. She explained that all objections to discharge are currently classified as adversary proceedings and must be initiated by complaint. But, as revised, FED. R. BANKR. P. 4004 (grant or denial of discharge) and FED. R. BANKR. P. 7001 (scope of the Part VII adversary proceeding rules) would allow certain objections to discharge to be initiated by motion, rather than complaint. The advisory committee, she added, had received some helpful technical comments on the amendments and had decided as a result to make changes in the placement of the provisions. Originally, the proposal would have set forth the principal change in Rule 7001. But a former member pointed out that since Rule 7001 introduces the Part VII adversary proceeding rules, it should not begin by referring to a contested matter. Therefore, the advisory committee had moved the key provision to Rule 4004(d). The change, she said, would not require republishing.

Three of the rules, she said, deal with the statutory obligation of individual debtors to file a statement that they have completed a personal financial management course. Amended FED. R. BANKR. P. 1007(c) (lists, schedules, statements, and time limits) would extend the deadline for filing the statement from 45 to 60 days after the date set for the meeting of creditors. This would allow the clerk of court, under proposed new FED. R. BANKR. P. 5009(b) (notice of failure to file the statement), to send a notice within 45 days to anyone who has not filed the required statement that they must do so before the 60-day period expires. Rule 4004(c)(4) (grant of discharge) would be amended to direct the court to withhold the discharge until the statement is filed.

Professor Gibson stated that the advisory committee had received one comment from a bankruptcy judge that the noticing obligation would place an undue burden on the clerks of court. But a survey taken of the clerks by the committee's bankruptcy-clerk liaison, James Waldron, had shown that many send out the notice now, and it would not impose a major burden to require it.

Professor Gibson said that FED. R. BANKR. P. 1019 (conversion of a case to chapter 7) would provide a new period to object to exemptions when a case is converted from chapter 11, 12, or 13 to chapter 7. The amendment would give creditors a new period to object – unless the case had previously been in chapter 7 and the objection period had expired, or it has been pending more than a year after plan confirmation. The advisory committee had received one comment on the rule from the National Association of Bankruptcy Trustees supporting the rule but not supporting the one-year provision.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 4001

Professor Gibson reported that the advisory committee recommended approval of two changes to Rule 4001 (relief from the automatic stay and other matters) without

publication because they are simply conforming amendments. Rule 4001 contains two time-period adjustments that had been overlooked and not included in the package of time-computation rules that will take effect on December 1, 2009.

OFFICIAL FORM 23

The advisory committee would also make a change in Official Form 23 (debtor's certification of completing a financial management course) without publication to conform to the change being made in Rule 1007. It would revise the instructions regarding the time for consumer debtors to file their certificate of having completed a personal financial management course. The proposed change in the form would become effective on December 1, 2010, at the same time that the proposed amendment to Rule 1007 takes effect.

The committee without objection by voice vote approved the proposed amendments to Rule 4001 and Official Form 23 without publication for approval by the Judicial Conference.

Amendments for Publication

FED. R. BANKR. P. 1004.2

Professor Gibson explained that the advisory committee would republish proposed new Rule 1004.2 (petition in a chapter 15 case) because it had made a substantive change in subdivision 1004.2(b) in response to public comments following the August 2008 publication.

An entity filing a chapter 15 petition to recognize a foreign proceeding must state in the petition the country where the debtor has the "center of its main interests." A party may challenge that designation. A commentator argued, persuasively, that the proposed 60-day time period allowed in the August 2008 version of the rule for a party to challenge the designation was simply too long. Therefore, the advisory committee would now set the deadline to file a challenge at 7 days before the hearing on the petition unless the court orders otherwise.

The committee without objection by voice vote approved the proposed new rule for republication.

FED. R. BANKR. P. 2003, 2019, 3001, 3002.1, 4004

Professor Gibson highlighted some of the other proposed changes to be published, focusing on two that she said were likely to attract a good deal of attention.

Rule 2019 (representation of creditors and equity security holders in Chapter 9 and 11 cases), she explained, is a long-standing rule that requires disclosure of interests by representatives of creditors and equity security holders. She noted that the advisory committee had received suggestions from trade associations that the rule be deleted on the grounds that it is unnecessary and over-inclusive.

On the other hand, the advisory committee had received comments from the National Bankruptcy Conference, the American Bar Association's Business Bankruptcy Committee, and two bankruptcy judges in the Southern District of New York that the rule should not be eliminated. Rather, it should be rewritten and expanded in scope, both as to whom it applies and what information they must disclose. In response, the advisory committee added a broader definition to the rule to require disclosures from all committees and groups that consist of more than one creditor or equity security holder, as well as entities or committees that represent more than one creditor or equity security holder. The court would also have discretion to require an individual party to disclose.

In addition, the amended rule would expand the type of financial disclosure that must be made beyond just having a financial interest in the debtor. As revised, a party in interest would have to disclose all "disclosable economic interests," defined in the rule as all economic rights and interests that establish an economic interest in a party that could be affected by the value, acquisition, or disposition of a claim or interest.

The purpose of the expanded rule, she said, was to provide better information on the motive of all parties who assert interests in a case to help the court ascertain whom they represent and what they are trying to do. In addition, the advisory committee had reorganized the rule to clarify the requirements and specify the consequences of noncompliance.

Professor Gibson explained that the proposed amendments to Rule 3001(c) (proof of claim based on a writing) and new Rule 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would govern home mortgages and other claims in consumer cases. Rule 3001(c) specifies the supporting information that must be attached to a proof of claim. She pointed out that claims today are often filed by financial entities that the debtor has never heard of because they are bought and sold in bulk freely on the market. Amended Rule 3001(c) would tighten up the documentation requirements to allow the debtor to see what claims are legitimate, what fees are being charged, and what defaults are alleged. Proposed subdivision 3001(c)(2)(D) specifies the consequences for a claim holder of not complying with the rule.

Professor Gibson explained that new Rule 3002.1 would work in tandem with the Rule 3001(c) changes and would govern mortgage claims in chapter 13 cases. It is common for debtors to attempt to cure their mortgage defaults and maintain their payments under the chapter 13 plan in order to keep their home. But problems arise with mortgage securitization, as holders of the mortgages change. The amounts of arrearages

claimed on the mortgage, as well as various penalties and fees, are not clear to either the debtors or the trustees. Debtors, for example, often believe that they have cured the default, but after the plan is completed and the case closed they face a new default notice with a variety of new fees added on. Accordingly, the proposed rule would require full disclosure by the mortgage holder of both the amounts needed to cure and any fees and charges assessed over the course of the plan. The proposed rule also provides for a final cure and sanctions for not following the prescribed procedures.

Professor Gibson reported that some bankruptcy courts have been following a similar procedure on a local basis with considerable success. The bankruptcy system, she said, should benefit from the national uniformity that the rule will bring.

One member questioned the wisdom of adding new sanctions provisions to the rules. He suggested that it is unusual to have sanctions set forth in separate rules, rather than in a general sanctions provision, such as those in FED. R. CIV. P. 11 and FED. R. BANKR. P. 9011.

Professor Gibson explained that the two proposed amendments are very different from the other rules because they deal with the specific requirement that a creditor give a debtor information about the amount of the mortgage or other consumer claims. Judge Swain added that there are very few other sanctions provisions in the bankruptcy rules, and they tend to deal with very practical disclosure issues. FED. R. BANKR. P. 2019 (representation of creditors and equity security holders in chapter 9 and 11 cases), for example, authorizes a court to refuse to hear from a party that has failed to disclose. Proposed Rules 3001(c) and 3002.1, she said, attempt to have the creditor focus specifically on fees and charges tacked onto mortgages.

OFFICIAL FORMS 22A, 22B, 22C

Professor Gibson reported that the proposed changes in the means test forms were designed to conform the forms more closely to the language and intent of the 2005 bankruptcy legislation. Judge Swain explained that the revisions would replace the term "household size" in several places on the forms with "number of persons" in order to count dependents in a way that is consistent with Internal Revenue Service nomenclature.

The committee without objection by voice vote approved the proposed amendments to the rules and forms for publication.

Informational Items

Judge Swain reported that the advisory committee was working on two major projects that would have a major impact on the bankruptcy rules and forms.

REVISION OF THE BANKRUPTCY APPELLATE RULES

First, Judge Swain said, the advisory committee was reviewing comprehensively Part VIII of the Federal Rules of Bankruptcy Procedure, governing appeals from a bankruptcy court to a district court or bankruptcy appellate panel. The current rules had been modeled on the Federal Rules of Appellate Procedure (FRAP) as they existed more than 20 years ago. Since that time, though, the FRAP have been amended several times and restyled as a body. The Part VIII bankruptcy rules, she said, are no longer in sync with them.

She pointed out that Eric Brunstad, a former advisory committee member and distinguished appellate attorney, had drafted for the committee a revised set of rules to bring the Part VIII rules up to date. The two principal goals that the advisory committee would try to achieve are:

1. to clarify the rules – because the current rules are obscure and difficult in many respects; and

2. to eliminate the "hourglass" effect, under which page limits imposed on appeals from the bankruptcy court to the district court later undercut a party's further appeal to the court of appeals.

Judge Swain reported that the advisory committee had convened a very successful special subcommittee meeting in March 2009, to which it had invited a variety of interested parties to discuss their experience with the current rules and suggest how the rules might be improved. She said that the meeting had demonstrated that there is a great deal of support for pursuing the project to revise the part VIII rules.

On the other hand, concern had been expressed by several participants that it would not be advisable to pattern the bankruptcy rules strictly after the current Federal Rules of Appellate Procedure because the bankruptcy courts have made enormous progress in taking advantage of technology. Since most bankruptcy courts and courts hearing bankruptcy appeals now operate with electronic case files and electronic filing, several of the current appellate rules are outdated or immaterial. For example, she said, courts using electronic records are no longer concerned with the colors of briefs or with many of the other requirements devised for a purely paper world. She said that the advisory committee would attempt to draft new appellate rules that take electronic record-keeping fully into account. She added that the committee will conduct another special subcommittee meeting in the fall and is grateful for Professor Struve's collaboration in its work on the bankruptcy appellate rules.

BANKRUPTCY FORMS MODERNIZATION

Second, Judge Swain reported that the advisory committee had made a good deal of progress on its major project to update and modernize the bankruptcy forms. She noted that its forms subcommittee had conducted an extensive analysis and

deconstruction of all the information contained in the forms currently filed at the commencement of a bankruptcy case. It had also obtained the services of a professional forms consultant who has worked for the Internal Revenue Service and the Social Security Administration in formulating questions for the general public and making forms more user-friendly and effective in eliciting required information.

She added that the advisory committee's forms subcommittee was also working closely with the group designing the "Next Generation" electronic system that will replace CM/ECF with a new system that will take full advantage of recent advances in electronics and add new functionality. She pointed out that several individuals and organizations had asked the judiciary to build a greater capacity into the new system to capture, retrieve, and disseminate individual data elements provided by filers on the standard bankruptcy forms. She noted that the forms modernization subcommittee will meet again on June 26, 2009, at the Administrative Office.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of May 8, 2009 (Agenda Item 5).

Amendments for Final Approval

FED. R. CIV. P. 8(C)

Judge Kravitz reported that the advisory committee in August 2007 had published a proposal to eliminate discharge in bankruptcy as an affirmative defense that must be asserted under Rule 8(c) (pleading affirmative defenses) to avoid waiver. He noted, though, that the Department of Justice had objected to the change.

Judge Eugene R. Wedoff, a member of the Advisory Committee on Bankruptcy Rules, had acted as the civil advisory committee's liaison with officials in the Department on the matter, but had been unable to reach an agreement with them. The civil advisory committee then asked the Advisory Committee on Bankruptcy Rules formally to consider the proposed amendment. That committee too supported eliminating the bankruptcy-discharge defense from Rule 8. The civil advisory committee met again in April 2009 and invited both Judge Wedoff and the Department to make presentations.

After a lengthy discussion, the advisory committee voted unanimously, except for the Department, to proceed with the proposed change to Rule 8. Judge Kravitz explained that the advisory committee was convinced that inclusion of a bankruptcy discharge as an affirmative defense is simply wrong as a matter of law because the Bankruptcy Code for

years has made all debts discharged in bankruptcy legally unenforceable. They cannot be asserted in any judicial proceedings. Nevertheless, the current rule has misled some courts into finding waiver when a party fails to assert bankruptcy as an affirmative defense. The advisory committee, he said, believed that it was important to eliminate a rule that is continuing to lead some judges to err.

Judge Swain added that the Advisory Committee on Bankruptcy Rules was in complete agreement with those views. Professor Gibson added that the only complication in the matter was that even though a debtor may obtain a discharge in bankruptcy, there are certain statutory exceptions to the discharge. A question might arise in future litigation, for example, over whether a particular type of debt excluded from the discharge in the bankruptcy litigation may still be enforced legally. She explained that this issue is what had caused the Department's concerns. Nevertheless, she said, the proposed amendment to Rule 8 was needed because it will eliminate a trap.

Judge Kravitz reported that Judge Wedoff had prepared some language that might be added to the committee note to reinforce Professor Gibson's point. Ms. Shapiro said that the Department of Justice rested on the statements that it had already made on the matter. She added, though, that the proposed additional language for the committee note will go a long way to easing the Department's concerns.

The committee without objection by voice vote approved adding the proposed, bracketed language to the committee note.

The committee, with one objection (the Department of Justice), by voice vote approved the proposed amendment to Rule 8(c) for approval by the Judicial Conference.

FED. R. CIV. P. 26

Judge Kravitz expressed his gratitude to Judge David G. Campbell and Professor Richard L. Marcus for serving superbly as chair and reporter, respectively, of the advisory committee's Rule 26 project. He noted that the project had been very thorough and had produced a set of balanced, well-crafted amendments that will reduce discovery costs and make a practical, positive difference in the lives of practicing lawyers.

Judge Kravitz reported that the proposed amendments to Rule 26 (disclosures and discovery) enjoyed wide support among bench and bar, and among both plaintiff and defendant groups. Among the supporters were the American Bar Association, its Section on Litigation, the American College of Trial Lawyers, the Association of the Bar of New Jersey, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges Association, the American Association for Justice, the Lawyers for Civil Justice, the Federation of Defense and Corporation Counsel, the Defense Research Institute, the American Institute of Certified Public Accountants, and the Department of Justice. The amendments had been opposed only by a group of law professors. Their concerns, he said, had been carefully considered, but not shared, by the advisory committee.

Judge Kravitz explained that the amendments would accomplish two results. First, they will require lawyers to disclose a brief summary of the proposed testimony of non-retained expert witnesses whom they expect to use. This change should eliminate the confusion that now exists regarding the testimony of treating physicians, employees, and other non-retained experts.

Second, the rule will place draft reports of retained experts and communications between lawyers and their retained experts under work-product protection. In doing so, it will reduce costs, focus the discovery process on the merits of an expert's opinion, and channel lawyers into making better use of experts. At the same time, though, the amendments will not eliminate any valuable information that may be elicited during the discovery phase of a case. Judge Kravitz explained that little useful information is available today under the current rule because lawyers use stipulations and a variety of other practices to prevent discoverable information from being created in the first place.

These other practices are unnecessary and wasteful. One common practice is to hire two sets of experts – one to testify and the other to consult with the litigation team. In addition to being inefficient, the practice gives a tactical advantage to parties with financial resources. Another artificial discovery-avoidance tactic involves using experienced experts who make extraordinary efforts not to record any preliminary draft report in order to prevent discovery.

He noted that the advisory committee had made a few changes in the draft following publication of the amendments. It had eliminated the last paragraph of the committee note, referring to use of information at trial, and added a new sentence in the

note. Both emphasize that the rule does not undercut the gate-keeping role and responsibilities of judges under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). The advisory committee had also changed the wording of Rule 26(b)(4) from "regardless of the form of the draft" to "regardless of the form in which the draft is recorded" to better capture the idea of drafts recorded electronically, while precluding the concept of an "oral" draft report.

The advisory committee, however, had decided not to extend the protection against disclosure enjoyed by retained expert witnesses to non-retained experts. There had been, he said, public comments recommending that the protection be extended at least to employees. The advisory committee, he said, may do so in the future. But for now, it had decided to defer the issue for a number of reasons. Most importantly, the committee believed that it could not proceed with a change because it had not signaled it sufficiently to the public and would have to republish the proposal. In addition, he explained, drafting a provision to extend the protection would be very tricky, as many employees are both fact witnesses and experts. There are also questions regarding former employees vis-a-vis present employees. Moreover, if the provision were limited to employees, it may be seen as tilting more towards defendants, rather than plaintiffs, and the advisory committee wants to be scrupulously neutral on the issue.

Several members praised the work of the advisory committee and said that the proposed amendments would eliminate the need for stipulations and artificial devices now used to avoid the rule. They suggested that the amendments will allow discovery of witnesses to proceed more openly and honestly. Members said that the advisory committee had done an excellent job of working through and accommodating the various public comments. Judge Kravitz added that Judge Campbell and Professor Marcus deserved the lion's share of the credit for the work.

The committee without objection by voice vote approved the proposed amendments to Rule 26 for approval by the Judicial Conference.

FED. R. CIV. P. 56

Judge Kravitz reported that the major project to revise Rule 56 (summary judgment) had been an exercise in rule-making at its very best. The advisory committee, he said, had taken full advantage of empirical research by the Federal Judicial Center (Joe Cecil), the Administrative Office (Jeffrey Barr and James Ishida), and Judge Rosenthal's staff (Andrea Kuperman). It had prepared and circulated several different drafts and had conducted three public hearings and two mini-conferences with lawyers, judges, and professors. The advisory committee, he said, had listened carefully to the views of people with very differing ideas, and it had made several changes in the proposed rule as a result of the public hearings and written comments.

The rules process, in short, had worked exactly as it should. He offered his special thanks to Judge Michael M. Baylson, chairman of the Rule 56 subcommittee, for his dedication and leadership in producing a greatly improved rule governing a central component of the civil litigation process. He also thanked Professor Cooper, the committee's reporter, for his enormous assistance and wise counsel during the project.

Judge Kravitz reported that the advisory committee had announced two overarching goals for the project at the outset. First, it did not want to change the substantive standard for summary judgment in any way. Second, it did not want the rule to tilt in either direction, towards plaintiffs or defendants. Both goals, he said, had been achieved.

The advisory committee also had two other goals in mind. First, it had set out to bring the text of the rule in line with the way that summary judgment is actually practiced in the courts today. Second, it wanted to bring some national uniformity to summary judgment practice. The committee, Judge Kravitz said, had accomplished the first goal. The second goal, he said, had been accomplished in part.

Judge Kravitz reported that the advisory committee had made three changes in the rule from the version that had been published.

First, it had eliminated from the rule the requirement of a point-counterpoint procedure based on the comments of several judges and lawyers who have used the procedure and believe that it imposes unnecessary expense. Several judges who testified at the public hearings, including Judges Holland, Lasnik, Wilken, and Hamilton, had been articulate in opposing the point-counterpoint procedure on the basis of their personal experience. But, he said, many other judges and lawyers, including the chair and several members of the advisory committee, believe that the procedure is quite effective.

Judge Kravitz emphasized, though, that all sides agree that, regardless of the specific procedure used to handle summary judgment motions, it is essential that lawyers provide pinpoint citations to the record to back up their assertions. Therefore, the advisory committee had decided to allow districts to continue with their own procedures for eliciting the facts, but uniformly to require pinpoint citations. He added that, even without the prescribed point-counterpoint procedure, the revised rule embodies a number of other good new features, such as specifically acknowledging partial summary judgment, limiting motions to strike, and addressing non-compliance.

The second significant change made following publication was to re-introduce the word "shall" into the text of the rule. As revised in new Rule 56(a) it would specify that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

"Shall," he said is an ambiguous term and should not normally be used in drafting. But the dilemma that the advisory committee faced was that the word "shall" had acquired a substantive meaning in former Rule 56(c).

"Shall" had been used in the rule for decades until replaced with "should" as part of the 2007 general restyling of the civil rules. But in revisiting the matter in depth, Judge Kravitz said, the advisory committee simply could not find an appropriate replacement term for "shall," based on the pertinent case law. Neither "should" nor "must" are completely accurate. Many public comments, moreover, had asserted that selecting one or the other term would be viewed as making a change in substance and tilting the playing field. The advisory committee, he said, had even tried to formulate a revision using the passive voice, but decided that the alternative might inflict even more damage.

After hearing all the arguments, Judge Kravitz said, the advisory committee had returned to the vow that it had made at the outset of the project – not to change the substantive standard for granting summary judgment as developed in each circuit under the historical term "shall." Therefore, it decided to return to "shall" and allow the case law to continue to deal with that term. If, however, the Supreme Court were to change the substantive standard in the future, the advisory committee could later adjust the language of the rule. In essence, he said, the advisory committee does not advocate use of the term "shall" in drafting, but it had faced an unsolvable problem. The ambiguity in Rule 56 was so intractable that it could not be changed without affecting substance.

The third change made following publication was to eliminate the national rule's proposed time schedule for filing motions for summary judgment, responses to those motions, and replies to the responses. With elimination of the point-counterpoint procedure, there was no longer a need to retain all the deadlines. The advisory committee had been unanimous in deciding to specify only the deadline for filing a summary judgment motion and not to prescribe a schedule for further filings and responses. He noted that there is, for example, no other place in the Federal Rules of Civil Procedure where the rules fix briefing schedules, and it would not be appropriate to specify them for just one category of motions. In addition, he said, some lawyers recommended that the rule provide for sur-replies, which would have complicated the rule further.

The advisory committee had also been concerned about the time-computation rules that take effect on December 1, 2009. They will incorporate the time periods to respond and reply in the existing Rule 56, only to have a completely revised rule delete those time periods on December 1, 2010, when the new Rule 56 would take effect. The advisory committee concluded, however, that it needed to produce the best rule possible for the future, even though there might be some confusion for a year.

Finally, Judge Kravitz explained that the advisory committee had considered at length whether to republish the rule, since several changes had been made following the August 2008 publication. But it decided unanimously not to do so because, at the Standing Committee's direction, it had already solicited the public's comments on a number of specific issues. The revised rule, he said, does not add any provision not fully noticed to the public. Rather, the advisory committee merely eliminated some provisions of the published rule.

Several committee members agreed that the rules process had worked at its best to facilitate a healthy public debate on summary judgment practice and to produce a very workable new rule. Several noted that legitimate differences of opinion had been expressed on some of the major issues, and the advisory committee had accommodated the differing views as well as possible. Some pointed out that they personally favored the point-counterpoint procedure, but recognized that it could not be forced on all the courts, particularly those that have tried and rejected it. They noted, though, that individual judges and districts that have adopted the procedure will be free to continue using it.

Support was voiced for the advisory committee's decision to return to use of the word "shall' in Rule 56(a) on the grounds that it preserves the substantive standard for granting summary judgment. A few members went further and suggested that "shall" is an appropriate term to use in drafting, despite the style conventions. The committee's style consultant, Professor Kimble, though, disagreed and asserted that "shall" is never appropriate. He suggested that a different formulation might still be developed to maintain the substantive standard.

Judge Rosenthal emphasized that the advisory committee's dilemma had been to resolve a conflict between two competing principles. First, as part of the restyling process, all the advisory committees have consistently eliminated the word "shall." But the higher principle that prevailed was avoiding making any change in the substantive standard for summary judgment. She noted that, in the interests of improving style by changing "shall" to "should" in the 2007 restyling amendments, the committee had actually changed the substantive law in some circuits.

A member suggested adopting a public comment to replace "as to" with "about" in proposed Rule 56(a)(2). The style consultant agreed that the change was better stylistically, but several members urged that the change not be made since it was not essential. One member added that the current language is almost a sacred phrase and should not be tinkered with.

The committee without objection by voice vote agreed not to make the proposed additional change in the language of Rule 56(a)(2).

Another member expressed concern over the language in proposed Rule 56(c)(2) authorizing a party to assert in its response or reply that the other party's material cited to

support or dispute a fact "cannot be presented in a form that would be admissible in evidence." He suggested that the language had been revised from the formulation presented to the public for comment, *i.e.*, that the material "is not admissible in evidence." The revised language, he said, appeared to require the judge to make a ruling on the potential future admissibility of evidence.

Judge Kravitz explained that affidavits and other materials submitted as part of the summary judgment process are not evidence. Professor Cooper added that the published language was too broad because it cannot be known until trial what evidence will be admissible. Some public comments, he said, had suggested alternative language, such as "would not be admissible" or "could not be put in a form that would be admissible." The specific language added after publication was intended to show that something more than an affidavit is needed. There is no need for the objecting party to make a separate motion to strike. In addition, failure to challenge the material during summary-judgment proceedings does not forfeit the party's right to challenge its admissibility at trial.

Other members suggested that the change in language was helpful because it lays out an option for parties to deal with an issue that arises often as part of summary-judgment practice, though not specified in the current rule. When a party objects that a submission cannot be produced in any admissible form, it allows the judge to cut through the issues and remedy any technical problems as part of the summary-judgment motion itself, rather than wasting time on motions to strike. Judge Kravitz pointed out that the revised rule gives the judge flexibility to tell a party that it has not presented the material in an admissible form, to give the party an additional opportunity to correct the defect, and to fashion an appropriate remedy.

One member suggested that the problem with the language may be that it could be construed as requiring the moving party to carry some burden, such as to show that the other party cannot present evidence in an admissible form. The word "cannot" appeared to be the problem. She suggested that it be changed to "could not." It was also suggested that the chair and reporter of the advisory committee consider possible modifications in the language.

Judge Kravitz recommended, alternatively, that an explanatory sentence be added to the committee note. He pointed out that in the situation covered by the provision, there is no doubt that the party has not properly presented the pertinent material, but it is difficult to say that it "cannot" be so presented. He suggested adding language to the note to explain that an assertion that the opponent could not produce material in admissible form functions like an objection at trial. The proponent of the material can then either show that it is admissible or explain the admissible form that is anticipated.

A member stated that the text of the rule was perfectly appropriate. An objector only has to assert that the material cannot be presented. The moving party then has the burden of showing that it can.

Another member suggested that the rule might be rephrased to say something like: "If an objection has been made that the material has not been presented in a form that can be admissible at trial, the court may require (or allow) the proponent of the material to show that it can be presented in an admissible form." Judge Kravitz pointed out, though, that the advisory committee was trying to get away from motions to strike. It would prefer to have parties address the matter in their summary-judgment briefs.

Other members said that the language of the rule, as modified after publication, was correct. One pointed out that proposed Rule 56(c)(2) must be read together with proposed Rule 56(c)(4), which states that an affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. The trial judge can easily handle any problems that arise. A member declared that it is a very interesting issue in theory, but will not be a real problem in practice.

A member suggested substituting the word "object" for "assert." "Assert" requires the opponent to know, or allege, that the material cannot be presented in admissible form. "Object" makes it clear that the opponent is only raising the point, placing the burden on the proponent. Judge Kravitz explained that the advisory committee had used the word "assert" because it is a word commonly used to refer to a point mentioned in a brief. He agreed to change it to "object."

The committee with one objection by voice vote approved changing "assert" and "asserting" in proposed Rule 56 to "object" and "objecting."

The committee without objection by voice vote then approved the proposed amendments to Rule 56 for approval by the Judicial Conference.

The committee without objection by voice vote further approved the proposed amendments without republication.

A member suggested adding language to the committee note to alert the reader that the revised rule places the burden on the parties to raise the point that the submitted material cannot be presented in an admissible form.

The committee by a vote of 7 to 3 approved making the suggested addition to the committee note.

Amendment for Publication

SUPPLEMENTAL RULE E(4)(f)

Professor Cooper noted that Rule E(4)(f) (in rem and quasi in rem actions – procedure for release from arrest or attachment) would be amended to delete the last sentence because it has been superseded by statutory and rule developments. The statutes cited in the rule, 46 U.S.C. §§ 603 and 604, were repealed in 1983. Deletion of the reference to them seems entirely appropriate, and publishing the amendment for public comments might also flush out any arguments that other statutes should be invoked.

Deletion of the reference to forfeiture actions, though, is more complicated. Rule G, which took effect in 2006, governs forfeiture actions in rem arising from a federal statute. It also specifies that Supplemental Rule E continues to apply to the extent that Rule G does not. The problem, he said, is how best to integrate Rule G with Rule E(4)(f). The proposed amendment would strike the last sentence of Rule E(4)(f) and let courts figure it out on a case-by-case basis. The Department of Justice, he said, had suggested adding a sentence stating that Rule G governs hearings in a forfeiture action.

Professor Cooper added that the advisory committee recommended publishing the rule for comment. But since the proposed changes are relatively minor, the publication should be deferred until other amendments to the civil rules are proposed and the proposed amendment to Supplemental Rule E(4)(f) can be included in the same publication.

The committee without objection by voice vote approved the proposed amendment for publication at an appropriate future time.

Informational Items

Judge Kravitz reported that the advisory committee would convene a major conference on the state of civil litigation to be held at Duke Law School in May 2010. He noted that Judge John G. Koeltl would chair the conference, and the Federal Judicial Center was helping him compile empirical data for the program. He pointed out that Judge Koeltl was working with the Litigation Section of the American Bar Association on a survey of its members. In addition, Judge Koeltl had persuaded RAND and others to produce papers and other information for the conference. He had put together a comprehensive agenda and was now securing moderators and panel members. The Chief Justice will deliver a taped message. The program may be broadcast by Duke, and the Duke Law Review is expected to publish the proceedings.

Judge Kravitz reported that a special subcommittee chaired by Judge Campbell and assisted by Professor Marcus was considering a range of potential changes to Rule 45 (subpoenas). The subcommittee was in the process of seeking input and planning for mini-conferences with the bench and bar.

Judge Kravitz reported that a joint subcommittee comprised of members of the civil and appellate advisory committees had been appointed and will begin studying several issues that intersect both sets of rules. In addition, the civil advisory committee was examining issues arising when judges are sued in their individual capacities, including service in those cases. One suggestion is to require that service be made on the clerk of the court where the judge sits.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 11, 2009 (Agenda Item 9).

Amendments for Final Approval

VICTIMS' RIGHTS AMENDMENTS

FED. R. CRIM. P. 12.3

Judge Tallman reported that the proposed amendment to Rule 12.3 (notice of public-authority defense) would conform the rule with a similar amendment made recently in Rule 12.1 (notice of alibi defense). He noted that the change was appropriate, even though the public-authority defense arises rarely.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

A member pointed out that proposed Rule 12.3 and Rule 12.1 both permit the district court in certain circumstances to order the government to turn over to the defendant the names and telephone numbers of victims, which would otherwise be protected. She recommended that both rules require the Government to inform the protected persons that their names and numbers are being disclosed. Judge Tallman replied that proposed Rule 12.3(a)(D)(ii) explicitly authorizes a court to fashion a reasonable procedure to protect the victims' interests.

FED. R. CRIM. P. 21

Judge Tallman reported that the proposed amendment to Rule 21(b) (transfer for trial) would allow a court to consider the convenience of any victim in making a decision to transfer a case for trial.

A member questioned the need for the rule since it is not required by the Crime Victims' Rights Act. Judge Tallman pointed out that the advisory committee has been

concerned over criticism that it has not been expansive enough in making changes to the rules to implement the Act. Professor Beale added that this was one of the few rules where the advisory committee had made changes that go beyond what is mandated by the Act. She explained that the advisory committee wants to incorporate victims' rights as fully as possible without doing damage to the carefully balanced criminal justice system. Victims' rights groups, she said, have expressed a particularly strong interest in victims being able to attend court proceedings, and the proposed amendment to Rule 21 would further that interest. She pointed out, though, that the committee had made several other, more significant changes in the rules for victims at earlier meetings.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 5

Judge Tallman reported that the advisory committee had withdrawn its proposed change to Rule 5 (initial appearance) because it felt the current language adequately referenced the statutes providing consideration of the safety of victims and the community. The proposal would have required a court, in making the decision to detain or release a defendant at an initial appearance, to consider the right of any victim to be reasonably protected from the defendant.

Professor Beale explained that the advisory committee had been concerned that by singling out one situation, it had put its finger on the scales and changed the substantive law. The proposed amendment, moreover, was redundant and unnecessary. The Bail Reform Act, she said, is a carefully balanced and nuanced law, and just singling out one factor in support of victims could cause more damage than good. But in light of the politics of the situation, the decision to withdraw the amendment had not been an easy one for the committee.

A member agreed that many of the victims' rules amendments were not necessary, but clear political implications counsel in favor of including them. The Crime Victims' Rights Act, he said, emphasizes particularly the safety of victims. Therefore, this may be one area where a rule amendment may be advisable. Victims are particularly vulnerable to being harmed by defendants who have been released. He said, moreover, that he had not been persuaded by the argument that the proposed amendment would change the substantive law.

Judge Tallman pointed out that the Federal Magistrate Judges Association, whose members apply the rule every day, oppose changing the rule because they view the Bail Reform Act and the Crime Victims' Rights Act as sufficient, and changing the rule would upset the careful balance of the statutes. Judge Rosenthal added that the rule already

speaks of detention or release "as provided by statute," which covers both the Bail Reform Act and the Crime Victims' Rights Act.

Members questioned whether the Standing Committee is authorized to initiate its own rules proposals or to forward to the Judicial Conference a proposed amendment that has been withdrawn or rejected by an advisory committee. Professor Coquillette suggested that the Rules Enabling Act appears to contemplate the Standing Committee confining itself to reviewing the recommendations of the advisory committees.

A member recommended sending the matter back to the advisory committee for further consideration. But Judge Tallman pointed out that the advisory committee had already published the rule for comment, had then discussed it thoroughly, and had voted unanimously not to proceed with the amendment. He said that he was not sure that returning the matter to the committee would change the result.

A participant suggested, though, that other statutory changes may be made in the future. Sending the rule back to the advisory committee, rather than rejecting it, would keep the matter alive and be advisable as a matter of policy. A member added that the advisory committee might be asked to include the matter as part of its ongoing study of how the courts are implementing the Crime Victims' Rights Act. Professor Beale added that there is a careful balance between that statute and the Bail Reform Act, and the advisory committee will continue to monitor the situation closely to make sure that any problems are addressed.

The committee unanimously by voice vote returned the proposed amendment to the advisory committee with instructions to further study proposed amendments to Rule 5 as part of its ongoing study of the courts' implementation of the Crime Victims' Rights Act.

OTHER AMENDMENTS

FED. R. CRIM. P. 15

Judge Tallman reported that the advisory committee had briefed the Standing Committee before on the proposed amendments to Rule 15 (depositions). Recommended by the Department of Justice, they would allow the government – under certain limited conditions – to take a deposition in a criminal case outside the United States and outside the physical presence of the defendant, with the defendant participating by electronic means. Before allowing the deposition to proceed, the trial court would have to make case-specific findings on the following six factors:

1. the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

2. there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
3. the witness's presence for a deposition in the United States cannot be obtained;
4. the defendant cannot be present because: (I) the country where the witness is located will not permit the defendant to attend the deposition; (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing;
5. the defendant can meaningfully participate in the deposition through reasonable means; and
6. for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

Judge Tallman explained that the Fourth Circuit had already approved procedures similar to those set forth in the proposed amendment and had held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

Judge Tallman pointed out that an analogous proposal for a change to Rule 26 (taking testimony) had been forwarded to the Supreme Court in 2002, but the Court rejected it on Confrontation-Clause grounds in an opinion by Justice Scalia. The advisory committee, he said, recognized fully that there may also be confrontation issues with the new proposal. But it also recognized that the practical need for the amendment is substantial, and it had been carefully crafted to address the Confrontation-Clause factors considered by the Supreme Court in 2002. He added that, unlike the proposed amendments to Rule 26, the proposed amendment to Rule 15 deals only with the taking of depositions and not the later admissibility of their contents at trial, which is where the Confrontation Clause issue arises.

Judge Tallman noted that there had been opposition to the proposed rule, as expected, from the defense bar. As a result, the advisory committee had limited the rule's reach to make sure that a deposition is restricted to evidence necessary to the government's case. But the committee did not adopt three other suggestions made by the defense bar during the comment period: (1) to limit the rule to government witnesses; (2) to require the government to show that the deposition would produce evidence "necessary" to its case; and (3) to require the government to show that it had made diligent efforts to secure the witness's testimony in the United States.

Deputy Attorney General Ogden thanked the committee for its attention to the matter and emphasized that the proposed rule is of substantial importance to the Department of Justice. It would be needed only in a few cases, but the depositions would

be very important in those cases. The detailed procedures will require the Department to go to a great deal of trouble and expense to obtain the testimony. Arranging for a foreign deposition is costly and difficult, so it will not be pursued lightly, and the rule will be used only in cases that are vitally important to the United States.

Mr. Ogden said that the Department fully recognizes the importance of the issues under the Confrontation Clause. But, he said, the careful conditions that the rule specifies go a long way to shield the proposal from constitutional infirmity. The rule, he assured the committee, will not be taken lightly. Using the rule will be expensive because the government will likely also have to pay for defense counsel. And it will have to get the cooperation of the State Department and the approval of the foreign country involved. Moreover, the trial court has to approve taking the deposition, and it can do so only after having made all the requisite findings specified in the rule.

A member pointed out that subparagraph 15(c)(3)(F) is the only part of the rule that refers to the government. The rest of the rule would also apply to defendants. Professor Beale explained that the federal defenders had wanted to limit the rule to government witnesses, but the advisory committee did not agree. In fact, the committee had been surprised that the suggestion had come from the defenders. The defenders, she said, had suggested that they would very rarely use the device. As a matter of policy, though, the advisory committee believed that the rule should not be just a one-way street.

A participant suggested that the proposed amendments will have an impact on the admissibility of declarations against penal interest under FED. R. EVID. 804(b)(3). To admit evidence under Rule 804, he said, a party must show that the declarant was not only absent from trial, but cannot be deposed. Under proposed Rule 15, and its expanded possibilities to conduct depositions, declarations against penal interest will be admissible less often.

A member expressed strong opposition to the proposed amendments, asserting that they were directly contrary to the Confrontation Clause. He said that the committee should not recommend rules that are constitutionally debatable. That alone, he said, should be grounds for not proceeding further.

In addition, he said, there was no empirical support for the rule. Normally, he said, the advisory committee asks for data and background information. In this case, the procedures differ widely from country to country. The advisory committee needs to have a clearer understanding of the different procedures and requirements imposed around the world. It also needs to know more specifically how big a problem the government actually faces without the rule. In addition, he said, many additional procedural safeguards required by the developing case law had not been included in the proposed amendments, including some of the requirements set forth in the *Ali* case. The key question, he said, is not how rarely the proposed authority will be exercised, but whether it is fundamentally sound.

He noted that subparagraph 15(c)(3)(F) specifies that the procedure may only be invoked if there is "an important public interest." But, he noted, the government claims an important public interest in every prosecution. The provision, consequently, is not meaningful. Subparagraph 15(c)(3)(E) requires that the defendant be able to participate in the deposition by "reasonable means," but that standard is too vague. In addition, it is unclear how the government will show that the witness cannot be obtained. He concluded that if this rule were so important to the country, it should be enacted by legislation, rather than by rule.

A member pointed out that the Confrontation Clause can still be used to prevent any testimony elicited at the foreign deposition from being used in court. Mr. Ogden agreed that admissibility questions must still be addressed in each case, but said that courts are competent to make the case-by-case decisions that the rule requires.

A member suggested that the rule would be very helpful because it would provide national uniformity on a matter that individual courts currently have to struggle with. She said that trial courts need guidance and a framework for dealing with foreign depositions. Another participant said, however, that it may be premature for the committee to bless the specific proposed procedure and suggested that the Department might consider adopting an internal guide rather than seeking a rule.

Professor Beale said, though, that the proposed rule would create a desirable template to guide the Department and the courts on taking depositions. She pointed out that the rule is procedural in nature. She emphasized that the evidence produced at the deposition still must face other obstacles under the Confrontation Clause and the Federal Rules of Evidence when the government tries to admit the testimony.

Another member expressed concern about proceeding by rule at this point and questioned whether the advisory committee had pinned down all the procedures correctly. Perhaps some additional flexibility may be needed. Moreover, she suggested, the advisory committee may be underestimating how often the defense might want to invoke the rule. The principal justification for the rule is that the courts need some procedural guidance on taking foreign depositions. But in light of the lack of definitive information at this point, it might be better to defer on a rule and consider providing other kinds of guidance to the courts, such as memoranda, white papers, or studies.

A participant asked whether the Department of Justice had considered proceeding with an internal Department memorandum based on the existing case law, rather than seeking a controversial rule. Mr. Ogden responded that the Department had conducted an extensive review of the matter and had taken an official position that seeking a federal rule is the best way to proceed.

A member added that the government faces many thorny problems in meeting the requirements and restrictions of other countries' laws. The federal courts, therefore, may

need more advice on how to deal with these problems as a practical matter. Mr. Ogden responded that the Department would not even proceed if there were legal impediments in a particular country. He pointed out that the rule is based on the actual cases that had arisen to date and reflects the current case law.

A member responded, though, that it would be very difficult to obtain additional relevant information without actually having a rule in place. A procedural rule is needed, he said, and the Confrontation Clause and rules of evidence are in place to protect against constitutional violations. The Department of Justice, he said, still has obstacles to face, even if it follows the procedures specified in the rule. He recommended proceeding with the rule and monitoring how it works in practice.

Mr. Ogden noted that the Department had some concern about proposed subparagraph 15(c)(3)(F), which requires the government to establish that the prosecution advances "an important public interest." He pointed out that the requirement would lead to a determination by the court as to what is important, and what is not. The Department, he said, was prepared instead to have the certification made internally by a high-level Department official, at least as high as the Assistant Attorney General level.

Judge Tallman explained that the reason for including the provision was to respond to criticisms by the defense community that it would be too easy for a prosecutor to use the foreign deposition procedure without some greater level of accountability. The defense bar had argued for a certification by the Attorney General. He suggested that the committee might strike subparagraph (F) entirely upon assurance that the Department will impose an internal requirement of high-level approval.

A participant suggested that it is misleading to say that only a few cases will be brought under the rule because there are in fact many cases in this area. The key issue, he said, is preserving the defendant's right to face-to-face confrontation. The situations presented by the rule are similar in ways to those involved in confrontation of child witnesses. He suggested that the advisory committee was, in effect, trying to apply *Maryland v. Craig*, 497 U.S. 836 (1990), and the various statutes that implement it.

Judge Rosenthal concluded that members had expressed discomfort on two levels:

1. Whether the case had been made that the rule is needed.

2. Whether the committee knows enough about how the rule might be applied, even though it would be difficult to obtain that information in advance without having a rule in place.

She added that the advisory committee also needed to decide whether subparagraph 15(c)(3)(F) was needed, and whether the committee was confident enough to let the rule go forward in final form to the Judicial Conference and the Supreme Court.

She noted that the advisory committee had drafted the rule very carefully to respond to all the expressed concerns. She pointed out that Justice Scalia's 2002 opinion was specific in setting forth the minimal requirements for a rule, and the rule that the advisory committee had drafted appeared to respond well to the concerns he had articulated. One member suggested that although the draft rule contained all the minimal requirements, it might also specifically state that a judge may impose other requirements.

A participant noted that FED. R. EVID. 804(b)(1) (hearsay exceptions – declarant unavailable) deals with admissibility and has its own standard that requires a party to be afforded a trial-like "opportunity" to examine the witness before the witness's testimony may be admitted. He suggested that the criminal provision be dovetailed with the evidence rule or use the language of the evidence rule. Admissibility of the deposition evidence at trial is governed by the standards of FED. R. EVID. 804(b)(1), so a different standard is not needed in proposed FED. R. CRIM. P. 15(c). In fact, if the evidence is admissible under FED. R. EVID. 804(b)(1), it will probably also satisfy the Confrontation Clause under the pertinent case law. But for the evidence to meet the Rule 804(b)(1) standard, the defendant needs a "trial-like" opportunity to confront the witness.

A member moved to adopt the proposed amendments to Rule 15 with two changes:

1. delete proposed subparagraph 15(c)(3)(F) – on the representation of the Department of Justice that before invoking the revised Rule 15, it will require internal approval by an Assistant Attorney General; and

2. amend subparagraph 15(c)(3)(E) to conform it to the provisions of FED. R. EVID. 804(b)(1).

Professor Beale reported, though, that the advisory committee had been persuaded not to import the standard of FED. R. EVID. 804(b)(1) into the revised criminal rule. She explained that the district court evaluates motive and opportunity under Rule 804(b)(1) after the deposition has been taken, while ruling on admissibility of the evidence at trial. The standard in proposed FED. R. CRIM. P. 15(c), however, is different. It articulates the requirements that must be met for approving taking the deposition in the first place.

The member restated his motion to approve the proposed amendments with just one change – elimination of subparagraph 15(c)(3)(F).

The committee by a vote of 9-1 approved the motion and voted to forward the proposed amendments to Rule 15 for approval by the Judicial Conference.

FED. R. CRIM. P. 32.1

Judge Tallman reported that the proposed amendments to Rule 32.1(a)(6) (revocation or modification of probation or supervised release) had been requested by the

Federal Magistrate Judges Association. They would resolve ambiguities and clarify in two ways the burden of proof for obtaining release in revocation and modification proceedings.

First the amended rule would specify the precise statutory provision that governs the revocation proceeding – 18 U.S.C. § 3143(a)(1), rather than all of 18 U.S.C. § 3143(a), which contains other provisions that do not apply and have caused some confusion. Second, the current rule places the burden of proof on the person seeking release, but it does not specify the standard. The revised rule specifies that the person facing revocation or modification must establish by "clear and convincing evidence" that he or she will not flee or pose a danger to any other person or the community.

He noted that an additional change to the rule, to allow video conferencing of these proceedings, was pending separately before the advisory committee for approval to publish as part of the package of technology-related amendments.

A member pointed out that the proposed committee note stated that the amendment reflected established case law. But only a single Ninth Circuit case and a district court case had been cited. She questioned whether the case law was in fact uniform across the country and expressed some concern that the committee may be making a substantive change in the law in some circuits. Professor Beale responded that the case law is, in fact, clear, as is the statute itself. She added that the defense bar did not object to the rule specifying the standard of "clear and convincing evidence."

Professor Coquillette recommended that the case references and the last sentence of the note be eliminated. He pointed out that case law is subject to change. Judge Tallman agreed with the suggestion.

The committee unanimously by voice vote approved the proposed amendments to the rule for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the proposed amendments to Rule 12 (pleadings and pretrial motions) would conform the rule to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002). They would also save judicial resources by encouraging defendants to raise all objections to an indictment before trial. Rule 12(b)(3)(B), he said, sets forth the general rule that a defendant must raise before trial any claim alleging a defect in the indictment or information. But it also specifies that the particular objection that the indictment fails to state an offense may be raised at any time. This exception was justified originally on the ground that the latter claim is jurisdictional in nature and therefore may be raised at any point.

In *Cotton*, however, the Supreme Court abandoned that justification by holding that a defective indictment does not deprive a court of jurisdiction. A claim that the indictment fails to allege an essential element of an offense does not raise jurisdictional issues. The claim can be forfeited if not timely raised. Judge Tallman explained that the Department of Justice had asked the advisory committee to amend Rule 12 to require explicitly that a claim that an indictment fails to state an offense be raised before trial.

The proposed amendment would do so. But it also contains a fail-safe provision in proposed Rule 12(e)(2), which states that a court may grant relief from the waiver either: (1) for good cause; or (2) if the indictment's omission of an element of the offense has prejudiced a substantial right of the defendant. The proposed amendment to Rule 34 (arresting judgment) would conform that rule to the proposed amendment to Rule 12(b).

Judge Tallman explained that the advisory committee had wrestled with whether to require a defendant to show both good cause and prejudice to obtain relief from the waiver, but it had concluded that only one or the other should be required. Professor Beale added that the advisory committee wanted to provide judges with greater leeway in dealing with this specific type of error and noted that it is a different standard from that required for relief from other errors.

Several members suggested that "forfeiture" would be a better choice of words than "waiver" because the context makes clear that Rule 12 deals with forfeiture. Moreover, the Supreme Court used the term "forfeiture" in *Cotton.* Judge Tallman replied that "waiver" has always been used in the text of Rule 12, even though "forfeiture" might be a better term if the advisory committee were writing the rule on a clean slate. He suggested that the proposed rule could be published using the term "forfeiture," and the advisory committee could solicit public comments regarding the appropriate choice. It was also suggested that both terms could be used in the publication and placed in brackets to solicit comments from bench and bar.

Some members questioned whether the proposed amendments were completely consistent with *United States v. Cotton* and suggested that there are alternative possible readings of the holding. Judge Rosenthal noted that revising the remedy provision of the rule, Rule 12(e)(2), would pose many drafting difficulties. Professor Beale explained that the advisory committee had struggled with drafting that portion of the rule and suggested that it might be advisable, in light of the comments of the members, for the advisory committee to explore the issues further and consider additional adjustments in the rule. A member suggested that the advisory committee also take a fresh look at all the criminal rules that use the term "waiver," rather than "forfeiture."

Due to the many issues surrounding the provision, Judge Rosenthal suggested that the best course of action might be for the matter to be returned to the advisory committee for further study.

The committee without objection by voice vote approved returning the proposed amendments to Rules 12 and 34 to the advisory committee for further study.

TECHNOLOGY RULES

Judge Tallman reported that the proposed amendments started with a commission given to Judge Anthony J. Battaglia and his subcommittee to review all the Federal Rules of Criminal Procedure with a view towards improving them to take account of technology changes. He added that technology has now reached the stage of high reliability and accessibility that the rules should take specific account of it and make it easier for prosecutors, law enforcement officers, judges, and others to use the system. The proposed changes deal largely with the issuance of arrest and search and seizure warrants, and with the use of video conferencing to avoid having to bring people into court.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope of the rules and definitions) would broaden the definition of "telephone," "telephonic," or "telephonically" to include any form of live electronic voice communication. The definition is intended to be sufficiently broad in order to cover both recent changes and future changes in technology. The committee note, moreover, also speaks of services for the hearing impaired.

Judge Tallman emphasized that use of the technological options is discretionary. Judges, prosecutors, and officers may continue to handle proceedings in the traditional way. But he pointed out that there are many areas in the country where the distance between a judicial officer and a law enforcement officer is great. The proposed rules authorize the use of technology to close the distance gap and improve enforcement of the law.

Professor Beale pointed out that live communication will continue to be required for taking an oath. Under proposed new Rule 4.1, "[t]he judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based." The proposed rules preserve live communication in person by video or telephone.

FED. R. CRIM. P. 3

Judge Tallman reported that Rule 3 (complaint) would be amended to require that a complaint be made under oath before a magistrate judge "except as provided in Rule 4.1."

FED. R. CRIM. P. 4

Judge Tallman explained that Rule 4 (arrest warrant or summons on a complaint) sets forth the procedure for obtaining a warrant on a complaint. The amended rule adopts the concept of a "duplicate original" that has been in Rule 41 for years, dealing with issuance of search warrants by telephone. The term will now be used for other kinds of process besides search warrants. Under proposed Rule 4(d), all warrant applications may be presented to a magistrate judge by telephone or other reliable electronic means.

FED. R. CRIM. P. 4.1

Judge Tallman explained that new Rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) was the heart of the technology amendments. It would place in one rule the procedure for obtaining electronic process of all kinds. The new rule extends the Rule 41(e)(3) procedures governing the issuance of a warrant on information transmitted by reliable electronic means to the issuance of a complaint and summons. Testimony taken by electronic means must be recorded in writing, but a written summary or order suffices if the testimony is limited to attesting to the contents of a written affidavit submitted by reliable electronic means. The applicant must prepare a "duplicate original" of a complaint, warrant, or summons and must read or otherwise transmit its contents verbatim to the judge. When approved by the judge, the duplicate original may serve as the original. The officer, who may be many miles away, may use the duplicate original as an original.

The judge always has discretion to require that the oath be taken in person. In addition, the judge may modify the complaint, warrant, or summons, and transmit the modified version to the applicant electronically, or direct the applicant to modify the proposed duplicate original. The judge, for example, might require more facts or alter the warrant to specify clearly what the agent is authorized to search and seize. The officer at the other end makes the changes and sends them to the judge.

Rule 4.1 also contains a provision in subsection (c), using language now found in Rule 41, specifying that "absent a finding of bad faith, evidence is not subject to suppression." This is derived from the decision of the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984).

Professor Beale pointed out that the new Rule 4.1 has a number of innovations not found in the current Rule 41. The oath, for example, would be broken out from the rest of the conversation between the law enforcement officer and the magistrate judge. She noted that many judges interpret the current rule to require the judge to write down everything said during the conversation. The new rule allows the judge to prepare only a summary or a brief order (rather than a verbatim record of the conversation) if the conversation was limited to an oath affirming a written affidavit. The rest of the conversation may be recorded. Judge Tallman added that the rule should produce a better record of all the proceedings from start to finish. It may also encourage greater use of the warrant process by law enforcement officers, which is good as a matter of public policy.

A member questioned the numbering of the new rule as FED. R. CRIM. P. 4.1, asking why it should not be placed later in the body of rules. Judge Tallman responded that the advisory committee had considered the matter and had decided to set forth the procedures immediately following the first place in the rules where they could be invoked – after Rule 4, governing issuance of arrest warrants. He suggested that the rule could easily be moved to a later position in the rules. A member suggested soliciting comments from the public on the appropriate numbering of the rule.

FED. R. CRIM. P. 9

Judge Tallman reported that amended Rule 9 (arrest warrant or summons on an indictment) would allow an arrest warrant on an indictment or information to be issued electronically.

FED. R. CRIM. P. 40

Rule 40 (arrest for failing to appear in another district or for violating conditions of release set in another district) would be amended to permit the use of video conferencing to conduct a Rule 40 appearance, with the defendant's consent. The procedure would be discretionary with the court.

FED. R. CRIM. P. 41

Rule 41 (search and seizure) would be substantially reduced in size because its provisions for issuing a telephonic warrant would be moved to the new Rule 4.1. In addition, the revised rule provides that electronic means may be used for the return of a search warrant or tracking warrant.

FED. R. CRIM. P. 43

Rule 43 (defendant's presence) would be amended to include a cross-reference to Rule 32.1. In addition, the court may permit misdemeanor proceedings to be handled by video conferencing.

A member noted that Rule 43 specifies that the entire proceedings in misdemeanor cases could be conducted without the defendant's presence. It would be possible, for example, for the arraignment, plea, and sentencing all to be conducted without the judge verifying in person that the defendant is the correct person before the court. But, she noted, that is already the case under the current Rule 43.

Judge Tallman explained that waiver of the defendant's presence should normally be used only for traffic cases and other low-penalty offenses, even though the language of the rule is broad enough to cover more serious offenses. He said that the system has to rely on the sound judgment of magistrate judges to determine which cases to apply the

rule in. He observed, for example, that the advisory committee had heard of several cases where prison inmates want to get rid of cases outstanding against them to avoid negative effect on their prison condition and opportunities. Professor Beale added that the proposed rule is an improvement over the current rule because it adds the alternative of conducting the proceedings by video conferencing to the current option of proceeding without the presence of the defendant at all.

FED. R. CRIM. P. 49

Rule 49 (serving and filing papers) would be amended to conform the criminal rules with the civil rules regarding electronic filing of documents. It is derived from FED. R. CIV. P. 5(d)(3), and makes clear that a paper filed electronically in compliance with a court's local rule is a written paper.

A participant stated that in the recent restyling of the evidence rules, the term "telephone" had been changed to "phone" in order to capture cell phones. It was recommended that the terminology in the criminal rules and the evidence rules be consistent. During a break in the proceedings, representatives of the criminal and evidence advisory committees and the Style Subcommittee conferred and agreed to change the references in the proposed restyled evidence rules back from "phone" to "telephone."

Professor Beale added that the package of technology amendments also included an amendment to Rule 6(e) (recording and disclosing grand jury proceedings), previously approved by the Standing Committee for publication. It would authorize the taking of a grand jury return by video conferencing.

FED. R. CRIM. P. 32.1

Judge Tallman pointed out that the amendments to Rule 32.1 (revocation or modification of probation or supervised release) were somewhat different from the other technology amendments. They deal with defendants who are subject to revocation or modification of probation or supervised release. At the defendant's request, the court would be able to allow the defendant to participate in the proceedings through video conferencing. The advisory committee, he said, had reviewed the case law and had seen no suggestion that the defendant's waiver would be inconsistent with the Sentencing Reform Act.

A participant suggested that the revised rule appeared to carry the negative implication that a judge may not modify conditions by telephone. In revocation cases where a defendant is far away, a judge may simply telephone the defendant and the probation officer to resolve a matter without the need for a hearing. The rule, he said, should not imply that the judge cannot continue to resolve matters in this manner. As written, though, it appears to apply to all modifications of probation or supervised release.

It should, instead, provide that in appropriate cases a judge may simply use the telephone to resolve problems.

Professor Beale stated that the situation posed is different from that contemplated in the proposed amendments to Rule 32.1. In the former, the defendant is waiving a hearing altogether. The judge then chooses to speak personally with the defendant and the probation officer by telephone and be assured that the defendant's waiver is voluntary and knowing. The proposed amendments to Rule 32.1, by contrast, address holding a hearing – which the defendant has not waived – by video conferencing at the defendant's request.

Another participant suggested that there may be a potential conflict between Rule 32.1(c)(2)(A), specifying that a hearing is not required if the person waives it, and the proposed new Rule 32.1(f) because the latter applies to the entire rule and could be construed as replacing Rule 32.1(c)(2)(A). Another participant recommended adding a heading to Rule 32.1(f).

Professor Beale reported that Rule 32.1 was the only rule in the technology package that had produced any controversy during the advisory committee's deliberations. Some members, she said, had expressed concerns over a judge being able to revoke release by video conference. A member added that the appropriate procedure depends in large measure on what the judge is going to do. Sometimes the modifications will be very minor in nature, but other times they may be more serious. She pointed out that before video conferencing became widely available, judges simply used the telephone to handle many different circumstances. Video conferencing is easier to use than in the past, but it is still a big step to take and is more difficult and inconvenient than using the telephone.

A participant suggested adding a sentence to the committee note to address the issue. Another suggested that the note state that whenever a defendant is entitled to waive a hearing completely, the proceeding may be conducted by telephone. Others agreed that additional language would be helpful.

A participant pointed out that use of the word "proceedings" in Rule 32.1(f) may create some ambiguity. In reality, the rule should refer to a "hearing" conducted by video conference. That term, she said, is used several other places in the rule.

A participant questioned the need for the rule because a defendant may waive the hearing altogether. Professor Beale explained that the rule sets forth alternatives. The advisory committee had decided to exempt Rule 32.1 proceedings from the requirements of Rule 43 because there had been some uncertainty among the members as to whether Rule 43 applied to revocation and modification proceedings.

The committee without objection by voice vote approved Rule 32.1 for publication with additional language to be included in the committee note

emphasizing that use of a telephone is still a permissible alternative to video conferencing in appropriate circumstances.

The committee then without objection by voice vote approved all the other proposed technology-related amendments for publication, including the amendments to Rule 6 approved for publication by the committee in June 2008.

Judge Tallman pointed out that proposed amendments to Rule 47 (motions and supporting affidavits) had been withdrawn by the advisory committee.

Judge Rosenthal extended special thanks to Judge Battaglia for spearheading the technology project and producing a superb package of amendments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 6, 2009 (Agenda Item 8).

Amendments for Final Approval

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that the proposed amendment to Rule 804(b)(3) (statement against interest) would change the hearsay exception regarding the statement against penal interest of an unavailable witness. The existing rule, he said, requires a defendant in a criminal case to show "corroborating circumstances" in order to have the statement admitted. But the government introducing a statement does not have the same requirement. The amended rule, he said, would apply the corroborating circumstances requirement to the government as well. The Department of Justice, he said, did not object to the amendment, and there had been no written comments objecting to its substance. One comment from a defense lawyer had recommended that corroborating circumstances be deleted as a requirement for a defendant, but the committee did not consider that course appropriate as a substantive matter. The public hearings had been cancelled because no witnesses had asked to testify on the rule.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Amendments for Publication

RESTYLED FED. R. EVID. 101-1103

Judge Hinkle reported that the written agenda materials provided background information about the restyling project. The effort to restyle the federal rules started back in the early 1990s under the leadership of committee chair Judge Robert Keeton and committee member Professor Charles Alan Wright. It has been a long and successful process over several years, though not without controversy. Some had thought that it would not be worth the effort to change the rules, even if the end product were improved. But, in fact, the four restyling projects have been very successful, and the rules are clearly much better than before.

He pointed out that accuracy and clarity are the most important values in the restyling effort. It is important, he said, for a judge or a lawyer to be able to look at an evidence rule and know immediately what it means. Consistency is also important, but it does not rise to the same level as the other two values.

The process used to restyle the Federal Rules of Evidence, he said, had started with Professor Kimble rewriting each of the rules in the first instance. Then Professor Capra made his changes. The drafts were then sent to the advisory committee and the style subcommittee of the Standing Committee for comment. The rules were reviewed carefully several times and at several levels. In addition, some members of the Standing Committee had already made specific comments on the proposed rules.

But, he said, that will not be the end of the process. The advisory committee was only asking for authority to publish the rules for comment. It should receive a number of public comments, each of which will be reviewed in 2010. He thanked Judge Hartz for spotting inconsistencies, and he thanked Jeffrey Barr and Stacey Williamson of the Administrative Office for great staff support in getting the package completed.

Judge Hinkle reported that the advisory committee was presenting Rules 801-1103 to the Standing Committee for the first time. All the other rules in the restyling package had been presented to the committee at earlier meetings. The advisory committee was now seeking authority to publish the entire set of evidence rules for comment. It would also like authority to make further corrections before publication.

Judge Hinkle noted that several changes had been made in the restyled hearsay rules from "offered to prove" to "admitted to prove," and the advisory committee will highlight the terminology in the publication. Professor Capra explained that the change had started with the restyling of Rule 803(22). There, it would be a substantive change from the current rule to use "offered to prove" because the judge plays a fact-finding role and so admissibility is not controlled by the purpose of the proffering party. Once the advisory committee had made the change from "to prove" to "admitted to prove", he said,

it decided to change all the instances of "offered to prove" to "admitted to prove" because the judge has some role as to each piece of evidence offered. What is determinative is not what the lawyer states the evidence is offered for, but what the judge admits it to prove. He said that the advisory committee wanted to hear from the public on the use of the terminology so that it can make a reasoned choice on it.

A member questioned the use of unnumbered bullet points, rather than numbers, noting that bullet points cannot be cited. He added, though, that it is not a big problem because a whole rule may be cited. Professor Kimble explained that the style guidelines call for using bullet points where there is no preferred rank order in a list. In Rule 407 (subsequent remedial measures), for example, there is no way to cite each of the measures listed. In addition, he pointed out that when a list is created with numbered divisions, a dangling paragraph may follow. That dangling paragraph cannot be effectively cited. Where a list is created within a rule, with text before the list and more text after the list, bullets work better than numbers. The member pointed out, though, that not every series in the restyled rules appeared to have been broken out and expressed a strong preference for breaking out and numbering all series and lists.

The member also questioned the use of dashes, rather than commas. In some cases, he pointed out, dashes are used to set off an aside, which is an appropriate usage. But often what appears within the dashes follows from what is said before the dash, which is inappropriate usage. Professor Kimble responded that dashes may properly be used for both purposes. They are often more successful than commas, especially if there are other commas in a sentence. One member emphasized that dashes make the text easier to read, and that is the key objective of the restyling effort.

The committee without objection by voice vote approved the proposed amendments for publication, subject to the advisory committee making additional, minor style changes.

Professor Capra thanked Professor Kimble for truly excellent work. He also said that the style subcommittee had accomplished amazing work with a very fast turn around time. In short, he said, the process had been fantastic. Judge Hinkle added that very special thanks are due to Professor Capra for his major, indispensable role in the restyling project.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that the primary changes made in the text of the proposed guidelines since the last meeting had been to strike just the right balance between concerns that the draft guidelines had placed insufficient limits on individual-judge orders and countervailing concerns that individual-judge orders are entirely

appropriate and useful. She thanked Judge Raggi for her help in improving the product to address those competing concerns.

Judge Rosenthal pointed out that the revised guidelines distinguish between substantive rules of practice, on the one hand, and rules of courtroom conduct, on the other. The former should clearly be set forth in local rules of court. But rules of courtroom conduct are appropriate for orders by individual judges. The revised second paragraph of Guideline 4, she said, now makes that distinction clear. In addition, at the request of the Department of Justice a new bullet point had been added to the internal administrative matters listed in Guideline 1 to suggest that standing orders are appropriate to deal with courthouse or courtroom access for individuals with disabilities. In addition, Guidelines 7 and 8 had been supplemented.

Judge Rosenthal reported that a reference had been added to Bankruptcy Rule 9029. She noted that the Advisory Committee on Bankruptcy Rules had suggested that the guidelines address some special needs of the bankruptcy courts. The bankruptcy courts, for example, sometimes need greater flexibility to use standing orders to effect urgently needed changes during the time that it takes for local rules to be put into effect. The recent implementation of the massive 2005 bankruptcy reform legislation demonstrated the value of operating under standing orders.

The committee, she said, planned to send the guidelines to the Judicial Conference with a request that they be distributed to the courts for consideration as non-binding guidance. But Mr. Rabiej suggested that it might be more effective to have the Judicial Conference actually adopt the guidelines. Some members agreed and said that it would be easier to get courts to adopt them if they are approved by the Conference itself. Judge Rosenthal added that the Conference might also be informed that the committee is considering bankruptcy guidelines and may return with additional recommendations.

The committee without objection by voice vote approved submitting the proposed guidelines for approval by the Judicial Conference.

SEALED CASES

Judge Hartz reported that the sealing subcommittee would meet again immediately following the Standing Committee meeting. He pointed out that the subcommittee included a representative from each advisory committee, a Department of Justice representative, and a clerk of court. He noted that the subcommittee was only addressing cases that are entirely sealed, not sealed documents within a case.

He reported that Tim Reagan of the Federal Judicial Center had completed a good deal of work on sealed cases, having examined all the cases filed in 2006 at both the district and appellate levels. He had found no bankruptcy cases in which an entire case

had been sealed by a court. He added that roughly 10,000 magistrate-judge and miscellaneous cases had been found, and a few will be sampled from each court. Most of these matters involve initial proceedings pending formal initiation of a criminal prosecution.

Judge Hartz pointed out that no indications of abuse had been found. In fact, he said, he had only seen one case that he thought might have been sealed improperly. The decisions of courts to seal cases, he said, appear to be reasonable. Nevertheless, there may be some other issues that should be addressed, such as how long cases should remain sealed. Apparently, there is a problem in that some courts appear to overlook the task of unsealing cases.

He noted that the subcommittee would consider whether there should be standards on when cases should be sealed. The subcommittee would also consider whether there should be procedural requirements for sealing, who should order the sealing, whether there should be notice of sealing, whether a record should be made of the reasons for sealing, and whether there should be time limits on the length of sealing. He pointed out that the subcommittee would also look at whether certain administrative measures should be pursued, such as adding special prompts to the courts' electronic case management and filing systems. Finally, the subcommittee would consider whether there is a need for additional empirical research or public hearings.

Judge Hartz pointed out that the subcommittee had contemplated at the start of the project that it would discover that most sealed cases might be national security cases. But, in fact, very few involve national security. The biggest group of sealed cases, he said, are criminal cases that involve danger to witnesses and victims. There are also a number of qui tam civil cases.

He thanked Professor Richard Marcus for participating in all the meetings and working exceptionally hard on the project. Judge Rosenthal added that Professor Marcus is a recognized national authority on sealing.

LONG-RANGE PLANNING

Judge Rosenthal pointed out that the rules committees have been deeply involved in long-range planning for several years. Some examples of current activities include the ongoing work of the privacy subcommittee, the convening of the upcoming conference at Duke Law School on the state of civil litigation, and the major projects of the Advisory Committee on Bankruptcy Rules to reformulate the appellate bankruptcy rules and modernize the bankruptcy forms. She invited all the participants to send the Administrative Office staff any additional ideas for long-range planning that the committees should consider.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi reported that she had been asked to chair the special subcommittee to examine implementation of the new privacy rules. The subcommittee, she said, would hold its first meeting immediately following the Standing Committee meeting. She pointed out that the subcommittee included several colleagues from the Court Administration and Case Management Committee, which had established the original Judicial Conference privacy policies later incorporated into the 2007 amendments to the w1federal rules. She added that Professor Capra will be the reporter for the subcommittee, and Judge Hinkle will participate. She said that the subcommittee would address the following areas:

1. Are amendments needed to the national privacy rules?

2. Are there problems in criminal cases and sealed cases that need to be addressed further? Should, for example, the Judicial Conference policy that certain documents not be included in the public case file be stated expressly in the national rules? If so, should the list of documents be expanded or contracted?

3. Should the policy of placing the burden on the parties to redact sensitive information be reviewed with an eye towards simplification? Are there viable alternatives that will assure protection of private information without imposing undue burden on the courts? Is more public education needed to inform the parties of their obligations to redact private information from transcripts?

4. Are additional efforts needed to implement the existing rules, especially in response to Congressional concerns that personal information still appears in some court case files?

NEXT MEETING

The committee agreed to hold the next meeting in January 2010, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Thursday and Friday, January 7-8, 2010, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 15, 2009

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 15, 2009 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2009.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the transfer of the official duty station for the vacant bankruptcy judgeship position in the Eastern District of California from Bakersfield to Sacramento.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2011, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Adopted a courtroom sharing policy for magistrate judges in new courthouse and courtroom construction, to be included in the *U.S. Courts Design Guide*.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

With regard to bankruptcy procedures:

a. Approved proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Exhibit D to Official Form 1 and of Official Form 23, to take effect on December 1, 2009.

Approved proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rule 804(b)(3) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and agreed to transmit them, along with an explanatory report, to the courts.

II

FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Suggestions for changes to the restyled rules
Date: October 15, 2009

The restyled rules were released for public comment in August. The comment period runs until essentially March 1, 2010. At this point, only a few public comments have been received, though one set of comments (from the American College of Trial Lawyers) provides extensive suggestions for possible changes to some of the restyled rules. Also, a few Evidence professors have suggested changes to some of the rules on the Evidence List-Serve.

There are also suggestions for change from within the Rules process — including from Professor Kimble, who has conducted another top-to-bottom review of the restyled rules (focusing mainly on Rules 101-706).

This memo addresses the suggestions for change to the restyled rules from all the above sources. At this point, the Committee's decisions would be necessarily tentative, as there will be other options or suggestions presented during the remainder of the public comment period.

Note that most of these changes have been reviewed by the Style Subcommittee, and the recommendations of that Subcommittee are set forth in the discussion. Also, Professor Saltzburg was asked to review some of the changes, and his recommendations are set forth as well.

This memo only discusses the restyled rules for which changes have been suggested. All of the restyled rules, as issued for public comment, are attached to this memorandum.

2

Rule 101(b)(4)

(b) Definitions. In these rules:

* * *

(4) "record" [in Rules 803, 901, 902, and 1005] includes a memorandum, report, or data compilation;

The suggestion, from the Reporter, is to delete the language in brackets.

Reporter's Comment:

This definition was originally placed in Rule 803, to avoid the need to constantly refer to "record, memorandum, report," etc. The Committee voted to move it to the general definitions section because the word "record" was used in rules other than 803. Professor Kimble suggested the bracketed language, out of concern that there are references to "on the record" — such as in Rule 103(a)(1) — that would not be subject to this definition. I believe that the bracketed material is not needed, because the term "on the record" is a well-known term of art and nobody will think that the Rule 101 definition is intended to affect that term. Moreover, a reference to specific rules, such as those in the brackets, will mean that any future amendment using the term "record" outside those rules will also require an amendment to Rule 101(b)(4).

Finally, it is odd to start a rule with the clause "In these rules" and then have a definition that applies to only some of the rules. As a matter of English, including the bracketed material would read as follows:

> In these rules "record" in Rules 803, 901, 902, and 1005 includes a memorandum, report, or data compilation.

At the least that is jarring and at worst it makes no sense.

I note that none of the definitions in the Criminal Rules are limited to only certain numbered rules. As far as I know, this would be the first time it's ever done.

Professor Kimble's Response:

This is pure style, I believe. Anyway, the word "record" triggers the definition. The word appears four times before Rule 803. True, the definition doesn't fit in those four instances, but people may be confused or at least think we missed something. It makes us look bad. I'm not a fan of cross-references — I dislike them — but here the cross-reference points the

reader immediately to the narrow slice of rules that the definition applies to. We are doing the reader a favor. The other definitions work throughout the rules. I realize that the cross-references don't work well with the lead-in "In these rules" but I think there's an overriding benefit.

Reporter's response:

If the problem is that the reader will think we overlooked something, a better solution is to add to the Committee Note. A reference like "the definition of 'record' does not apply to references to 'on the record' in rules ___" should suffice.

Rule 101(b)(6)

(b) Definitions. In these rules:

* * *

(6) a reference to any kind of written material — or to any other medium from which information can be obtained — includes electronically stored information.

Reporter's comment:

At the Standing Committee meeting in June, Judge Rosenthal and Ed Cooper (Reporter to the Civil Rules Committee) raised a concern that the reference to "written material" was not broad enough to cover all the types of evidence that could be offered in the form of ESI. In a series of subsequent emails, Ed made the following points:

> Skimming rapidly there are a number of things that might involve ESI but may not comfortably fit within the phrase "written material": book; certificate; commercial paper; copy; data compilation; deposition; document; family record; memorandum; oral assertion; original; output readable by sight; pamphlet; periodical; photograph; printed material purporting to be a newspaper or periodical; publication; record; recorded statement; report; tangible material (or its intangible equivalent); testimony; treatise.

Ed suggested the fix in the blackline above, which refers to "any other medium."

Professor Kimble and the Reporter agree that it would be useful to make the definition as broad as possible, and we recommend that the Committee tentatively approve this change. (Tentative because other solutions may be proposed in public comment).

Ed Cooper has also suggested that the definition of "record" in Rule 101(b)(4) be combined with the definition of "writing" in Rule 101(b)(6). Both Joe and I disagree with that suggestion. The definition of record addresses a problem different from the use of electronic evidence — it addresses the fact that the existing rules use a number of similar words when treating records, such as "memorandum", "report," etc. So the definition of "record" is intended to eliminate the need to state and restate the laundry list of similar words for any rule that deals with records. Because the definition of "record" serves a completely different function from the definition of "written material," it makes no sense to put them together.

Rule 104(b)

Relevancy That Depends on a Fact. When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the court may admit ~~it~~ the evidence on, or subject to, the introduction of evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

Reporter's comment:

This is a proposal from Professor Kimble, based on a suggestion from the American College. The College opines that the reference to factual conditions (which comes from the current rule) is "opaque."

There's no substantive change. There is a concern, though, in taking out any reference to a "condition." That concept is known and used by everyone, including the Supreme Court — "conditional relevance." Perhaps the fix, if one is needed, is to take out the word "fulfilling" in the first clause so that it is just "depends on a factual condition."

Professor Saltzburg agrees with the change and explains as follows:

I actually have long thought that the word "condition" in the rule is what causes confusion. Removing it leaves a rule that clearly defines what is meant by conditional relevance: i.e., one fact is relevant if another is also proved.

Professor Kimble's response:

It seems that Dan's main objection to my alternative is that it takes out the word "condition." But Professor Saltzburg thinks that's a good change. I submit that the rule is far clearer now than it was.

The Style Subcommittee approves of the suggested changes to Rule 104(b).

Use of "may":

Another — possibly major — problem with the restyled Rule 104(b) is the use of the word "may." The idea is that even if the condition is fulfilled, the evidence might still be inadmissible under other rules of exclusion, such as Rule 404(b). But the use of the word "may" here could also be read to mean that a judge could exclude the evidence *under Rule 104(b)* even if the condition is fulfilled. That construction of the word "may" would be a substantive change. If the only objection to the evidence is that the condition is not fulfilled,

and the judge finds prima facie evidence that the condition is met, then there *is no discretion* to exclude the evidence under Rule 104(b). Note that the word in the original rule is "shall", and it was applied by the courts to mean "must."

Professor Richard Friedman, in an email to the Reporter, expresses concern about the use of the word "may" in Rule 104(b). He notes that if the rule is intended to mean that when the condition is fulfilled, the evidence may still be inadmissible under other rules, then that intent is not clearly expressed.

Something like the following change should be made to the rule, to clarify its application and to avoid an argument that the change from "shall" is substantive:

> When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

This focuses specifically on the standard of proof, which is what the rule is about. And it doesn't create a confusing inference that once you establish the condition, the evidence is somehow automatically admissible.

Rule 104(c)

~~**Matters That the Jury Must Not Hear.**~~ **Conducting a Hearing Outside the Jury's Presence.** A hearing on a preliminary question must be conducted outside the jury's hearing if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and requests that the jury not be present; or

(3) justice so requires.

Reporter's Comment:

This is a suggestion from Joe Kimble, modified to reflect my comments.

Obviously it is not a substantive change. Joe was trying to find a parallel to the heading to Rule 103(d).

The Style Subcommittee approves the change in the heading.

Professor Saltzburg suggestion for change to caption:

"Preliminary Questions: Hearings Outside the Jury's Presence"

Joe Spaniol suggestion:

"When (or Need) to Conduct a Hearing Outside the Jury's Presence"

Rule 104(d)

Testimony by a Defendant in a Criminal Case<u>; Limited Cross-Examination</u>. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

Reporter's Comment:

This is a suggestion from Professor Kimble.

It's obviously not a substantive change, but it does not appear to be an improvement. In fact it is misleading because it implies that cross-examination of a defendant in a criminal case is *always* limited, when in fact that is only true if the testimony is on a preliminary question.

Here is an alternative:

"Testimony <u>on a Preliminary Question</u> by a Defendant in a Criminal Case."

A reference to "limited cross-examination" could be made after a semi-colon, but it would make the heading almost as long as the rule itself.

Professor Saltzburg agrees with the Reporter's alternative.

Professor Kimble's response:

We tend to underestimate the importance to the reader of good headings. They are critical navigational aids. And I don't worry that they might be longish.

The current heading is incomplete. The rule is not about a defendant's testimony; it's mainly about limiting cross-examination once the defendant testifies on a preliminary question. So I think my added two words are a good sharpener.

I don't think Dan's change accomplishes the same thing. We already know that the whole rule is about preliminary questions; that's what the title says. We normally don't need to incorporate the title of a rule into a heading.

Style Subcommittee approval:

"Limited Cross-Examination of a Defendant in a Criminal Case"

Rule 201(d)

Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the ~~noticed~~ fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

Reporter's Comment:

This suggestion is from Professor Kimble. It responds to a comment from the American College that a reference to "the noticed fact" is not completely accurate because, at the time of the hearing, the fact hasn't yet been noticed. It does not appear to be a substantive change. It's a good fix.

Rule 301

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. But this rule does not shift the burden of proof regarding ~~in the sense of the risk of non~~persuasion; the burden of ~~proof~~ persuasion remains on the party who had it originally.

Reporter's Comment:

This suggestion is from Professor Kimble.

The phrase "the burden of proof regarding persuasion" is awkward. Lawyers speak of the burden of proof, or the burden of persuasion, but not the burden of proof regarding persuasion. The restyling project should probably not be introducing phrases that are foreign to the way lawyers talk — that doesn't seem user-friendly.

If for some reason "the burden of proof in the sense of the risk of nonpersuasion" needs to be changed, here is an alternative:

But this rule does not shift the burden of proof ~~in the sense of the risk of nonpersuasion; the burden of proof~~ , which remains on the party who had it originally.

I think everyone will know what the rule means.

Joe has an alternative second sentence, and it has been approved by the Style Subcommittee:

"But the burden of proof remains on the party who had it originally."

This is much better than the suggested change. But in deleting the reference to "this rule" it could be argued that it is making a broader statement than is justified. Rule 301 is only a default rule. There are many statutes that shift the burden of persuasion. It's true that the first sentence recognizes the limitation of the rule, but a broad statement in the second sentence muddles that signal. That's why the second sentence should read: "But this rule does not shift the burden of proof, which remains on the party who had it originally."

Professor Kimble's comment:

Dan says that we should not be introducing phrases that are foreign to the way lawyers talk. I think the point of the restyling project is to change the often funny way lawyers talk — except for sacred phrases. I'd be happy with either of my alternative versions of the last sentence.

Rule 401

Evidence is relevant if it has any tendency to make more ~~or less~~ probable — or less probable — the existence of a fact that is of consequence in determining the action.

Reporter's Comment

This suggestion comes from Professor Kimble.

Joe has a good reason for the change. The use of "more or less" could be thought of as a reference to the colloquialism for a rough estimate.

There is a question about the use of the double dashes, though. If the use of double dashes is to emphasize what is set off (a topic discussed at the last Standing Committee meeting), then double dashes should not be used in this instance — because "less probable" is entitled to no more emphasis than "more probable." So the solution would be to use commas rather than double dashes in this rule.

Finally, is it awkward to say "to make more probable or less probable the existence"? Shouldn't the word "existence" come *before* the reference to probability? (As it does in the current rule). If so, it would look like this:

"Evidence is relevant if it has any tendency to make the existence of a fact — of consequence in determining the action — more probable or less probable."

The use of double dashes here makes sense because it sets out the materiality requirement of the definition, which should be emphasized.

Professor Saltzburg's comment:

I agree with Dan, although I never understand when we need double dashes and could live happily with Dan's language without double dashes.

Professor Kimble's comment:

The function of double dashes in drafting is not to emphasize what is set off. The main function is to signal a midsentence interruptive phrase and thus make it less disruptive. See Guideline 2.4(C)(2).

I think Dan's alternative is more awkward than mine because it puts a heavy piece before a light piece: "Evidence is relevant if it has any tendency to make [the existence of a fact — of consequence in determining the action —] [more probable or less probable]."

The phrase "more probable or less probable" belongs first. Also, I think "of consequence in determining the action" should not be separated from "fact." I believe this is style.

The Style Subcommittee approves the original restyled version, i.e., the rule as issued for public comment.

Rule 404(a)

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions <u>for a Defendant or a Victim</u> in a Criminal Case*. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged ~~crime~~ victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and
(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

Reporter's Comment:

These suggestions are from Professor Kimble.

The change to the heading does not use accurate terminology. The exception is not "for a defendant or a victim." The exception is for *evidence* offered to prove the character of a defendant or victim. So the change should either be deleted or expanded, e.g. "Exceptions for Evidence of a Defendant's or Victim's Character in a Criminal Case." But that seems pretty long, so it is probably better just to retain the existing restyled version.

Deleting "crime" before "victim" in (2)(B) is a good change because this exception only applies in a criminal case. So the word "crime" is superfluous.

Professor Saltzburg's comment:

I agree with Dan on both the title and deleting "crime"

Professor Kimble's comment:

Once again, the main heading to (a) — "Character Evidence" — reads logically with all the subheadings below it. In other words, (1) is understood to mean "Prohibited Uses [of Character Evidence]." Same thing in (2). It's understood to mean "Exceptions for [Character Evidence of] a Defendant or Victim in a Criminal Case." I'm trying to create a parallel with the heading to (3).

The Style Subcommittee agrees with Professor Kimble's change.

Rule 404(b)(2)

(2) ***Permitted Uses; Notice <u>in a Criminal Case</u>.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: * * *

Reporter's Comment:

This change is suggested by Professor Kimble.

This is a good change that makes the heading more descriptive. Professor Saltzburg agrees.

Rule 405(a)

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Reporter's comment:

Professor Kimble suggested this change out of concern that the restyled version did not make it exactly clear that the witness being cross-examined would ordinarily be different from the person whose character is being proved. Professor Roger Park made a similar suggestion on the Evidence ListServ.

Professor Saltzburg's suggestion:

When evidence of a person's character or character trait is admissible, ~~it may be proved by testimony~~ a witness may testify about the person's reputation or ~~by testimony~~ in the form of an opinion. On cross-examination of the witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Reporter: I like the change to the first sentence. It ties better into the second this way.

Professor Kimble:

Two problems with the change. First, it throws off the parallelism in the first sentence. Second, it throws off the parallelism with Rule 608(a). Perhaps it would work if we added "testify" before "in the form of."

Reporter:

If the goal is to clarify that it is the character witness who is being questioned, then it should probably just say "the *character* witness" instead of just "the witness."

The Style Subcommittee agrees with Professor Kimble's proposal.

Rule 406

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. ~~The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.~~

Reporter's Comment:

This suggestion was made by the American College of Trial Lawyers, on the ground that the second sentence of the rule is unnecessary. But the suggested change is unquestionably substantive given the history of the Rule. Pre-Rules common law barred habit evidence 1) where there was no corroboration, or 2) if there was an eyewitness to the event. The Advisory Committee determined that the second sentence was necessary to emphasize that these prior limitations on habit evidence were abrogated. Indeed, the second sentence was the *major reason* for Rule 406, because the first sentence simply provides that evidence that is relevant is admissible.

Here is the explanation from Weinstein's treatise, at 406-13:

> The requirement under prior law that evidence of the routine practice of an organization be corroborated was rejected on the ground that the presence or absence of corroboration relates to the sufficiency of evidence rather than its admissibility. * * *
>
> Rule 406 also provides that habit or practice evidence is admissible even if there are eyewitnesses to the event in question. This provision abrogated older authority that habit evidence was not admissible in certain cases if there was an eyewitness to the event.

Given the history, if the second sentence is deleted, there will be arguments that we have returned to the limitations on habit evidence that existed prior to the Federal Rules. Notably, the American College did not consider the history of Rule 406 in suggesting the deletion of the second sentence of the Rule.

Comment from Professor Saltzburg:

This is substantive and was specifically meant to distinguish the rule from common law cases.

Rule 410

The American College suggests a number of changes to Rule 410 but helpfully concedes that many if not all of them involve substantive change:

(**a**) **Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea ~~that was later withdrawn~~ or an agreement containing an admission of guilt to criminal conduct entered into with the prosecuting authority in order to resolve potential criminal charges without requiring entry of a guilty plea, if the guilty plea or written agreement was (a) withdrawn by right under relevant court procedure; (b) withdrawn by agreement with the prosecuting authority; or (c) adjudicated as withdrawn;

(2) a nolo contendere plea;

(3) a statement about either of those pleas made during ~~a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure~~ court proceedings regarding such pleas or agreements; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or an agreement containing an admission of guilt to criminal conduct entered into with the prosecuting authority in order to resolve potential criminal charges without requiring entry of a guilty plea, of if the discussions resulted in a guilty plea or such agreement that was (a) withdrawn by right under relevant court procedure; (b) withdrawn by agreement with the prosecuting authority; or (c) adjudicated as withdrawn ~~or they resulted in a later-withdrawn guilty plea~~.

Reporter's Comment:

These changes are intended to clarify two questions of Rule 410 application: 1) What is a "guilty plea" as defined in Rule 410?; and 2) When is a guilty plea considered "withdrawn" under Rule 410? It's not clear exactly what would be covered by the lengthy proposed language that is not already covered by the rule. But to the extent there is a difference in the language, it appears to be a substantive change.

It seems clear that any nuance to be added to whether a particular agreement is a "guilty plea" will be substantive. A number of cases attempt to define whether certain negotiations are part of the guilty plea process, and the case law indicates that this is a very fact-intensive question. See, e.g., *United States v. Guerrero,* 847 F.2d 1363 (9th Cir. 1988)

(suspect must have both a subjective and a reasonable expectation that he was negotiating a plea); *United States v. Hare,* 49 F.3d 447 (8th Cir. 1995) (Rule 410 inapplicable where statements were made unconditionally in an effort to cooperate but no proposal was on the table); *United States v. Cunningham,* 723 F.2d 217 (2nd Cir. 1983) (Rule 410 inapplicable where suspect made statements in an effort to convince the prosecutor that he was not guilty and should not be prosecuted – after agreeing that the statements could be used against him). The definition proposed by the College would conflict with at least some of this law – for example, the proposal would protect statements such as those made in *Cunningham, supra,* which was "an agreement containing an admission of guilt to criminal conduct" in order to resolve criminal charges.

The proposed change to (a)(3) is clearly substantive because it protects any statement made "during court proceedings" — while the existing rule protects statements made during a proceeding under Rule 11 or comparable state procedure. This would change the result in *United States v. Orlandez-Gamboa,* 320 F.3d 328 (2nd Cir. 2003). In that case, the defendant made statements in a *Columbian* proceeding. The court found the statements unprotected by Rule 410. It noted that Rule 410(a)(3) "cannot comfortably be read to exclude from evidence in domestic trials statements made during an allocution taking place in a foreign court according to that land's criminal procedures." Yet the College's amendment would cover such a statement because it covers *any* court proceeding, with no limitation to domestic courts.

I asked for Professor Broun's comments on the College's proposal, and he replied as follows:

> *In my judgment, all of the proposals made by the American College comments are clearly substantive. The proposed amendments to 410(a)(1), expanding and "clarifying" the withdrawal of a guilty plea expands the definition to a point way beyond where it was before. The ACTL comment may well be right and it may be something we should look at, but not in connection with the restyling. The change they recommend for (a)(3) is clearly substantive. It changes statements made during Fed.R.Crim.P. 11 proceedings to any "court proceeding." Maybe that's right, but it's clearly more than restyling. I don't agree with their comment with regard to (a)(3) that the prior language "had the benefit of being more comprehensive and clear." They want to interpret the section as applying to all proceedings -- including scheduling conferences. They may be right as a matter of policy, but that's not what the rule says. Again, we may want to take a look at a rule change, but their change is not restyling.*

In conclusion, the suggested changes would require a detailed analysis of policy and case law that goes well beyond the confines of the style project.

Rule 411

Evidence that a person did or did not have liability insurance is not admissible to prove ~~that~~ whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Reporter's Comment:

This change answers a charge that the restyled version has made a substantive change. The charge is that the rule currently prohibits proof by a *plaintiff* that he is *not* insured, when offered to prove that the plaintiff therefore had an incentive to be careful. This preposterous assertion — that a plaintiff would actually ever want to introduce the fact that he is not insured — was made by an academic (who else?) who has been cruising the restyled rules for substantive changes. (If he has to come up with something this farfetched, it seems the Committee has done a good job).

The change made by Professor Kimble covers the hypothetical of the plaintiff who wants to prove his lack of insurance. So it is a good change.

The Style Subcommittee agrees with the change.

Rule 412(b)(2)

Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to ~~any~~ the victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

Reporter's Comment:

The American College suggested changing "any" victim to "the" victim on the ground that even in a multi-victim case, "only harm to the impeached victim" is to be considered. But that statement reflects a misunderstanding about Rule 412(b). The rule was designed to protect *all* victims in a multi-victim case. And the rule is not even talking about an impeached victim, it is talking about admitting, as substantive evidence, a sexual act of a victim.

Assume that a number of plaintiffs charge an employer with sexual harassment, and the employer responds with evidence that two or more of the plaintiffs routinely had sex with each other on the job (or off the job, for that matter). In determining whether this evidence is admissible, the trial judge, under the existing rule, must consider the harm to *all* the victims — i.e., *any* victim — involved in the alleged sexual activity. But under the change proposed, the judge is only to consider the harm to "the victim." The change raises two questions: 1) *which* victim in a multi-victim case; and 2) why only one?

It seems apparent that the change is substantive, and it's based on a misconception that the rule is covering only a situation in which a single victim-witness is being impeached. This is incorrect. The rule also covers the attempt to admit substantive evidence that might have a bearing on more than one victim.

Professor Saltzburg agrees with the Reporter's assessment.

Rule 412(c)(2)

Reporter's Comment

The only change here is to take the hyphen out of "in-camera". Obviously this is not a substantive change. One thing that might be considered is to italicize, *in camera*. That's the way you usually see it done in cases, treatises, etc.

Professor Kimble:

We are not italicizing foreign phrases in the rules.

Rule 413(a)

Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered ~~on any matter to which it is relevant~~ to prove predilection/predisposition.

Reporter's Comment: **This is another suggestion from the American College — similar changes are proposed for the identically-worded Rules 414 and 415.**

The College's proposal is once again based on a misunderstanding of the Rule. The evidence is not only admissible for predilection or predisposition. It *really is*, as the rule says, admissible on any matter to which it is relevant. For example, the prior misconduct can be used not only for propensity, but also for any non-propensity purpose such as plan, motive, intent, ability, etc. So limiting admissibility to predisposition is a substantive change, without question. It imposes a substantive limitation on the rule's broad grant of admissibility.

The American College suggests that it is a problem that there is no indication in the Rule about what the evidence is relevant for. But that is hardly a unique occurrence in the Evidence Rules. Most of the rules do not specify what evidence is relevant for. See Rule 403. The only real exception is Rule 703.

Professor Saltzburg:

It is substantive and Dan is correct.

Rule 413(b) and 414(b)

Disclosure <u>to the Defendant</u>. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

Reporter's Comment:

This change is suggested by Professor Kimble.

This is a good change, as it makes the caption more specific. Professor Saltzburg agrees.

Rule 413(d) and 414(d)

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A or a comparable state law?;

(2) contact, without consent, between any part of the defendant's body - or an object - and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Reporter's Comment:

The definition of "sexual assault" is tied to "any conduct prohibited by 18 U.S.C. chapter 109A." The American College notes that the conduct covered by chapter 109A requires crossing a state line and states that "if the drafters intend to include state law violations * * * they might consider reviewing the language accordingly." Professor Kimble responds to this suggestion by adding "or a comparable state law" to the language of 413(d)(1). (With a question mark, which means it is only for consideration).

Expanding the number of crimes covered by the rule is a substantive change. It means that the rule will be admitting more evidence than previously. Congress made a substantive decision that the conduct to be covered in 413(d)(1) was to be defined by federal law. Any state crime would have to be covered by one of the other subdivisions. Maybe if Congress considered the question it would want to expand the coverage (though maybe not, because the other subdivisions seem pretty comprehensive). But that is clearly a substantive question.

Professor Saltzburg:

Congress would probably have added the College's language if it had considered it, but it did not and the change would be substantive.

Rule 606(a)

At the Trial. A juror may not testify ~~as a witness~~ before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

Reporter's Comment:

This suggestion is from Professor Kimble

"As a witness" seems repetitive of "testify" — so this is a good style change. Professor Saltzburg agrees.

Rule 608(a)

Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by ~~testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by~~ testimony in the form of an opinion about — or a reputation for — truthfulness or untruthfulness ~~that character~~. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

Reporter's Comment:

This change was suggested by the American College. The College argues that the phrase "having a character for truthfulness or untruthfulness" is "awkward and confusing." The problem with the fix is that it creates confusion about the kind of attack that is permitted by the rule. The rule does not allow an attack on credibility broadly conceived. It only permits one kind of attack — that the witness has a bad character for veracity (and then good character can be introduced if that character is attacked). The American College version nowhere sets forth that it is only *character for truthfulness* that can be attacked. It could be argued, though, that the reference in the second sentence to character for truthfulness, and specification that proof is in the form of opinion or reputation, is a sufficient signal that the only attack permitted by the rule is character for truthfulness. (Also, the caption to the rule refers to a witness's character for truthfulness or untruthfulness.). Reasonable minds can differ about whether "having a character for truthfulness" is so awkward and confusing that it needs to be fixed by a somewhat indefinite change.

Rule 608(c)

(c) Privilege Against Self-Incrimination. A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to ~~a~~ the witness's character for truthfulness.

Reporter's Comment:

This change was suggested by Professor Kimble. It would seem to be a useful clarification. The only possible character for truthfulness subject to the rule is the witness who is being impeached.

The Style Subcommittee agrees with this change.

Rule 609(b)

Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for ~~the conviction~~ it, whichever is later. Evidence of the conviction is admissible only if: * * *

Reporters' Comment:

This change was suggested by Professor Kimble.

This avoids repetitive use of the word "conviction" and there is no confusion about what "it" refers to. So this is a good change. Professor Saltzburg agrees.

Rule 612

(a) Scope. [Unless 18 U.S.C. §3500 applies in a criminal case, this] ~~This~~ rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires ~~a~~ an adverse party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or - if justice so requires - declare a mistrial.

Reporter's Comment:

The American College suggests putting the reference to the Jencks Act at the beginning of the rule. The change hews closer to the existing rule, which refers to the Jencks Act in the opening clause.

Moving the reference up makes sense, but the language used does not. It is not accurate to say "Unless 18 U.S.C. §3500 *applies* in a criminal case." The Act might *apply* but it might not apply in such a way as to alter Rule 612. So the language should be that in current subdivision (b):

Unless 18 U.S.C. § 3500 *provides otherwise* in a criminal case * * *

Also, if the Jencks Act reference is moved up, then the reference that is currently in (b) should be deleted, as it would be duplicative of the opening clause.

The addition of "the Writing" to the caption of 612(b) is a good change as it makes the caption more specific.

The inclusion of "adverse" in (a)(2) seems superfluous, as the scope provision applies only to adverse parties.

Professor Saltzburg:

I would put "the adverse" before "party" in (a)(2). The other changes seem to be improvements.

The Style Subcommittee agrees with the addition of "adverse" before "party" in (a)(2).

Professor Kimble:

Now I'm thinking twice about moving the "unless" clause. It's smoother where it is now. And doesn't it achieve the same effect? Subdivision (b) says the party doesn't have those options if the statute provides otherwise.

The Style Subcommittee agreed to retain the existing restyled version, i.e., to leave the first clause of restyled rule 612(b) ("Unless 18 U.S.C. [sec.]3500 provides otherwise in a criminal case,") where it is now. But the Subcommittee recognized that there may be a substantive call here: does the statute deal with any of those options?

Reporter's response:

Placement of the Jencks Act reference in (a) or (b) does not seem to make a substantive difference. Subdivision (a) just introduces options. Subdivision (b) tells you what the option is, and the Jencks Act properly limits that option. So I think the reference can be in either subdivision. It seems to make more logical sense as part of an introduction, though, and that would hew closer to the original rule.

Rule 613

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, ~~the~~ a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an ~~adverse~~ opposing party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Reporter's Comment:

There is no problem with the change from "the" to "a".

Professor Kimble asks if there is an intended difference between "adverse" in subdivision (a) and "opposing" in subdivision (b). The word "opposing" is necessary in subdivision (b) because it is referring to Rule 801d2, which itself refers to statements of *opposing* parties. If we need consistency, the fix is not to change (b) but to change (a) from "adverse" to "opposing." Notably, the word in the current (a) is "opposing" — so for both consistency with other provisions and less disruption of the original rule, the word should be "opposing" in (a).

Professor Saltzburg:

I would leave "opposing" in (a) for consistency with (b) and with 801.

Professor Kimble:

Everyone seems to agree that we should change "adverse" to "opposing." At some point, shouldn't we check all uses of these terms in the rules?

The Style Subcommittee agrees with the change to "opposing."

Rule 614(a)

Calling. The court may call a witness on its own or at a party's ~~suggestion~~ request [?]. Each party is entitled to cross-examine the witness.

Reporter's Comment:

This suggestion was made by Professor Kimble.

The term "request" sounds more accurate in the context of how a lawyer would approach a judge. It surely is a question of style.

Professor Saltzburg:

I actually would leave the word "suggestion." I had a case once where I did not want to call a witness, but the court seemed interested in what the witness would say. I "suggested" that the court might call the witness, but actually would have preferred that the court did not.

Professor Kimble:

The word "suggestion" seems like an odd word to use in rules. All the other rules use "request." Cf. 105, 201(c)(2), 201(d), 404(b)(2), etc. I can't imagine that a difference was intended here. And if a difference was intended, I believe it's so subtle that it has no appreciable value.

The Style Subcommittee would change "suggestion" to "request."

Rule 706(d)

(d) Disclosing the Appointment <u>to the Jury</u>. The court may authorize disclosure to the jury that the court appointed the expert.

Reporter's Comment:

This change was suggested by Professor Kimble

This is a good change, as it makes the caption more specific. Professor Saltzburg agrees.

Rule 801(a)

(a) Statement. "Statement" means:

(1) a person's oral or written assertion; or

(2) a person's nonverbal conduct, if the person intended it as an assertion.

The suggestion is to change the rule to clarify that the intent requirement applies to oral or written assertions as well as to nonverbal conduct.

Reporter's Comment:

The existing rule defines "statement" as follows:

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if *it* is intended by the person as an assertion.

Professor Craig Callen argues that the change in the placement of "it" may be substantive. Under the existing rule, it is unclear whether the "it" applies to oral or written assertions as well as nonverbal conduct. That is, it is unclear whether an oral or written communication must be an intentional assertion to be considered a "statement" and therefore subject to exclusion under the hearsay rule. The restyling provides without doubt that the intent requirement applies only to nonverbal conduct.

I brought up the issue of the intent requirement, as applied to verbal statements, in commenting on a previous draft. I noted then that the case law *does* apply an intent requirement to verbal statements. Thus, in a famous case, bets placed over the phone to a betting parlor were found not hearsay to prove the character of the place, because there was no intent to assert that the place was a betting parlor — the intent was to place a bet. See also *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005) (statement by bank robber to police — "How did you guys find us so fast?" — was hearsay because there was an intent to assert that the declarant had robbed a bank).

If the new placement of "it" could be read to mean that a verbal statement need not be an intentional assertion in order to be hearsay, then it would definitely be a substantive change. In the review of an earlier draft, Ken Broun argued that the change was not substantive, because Rule 801(c) requires verbal assertions to be intentional before they qualify as hearsay. Restyled Rule 801(c) provides as follows:

"Hearsay" means a prior statement - one the declarant does not make while testifying at the current trial or hearing - that a party offers in evidence to prove the truth of the matter asserted by the declarant.

Under Ken's view, the language "truth of the matter asserted" sufficiently accommodates the cases requiring verbal assertions to be intentional — because these cases essentially interpret the words "matter asserted" to require an intentional assertion. In other words, the intent requirement for implied assertions is found by courts in Rule 801(c) as much as it is in Rule 801(a).

At the time, the Committee appeared to agree with Professor Broun's judgment — or, put another way, no Committee member agreed with the Reporter's view that the new placement of the word "it" might constitute a substantive change. The matter is raised now only because a member of the public, an Evidence professor, has raised it.

If the Committee decides to revisit the matter and determines that deleting the requirement of intent for verbal statements in Rule 801(a) is a substantive change, the question is what the fix would be. The problem with any fix is that the existing language is vague — a vagueness discussed in a number of law review articles and treatises. Thus, a change that would make it clear that intent *is* required could be argued to be a substantive change, because the existing rule is unclear on whether this is so. (The argument that it is a substantive change is weakened, however, by the fact that the case law uniformly states that a verbal assertion cannot be hearsay unless the speaker intended to communicate the fact that the statement is offered to prove).

If the original vagueness were to be retained, then the rule could look like this:

"Statement" means an oral or written assertion — or nonverbal conduct of a person — if it is intended by the person as an assertion.

If the Committee were to make it clear that the intent requirement applied to verbal assertions, the rule might look like this (blacklined from the restyled version):

(a) Statement. "Statement" means:

(1) a person's oral or written intentional assertion; or

(2) a person's nonverbal conduct, if the person intended it as an assertion.

On balance, it would seem to make sense to return to the original vague iteration, but restyled as above. Any attempt to clarify raises the risk that parties will argue that it is a substantive change. And the "restyled vague" version above seems to flow pretty smoothly — but then, I am not a restylist.

Rule 801(d)(2)(B)

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

* * *

(B) is one that the party ~~appeared to adopt or accept as~~ showed it adopted or believed to be true;

Reporter's Comment:

The problem with the existing rule is that it uses the term "manifest" but the case law is not consistent with that word. You can adopt by silence, but "manifest" is not the word you think of when you think about silence. The restyled language seems less active and therefore more in accord with existing case law. But there is a legitimate concern that the less aggressive language may be interpreted as a substantive change that would liberalize *even further* the already minimal showing necessary for adoption. So in light of the problematic interface of rule language and case law, there is a strong argument that the restyled version should hew as closely to the existing rule as possible.

The change to "showed it adopted" is pretty close to the original. Essentially it exchanges "showed" for "manifested." In that respect, it is much preferable to "appeared."

The Style Subcommittee voted to retain the version as issued for public comment.

Rule 801(d)(2)(E)

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

* * *

(E) was made by the party's co-conspirator during and in furtherance of the conspiracy.

Reporter's Comment:

The existing rule reads as follows:

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Professor James Duane argues that the restyled version makes a substantive change because the existing rule's reference to "a coconspirator of a party" allowed the government to admit a statement against *any* defendant so long as the government could prove that the declarant conspired with any one defendant in the case. As he puts it: "taken literally and at face value, [the existing language] has always meant that a statement is technically admissible against all of the defendants in a criminal case, as long as it was made in furtherance of a conspiracy that included any one of the defendants as a member." Professor Duane notes that this possibility is precluded in the restyled version, as the statement must be made by a coconspirator of the party against whom it is offered.

But contrary to Duane's assertion, the existing rule has *never* been construed to allow the admission of coconspirator hearsay against a party who has not conspired with the declarant. It would be remarkable indeed to pin admissibility on the fact that the defendant happened to be unluckily joined in a case with a party who did conspire with the declarant, when there is no connection between the defendant and the declarant.

The preposterous notion that a coconspirator statement can be admitted against one who is not a coconspirator is in fact foreclosed by other language in the existing rule. The final sentence of existing Rule 801(d)(2) provides as follows:

The contents of the statement shall be considered but are not alone sufficient to establish * * * the existence of the conspiracy and the participation therein *of the declarant and the party against whom the statement is offered* under subdivision (E).

That language indicates that admissibility is predicated on a conspiracy between the declarant and the party against whom the statement is offered — not on the declarant's relationship to any other party in the case.

Notably, Professor Duane cannot cite a single case in which coconspirator hearsay was admitted in the absence of a finding of a conspiracy between the declarant and the defendant against whom the statement is offered. To the contrary, *all* the reported case law on the subject requires a showing of conspiracy between the declarant and the party against whom the statement is offered. See, e.g., *United States v. Mahkimetas*, 991 F.2d 379 (7th Cir. 1993) ("the government must show that (1) a conspiracy existed, (2) both the defendant and the declarant were members of that conspiracy and (3) the offered statement was made during the course of and in furtherance of the conspiracy."); *United States v. Bulman*, 667 F.2d 1134 (11th Cir. 1982) (coconspirator's statement properly excluded as to one defendant, while admitted against others, where government failed to establish a connection between the defendant and the declarant).

Professor Duane is engaging in head-of-a-pin hypothesizing. He has not shown that a substantive change has been made. The definition of a substantive change is one that changes an admissibility determination under existing law. As applied to the restyling of the coconspirator exception, there is no substantive change because the law is as before — admissibility is dependent on a conspiratorial connection between the declarant and the party against whom the evidence is offered. The restyled version *clarifies* the existing rule, but it does not change it.

Rule 803(2)

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress ~~or~~ of excitement that it caused.

Reporter's Comment:

This suggestion was made by a member of the Bankruptcy Rules Committee. That person noted that the existing rule refers to "stress *of* excitement" and not "stress *or* excitement." I initially agreed with the change to "or" because it just seemed to make more sense. It sounds odd if you say "I am under the stress of excitement." There is stress, and there is excitement, but is there really such a thing as "stress of excitement"?

If you google "stress of excitement" the only hits you get are to Rule 803(2). If you google "stress or excitement" you see that it is a common usage in a variety of contexts. It might even be thought that the use of "of" in the original rule was a typo — that they really meant "or."

But Ken Broun did some research and concluded that the use of the term "stress of excitement" was intentional. Here is Ken's summation:

> With regard to 803(2) and "stress of excitement" -- I worry about the "typo" explanation. * * * The 1969 draft of the Proposed Rules, 46 F.R.D. 345 contains the "stress of excitement" language. The first edition of McCormick, published in 1954, § 252 , first sentence says: "from the mists of res gestae there has emerged under Wigmore's discerning analysis, an exception to the hearsay rule for statements uttered under stress *of* excitement [emphasis added] produced by a startling event . . . " Wigmore, Vol. 3, § 1747, p. 2250 mentions "stress of nervous excitement and § 1749, p. 2253 "stress of nervous excitement." The case law before 1969 also contains repeated references to "stress of excitement." See also Section 1240 of the California Evidence Code. That language is/was in part (b) "Was made spontaneously while the declarant was under the stress of excitement caused by such perception." The California Law Revision Commission Comment cites Showalter v. Western Pacific R. R, 16 Cal.2d 460, 106 P.2d 895 (1940) where the court uses the phrase "stress of nervous excitement."

So it would appear that the "stress of excitement" language should be retained. There is no justification for changing it, especially given its historic lineage. Any change is bound to raise questions (as it did for the member of the Bankruptcy Rules Committee) about intended consequences.

Rule 803(6)

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity; and

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification.

But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Joe's alternatives for the hanging paragraph:

(E) There is no showing that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(E) The court does not determine that the source of information or the method or circumstances indicate a lack of trustworthiness.

Reporter's Comment:

The first alternative is inaccurate, as it would mean that the evidence would be excluded so long as *any* showing is made of untrustworthiness. There is a good deal of case law indicating that there must be more than a minimal showing of untrustworthiness for the record to be excluded. The suggested language would result in the exclusion of many more business records than under the current practice.

The second alternative is inaccurate because it would mean that the evidence would be admissible if the court simply made no determination on trustworthiness at all. Clearly the court must be obligated to make a determination. Moreover, even if the language is changed to "the court does not find" it would imply that the adverse party has the burden of showing untrustworthiness. And that is the problem with changing the language. Courts are in dispute on who has the burden on trustworthiness. The current language neatly elides the problem. The bottom line is that both alternatives are substantive.

Professor Saltzburg:

I'm not one of the sticklers who hates hanging paragraphs, but if we wanted a non-substantive (E), it could be: "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness." This would not be substantive, would continue not to define who has the burden of proof, and would avoid the hanging paragraph.

Reporter: **Professor Saltzburg's fix is a good one, assuming that the hanging paragraph is unacceptable.**

Professor Kimble:

It can't be, can it, that nothing works except a dangling paragraph. Are we really that hamstrung?

First of all, there's nothing in the current rule that states who has the burden of proof. We are going on hints and implications and extrapolations. Nor does the word "unless" carry with it any rule of construction (that I know of) about burden of proof. Professor Saltzburg's suggestion — which he said would not be substantive — is close to what I originally drafted: "the source of information or the method or circumstances of a preparation do not indicate a lack of trustworthiness." This is neutral on burden of proof, just as the current rule is.

If the courts disagree on who has the burden, I'm not sure why the Saltzburg-Kimble proposal would change things. Dan, can you please cite the cases you have in mind? Do those cases turn on the word "unless" in the current rule?

Reporter: **I cited the cases in previous memos. There is a split of authority on who has the burden of proof on the question of trustworthiness. It doesn't depend on a reading of the rule.**

Finally, note that if any change is made to the hanging paragraph in Rule 803(6), an identical change must be made to the hanging paragraphs in Rules 803(7) and (8).

The Style Subcommittee agreed to the following version:

"(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."

As noted, a similar change must be made to the hanging paragraphs in 803(7) and 803(8).

Rule 1001

In this article~~, the following definitions apply:~~

(a) ~~Writing.~~ A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) ~~Recording.~~ A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) ~~Photograph.~~ "Photograph" means a photographic image or its equivalent stored in any form.

(d) ~~Original.~~ An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout - or other output readable by sight - if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) ~~Duplicate.~~ "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

***Reporter's Comment*:**

This suggestion is by Professor Kimble

The change is clearly style not substance. And it is a good change, creating a parallel with the structure of the new definitions in Rule 101. Professor Saltzburg agrees.

II-A

ARTICLE I. GENERAL PROVISIONS[1] Rule 101. Scope	ARTICLE I. GENERAL PROVISIONS Rule 101 — Scope; Definitions
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	**(a) Scope.** These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101. **(b) Definitions.** In these rules: **(1)** "civil case" means a civil action or proceeding; **(2)** "criminal case" includes a criminal proceeding; **(3)** "public office" includes a public agency; **(4)** "record" [in Rules 803, 901, 902, and 1005] includes a memorandum, report, or data compilation; **(5)** a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and **(6)** a reference to any kind of written material includes electronically stored information.

Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal and Civil Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for*

[1] Rules in effect on December 1, 2008.

Restyling the Civil Rules, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at page x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing __ (2008-2009).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rule does not change their substantive meaning. *See, e.g.*, Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of its discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. It alters the structure of a rule in a way that may alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. It changes a "sacred phrase" — phrases that have become so familiar in practice that to alter them would be unduly disruptive. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

Rule 102. Purpose and Construction	Rule 102 — Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Committee Note

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 103. Rulings on Evidence	Rule 103 — Rulings on Evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: **(1)** if the ruling admits evidence, the party, on the record: **(A)** timely objects or moves to strike; and **(B)** states the specific ground, unless it was apparent from the context; or **(2)** if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	**(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	**(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	**(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Committee Note

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 104. Preliminary Questions	Rule 104 — Preliminary Questions
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.	**(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.	**(b) Relevancy That Depends on a Fact.** When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.	**(c) Matters That the Jury Must Not Hear.** A hearing on a preliminary question must be conducted outside the jury's hearing if: **(1)** the hearing involves the admissibility of a confession; **(2)** a defendant in a criminal case is a witness and requests that the jury not be present; or **(3)** justice so requires.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	**(d) Testimony by a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	**(e) Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Committee Note

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 105. Limited Admissibility	Rule 105 — Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Committee Note

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106 — Rest of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

Committee Note

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial Notice of Adjudicative Facts	ARTICLE II. JUDICIAL NOTICE Rule 201 — Judicial Notice of Adjudicative Facts
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it: **(1)** is generally known within the court's territorial jurisdiction; or **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** At any stage of the proceeding, the court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the noticed fact. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(e) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Committee Note

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS Rule 301. Presumptions in General in Civil Actions and Proceedings	ARTICLE III. PRESUMPTIONS IN CIVIL CASES Rule 301 — Presumptions in a Civil Case Generally
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion; the burden of proof remains on the party who had it originally.

Committee Note

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302 — Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 302 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401. Definition of ‘‘Relevant Evidence’’	ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401 — Test for Relevant Evidence
‘‘Relevant evidence’’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

Committee Note

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	Rule 402 — General Admissibility of Relevant Evidence
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.	Relevant evidence is admissible unless any of the following provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

Committee Note

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Committee Note

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404 — Character Evidence; Crimes or Other Acts
(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.** 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.** 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; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(1)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. **(2)** ***Exceptions in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. **(3)** ***Exceptions for a Witness*****.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	**(b) Crimes or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses; Notice.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 405. Methods of Proving Character	Rule 405 — Methods of Proving Character
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.	**(a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.	**(b) By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Committee Note

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 406. Habit; Routine Practice	Rule 406 — Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Committee Note

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407. Subsequent Remedial Measures	Rule 407 — Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 408. Compromise and Offers to Compromise	Rule 408 — Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or 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 the claim; and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 409. Payment of Medical and Similar Expenses	Rule 409 — Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Committee Note

The language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	Rule 410 — 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 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.	**(a) Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: **(1)** a guilty plea that was later withdrawn; **(2)** a nolo contendere plea; **(3)** a statement about either of those pleas made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or **(4)** a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. **(b) Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4): **(1)** in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness both statements ought to be considered together; or **(2)** in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and in the presence of counsel.

Committee Note

The language of Rule 410 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411. Liability Insurance	Rule 411 — Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Rule 412 — Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c): **(1)** Evidence offered to prove that any alleged victim engaged in other sexual behavior. **(2)** Evidence offered to prove any alleged victim's sexual predisposition.	**(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: **(1)** evidence offered to prove that a victim engaged in other sexual behavior; or **(2)** evidence offered to prove a victim's sexual predisposition.
(b) Exceptions. **(1)** In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: **(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; **(B)** evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and **(C)** evidence the exclusion of which would violate the constitutional rights of the defendant. **(2)** In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.	**(b) Exceptions.** **(1)** ***Criminal Cases.*** The court may admit the following evidence in a criminal case: **(A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; **(B)** evidence of specific instances of a victim's sexual behavior toward the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and **(C)** evidence whose exclusion would violate the defendant's constitutional rights. **(2)** ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure To Determine Admissibility. **(1)** A party intending to offer evidence under subdivision (b) must— **(A)** file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and **(B)** serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative. **(2)** Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.	**(c) Procedure to Determine Admissibility.** **(1)** ***Motion.*** If a party intends to offer evidence under Rule 412(b), the party must: **(A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered; **(B)** do so at least 14 days before trial unless the court, for good cause, sets a different time; **(C)** serve the motion on all parties; and **(D)** notify the victim or, when appropriate, the victim's guardian or representative. **(2)** ***Hearing*.** Before admitting evidence under this rule, the court must conduct an in-camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.
	(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Committee Note

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	Rule 413 — Similar Crimes in Sexual-Assault Cases
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code; **(2)** contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; **(3)** contact, without consent, between the genitals or anus of the defendant and any part of another person's body; **(4)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).	**(d) Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(1)** any conduct prohibited by 18 U.S.C. chapter 109A; **(2)** contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus; **(3)** contact, without consent, between the defendant's genitals or anus and any part of another person's body; **(4)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Committee Note

The language of Rule 413 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases	Rule 414 — Similar Crimes in Child-Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, ''child'' means a person below the age of fourteen, and ''offense of child molestation'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child; **(2)** any conduct proscribed by chapter 110 of title 18, United States Code; **(3)** contact between any part of the defendant's body or an object and the genitals or anus of a child; **(4)** contact between the genitals or anus of the defendant and any part of the body of a child; **(5)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or **(6)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).	**(d) Definition of "Child" and "Child Molestation."** In this rule and Rule 415: **(1)** "child" means a person below the age of 14; and **(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(A)** any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child; **(B)** any conduct prohibited by 18 U.S.C. chapter 110; **(C)** contact between any part of the defendant's body — or an object — and a child's genitals or anus; **(D)** contact between the defendant's genitals or anus and any part of a child's body; **(E)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or **(F)** an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E).

Committee Note

The language of Rule 414 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation	Rule 415 — Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation.
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.	**(a) Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation. The evidence may be considered as provided in Rules 413 and 414.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

Committee Note

The language of Rule 415 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE V. PRIVILEGES Rule 501. General Rule	ARTICLE V. PRIVILEGES Rule 501 — Privilege in General
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: • the United States Constitution; • a federal statute; or • other rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 501 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver	Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver
The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.	The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together.	**(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together.
(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: **(1)** the disclosure is inadvertent; **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).	**(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: **(1)** the disclosure is inadvertent; **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a Federal proceeding; or **(2)** is not a waiver under the law of the State where the disclosure occured.	**(c) Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a federal proceeding; or **(2)** is not a waiver under the law of the state where the disclosure occurred.
(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.	**(d) Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.
(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.	**(e) Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.	**(f) Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
(g) Definitions. In this rule: **(1)** ''attorney-client privilege'' means the protection that applicable law provides for confidential attorney-client communications; and **(2)** ''work-product protection'' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.	**(g) Definitions.** In this rule: **(1)** "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and **(2)** "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Committee Note

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VI. WITNESSES Rule 601. General Rule of Competency	ARTICLE VI. WITNESSES Rule 601 — Competency to Testify in General
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.	Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 601 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 602. Lack of Personal Knowledge	Rule 602 — Need for Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 703.

Committee Note

The language of Rule 602 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 603. Oath or Affirmation	Rule 603 — Oath or Affirmation to Testify Truthfully
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Committee Note

The language of Rule 603 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 604. Interpreters	Rule 604 — Interpreter
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.	An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Committee Note

The language of Rule 604 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 605. Competency of Judge as Witness	Rule 605 — Judge's Competency as a Witness
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Committee Note

The language of Rule 605 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 606. Competency of Juror as Witness	Rule 606 — Juror's Competency as a 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. 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.	**(a) At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.
(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. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	**(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence*.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. **(2)** ***Exceptions*.** A juror may testify about whether: **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** an outside influence was improperly brought to bear on any juror; or **(C)** a mistake was made in entering the verdict on the verdict form.

Committee Note

The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 607. Who May Impeach	Rule 607 — Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.

Committee Note

The language of Rule 607 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608 — A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	**(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: **(1)** the witness; or **(2)** another witness whose character the witness being cross-examined has testified about. **(c) Privilege Against Self-Incrimination.** A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

Committee Note

The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee is aware that the Rule's limitation of bad-act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

Rule 609. Impeachment by Evidence of Conviction of Crime	Rule 609 — Impeachment by Evidence of a Criminal Conviction
(a) General rule. For the purpose of attacking the 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 regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and **(B)** must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act 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 10 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.	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if: **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(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 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.	**(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if: **(1)** the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than 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.	**(d) Juvenile Adjudications**. Evidence of a juvenile adjudication is admissible under this rule only if: **(1)** it is offered in a criminal case; **(2)** the adjudication was of a witness other than the defendant; **(3)** a conviction of an adult for that offense would be admissible to attack the adult's credibility; and **(4)** admitting the evidence is necessary to fairly determine 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.	**(e) Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Note

The language of Rule 609 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 610. Religious Beliefs or Opinions	Rule 610 — Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Committee Note

The language of Rule 610 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611 — Mode and Order of Questioning Witnesses and Presenting Evidence
(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	**(b) Scope of Cross-Examination**. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions on cross-examination. And the court should allow leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Committee Note

The language of Rule 611 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 612. Writing Used To Refresh Memory	Rule 612 — Writing Used to Refresh a Witness's Memory
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— **(1)** while testifying, or **(2)** before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.	**(a) Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory: **(1)** while testifying; or **(2)** before testifying, if the court decides that justice requires a party to have those options. **(b) Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. **(c) Failure to Produce or Deliver.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Committee Note

The language of Rule 612 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 613. Prior Statements of Witnesses	Rule 613 — Witness's Prior Statement
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	**(a) Showing or Disclosing the Statement During Questioning.** When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	**(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

The language of Rule 613 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614 — Court's Calling or Questioning a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	**(a) Calling.** The court may call a witness on its own or at a party's suggestion. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	**(b) Questioning.** The court may question a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	**(c) Objections.** A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Committee Note

The language of Rule 614 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 615. Exclusion of Witnesses	Rule 615 — Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.

Committee Note

The language of Rule 615 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY Rule 701. Opinion Testimony by Lay Witnesses	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY Rule 701 — Opinion Testimony by Lay Witnesses
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Note

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 702. Testimony by Experts	Rule 702 — Testimony by Expert Witnesses
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Committee Note

The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 703. Bases of Opinion Testimony by Experts	Rule 703 — Bases of an Expert's Opinion Testimony
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Committee Note

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 704. Opinion on Ultimate Issue	Rule 704 — Opinion on an Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	**(a) In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case 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. Such ultimate issues are matters for the trier of fact alone.	**(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Committee Note

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	Rule 705 — Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.	Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Committee Note

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 706. Court Appointed Experts	Rule 706 — Court-Appointed 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. 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.	**(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. **(b) Expert's Role.** The court must inform the expert in writing of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate. The expert: **(1)** must advise the parties of any findings the expert makes; **(2)** may be deposed by any party; **(3)** may be called to testify by the court or any party; and **(4)** may be cross-examined by any party, including the party that called the expert.
(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) Compensation.** The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows: **(1)** in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like 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) Disclosing the Appointment.** The court may authorize disclosure to the jury that the court appointed the expert.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.	**(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

Committee Note

The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY Rule 801 — Definitions That Apply to This Article; Exclusions from Hearsay
The following definitions apply under this article: **(a) Statement.** A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	**(a) Statement.** "Statement" means: **(1)** a person's oral or written assertion; or **(2)** a person's nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. A ''declarant'' is a person who makes a statement.	**(b) Declarant.** "Declarant" means the person who made the statement.
(c) Hearsay. ''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	**(c) Hearsay.** "Hearsay" means a prior statement — one the declarant does not make while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant.
(d) Statements which are not hearsay. A statement is not hearsay if— **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or	**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about the prior statement, and the statement: **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or **(C)** identifies a person as someone the declarant perceived earlier.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).	**(2)** ***An Opposing Party's Statement.*** The statement is offered against an opposing party and: **(A)** was made by the party in an individual or representative capacity; **(B)** is one that the party appeared to adopt or accept as true; **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or **(E)** was made by the party's co-conspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense — a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Rule 802. Hearsay Rule	Rule 802 — The Rule Against Hearsay
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.	Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.

Committee Note

The language of Rule 802 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	Rule 803 — Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.	**(1)** ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.	**(2)** ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused.
(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.	**(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.	**(4)** ***Statement Made for Medical Diagnosis or Treatment.*** A statement that: **(A)** is made for — and is reasonably pertinent to — medical diagnosis or treatment; and **(B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.	**(5)** ***Recorded Recollection.*** A record that: **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and **(C)** accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	**(6)** ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if: **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge; **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; **(C)** making the record was a regular practice of that activity; and **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification. But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.	**(7)** ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if: **(A)** the evidence is admitted to prove that the matter did not occur or exist; and **(B)** a record was regularly kept for a matter of that kind. But this exception does not apply if the possible source of the information or other circumstances indicate a lack of trustworthiness.
(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.	**(8)** ***Public Records.*** A record of a public office setting out: **(A)** the office's activities; **(B)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(C)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation. But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.
(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.	**(9)** ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.	**(10)** ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that: **(A)** the record does not exist; or **(B)** a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.
(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.	**(11)** ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.	**(12)** ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate: **(A)** made by a person who is authorized by a religious organization or by law to perform the act certified; **(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and **(C)** purporting to have been issued at the time of the act or within a reasonable time after it.
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	**(13)** ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.	**(14)** ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if: **(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; **(B)** the record is kept in a public office; and **(C)** a statute authorizes recording documents of that kind in that office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.	**(15)** ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.	**(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.	**(17)** ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.	**(18)** ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if: **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and **(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.
(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.	**(19)** ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.	**(20)** ***Reputation Concerning Boundaries or General History.*** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.	**(21)** ***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.	**(22)** ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if: **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; **(B)** the judgment was for a crime punishable by death or by imprisonment for more than a year; **(C)** the evidence is admitted to prove any fact essential to the judgment; and **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.	**(23)** ***Judgments Involving Personal, Family, or General History or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: **(A)** was essential to the judgment; and **(B)** could be proved by evidence of reputation.
(24) [Other exceptions.] [Transferred to Rule 807]	**(24) [Other exceptions.]** [Transferred to Rule 807]

Committee Note

The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 804. Hearsay Exceptions; Declarant Unavailable	Rule 804 — Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness
(a) Definition of unavailability. ''Unavailability as a witness'' includes situations in which the declarant— **(1)** is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or **(3)** testifies to a lack of memory of the subject matter of the declarant's statement; or **(4)** is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or **(5)** is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.	**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant: **(1)** is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant's statement; **(2)** refuses to testify about the subject matter despite a court order to do so; **(3)** testifies to not remembering the subject matter; **(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or **(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5); or **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability in order to prevent the declarant from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.	**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: **(1)** ***Former Testimony.*** Testimony that: **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.	**(2)** ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
(3) Statement against interest. A statement which 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. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.	**(3)** ***Statement Against Interest.*** A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4)** ***Statement of Personal or Family History.*** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
(5) [Other exceptions.] [Transferred to Rule 807] **(6) Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.	**(5)** ***Statement Offered Against a Party Who Wrongfully Caused the Declarant's Unavailability.*** A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability in order to prevent the declarant from attending or testifying. **[Other exceptions.]** [Transferred to Rule 807]

Committee Note

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The amendment to Rule 804(b)(3) provides that the corroborating circumstances requirement applies not only to declarations against penal interest offered by the defendant in a criminal case, but also to such statements offered by the government. The language in the original rule does not so provide, but a proposed amendment to Rule 804(b)(3) — released for public comment in 2008 and scheduled to be enacted before the restyled rules — explicitly extends the corroborating circumstances requirement to statements offered by the government.

Rule 804(b)(6) has been renumbered, to fill a gap left when the original Rule 804(b)(5) was transferred to Rule 807.

Rule 805. Hearsay Within Hearsay	Rule 805 — Hearsay Within Hearsay
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.	Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Note

The language of Rule 805 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806 — Attacking and Supporting the Declarant's Credibility
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Committee Note

The language of Rule 806 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 807. Residual Exception	Rule 807 — Residual Exception
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.	**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: **(1)** the statement has equivalent circumstantial guarantees of trustworthiness; **(2)** it is offered as evidence of a material fact; **(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and **(4)** admitting it will best serve the purposes of these rules and the interests of justice. **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Committee Note

The language of Rule 807 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION Rule 901. Requirement of Authentication or Identification	ARTICLE IX. AUTHENTICATION AND IDENTIFICATION Rule 901 — Authenticating or Identifying Evidence
(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.	**(a) In General.** To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:	**(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.	**(1)** ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.
(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.	**(2)** ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.	**(3)** ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.
(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.	**(4)** ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.	**(5)** ***Opinion About a Voice.*** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.	**(6)** ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to: **(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called; or **(B)** a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.	**(7)** ***Evidence About Public Records.*** Evidence that: **(A)** a record is from the public office where items of this kind are kept; or **(B)** a document was lawfully recorded or filed in a public office.
(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.	**(8)** ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it: **(A)** is in a condition that creates no suspicion about its authenticity; **(B)** was in a place where, if authentic, it would likely be; and **(C)** is at least 20 years old when offered.
(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.	**(9)** ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.	**(10)** ***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Committee Note

The language of Rule 901 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 902. Self-authentication	Rule 902 — Evidence That Is Self-Authenticating
Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:	The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.	**(1)** ***Domestic Public Documents That Are Signed and Sealed.*** A document that bears: **(A)** a signature purporting to be an execution or attestation; and **(B)** a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.	**(2)** ***Domestic Public Documents That Are Signed But Not Sealed.*** A document that bears no seal if: **(A)** it bears the signature of an officer or employee of an entity named in Rule 902(1)(B); and **(B)** another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.	**(3)** ***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The 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. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either: **(A)** order that it be treated as presumptively authentic without final certification; or **(B)** allow it to be evidenced by an attested summary with or without final certification.
(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.	**(4)** ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was lawfully recorded or filed in a public office — if the copy is certified as correct by: **(A)** the custodian or another person authorized to make the certification; or **(B)** a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.	**(5)** ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.
(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.	**(6)** ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.	**(7)** ***Trade Inscriptions and the Like.*** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.	**(8)** ***Acknowledged Documents.*** A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgements.
(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.	**(9)** ***Commercial Paper and Related Documents.*** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.	**(10)** ***Presumptions Under a Federal Statute.*** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	**(11)** ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	**(12)** ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 903. Subscribing Witness' Testimony Unnecessary	Rule 903 — Subscribing Witness's Testimony
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.	A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Committee Note

The language of Rule 903 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001. Definitions	ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001 — Definitions That Apply to This Article
For purposes of this article the following definitions are applicable: **(1) Writings and recordings.** ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. **(2) Photographs.** ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures. **(3) Original.** An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''. **(4) Duplicate.** A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.	In this article, the following definitions apply: **(a) Writing.** A "writing" consists of letters, words, numbers, or their equivalent set down in any form. **(b) Recording.** A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner. **(c) Photograph.** "Photograph" means a photographic image or its equivalent stored in any form. **(d) Original.** An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it. **(e) Duplicate.** "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Note

The language of Rule 1001 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1002. Requirement of Original	Rule 1002 — Requirement of the Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.	An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Note

The language of Rule 1002 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1003. Admissibility of Duplicates	Rule 1003 — Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.	A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Note

The language of Rule 1003 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1004. Admissibility of Other Evidence of Contents	Rule 1004 — Admissibility of Other Evidence of Content
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—	An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or	**(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith;
(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or	**(b)** an original cannot be obtained by any available judicial process;
(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or	**(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.	**(d)** the writing, recording, or photograph is not closely related to a controlling issue.

Committee Note

The language of Rule 1004 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1005. Public Records	Rule 1005 — Copies of Public Records to Prove Content
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.	The proponent may use a copy to prove the content of an official record — or of a document that was lawfully recorded or filed in a public office — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Note

The language of Rule 1005 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1006. Summaries	Rule 1006 — Summaries to Prove Content
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.	The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Committee Note

The language of Rule 1006 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1007. Testimony or Written Admission of Party	Rule 1007 — Testimony or Admission of a Party to Prove Content
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.	The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written admission of the party against whom the evidence is offered. The proponent need not account for the original.

Committee Note

The language of Rule 1007 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1008. Functions of Court and Jury	Rule 1008 — Functions of the Court and Jury
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.	Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether: **(a)** an asserted writing, recording, or photograph ever existed; **(b)** another one produced at the trial or hearing is the original; or **(c)** other evidence of content accurately reflects the content.

Committee Note

The language of Rule 1008 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

XI. MISCELLANEOUS RULES Rule 1101. Applicability of Rules	XI. MISCELLANEOUS RULES Rule 1101 — Applicability of the Rules
(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms ''judge'' and ''court'' in these rules include United States bankruptcy judges and United States magistrate judges.	**(a) To Courts and Judges.** These rules apply to proceedings before: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.	**(b) To Proceedings.** These rules apply in: • civil cases and proceedings, including admiralty and maritime cases; • criminal cases and proceedings; • contempt proceedings, except those in which the court may act summarily; and • cases and proceedings under 11 U.S.C.
(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.	**(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.
(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: **(1) Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104. **(2) Grand jury.** Proceedings before grand juries. **(3) Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.	**(d) Exceptions.** These rules — except for those on privilege — do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled ''An Act to authorize association of producers of agricultural products'' approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled ''An Act authorizing associations of producers of aquatic products'' approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes'', approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled ''An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes'', approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.	**(e) Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

Committee Note

The language of Rule 1101 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1102. Amendments	Rule 1102 — Amendments
Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.	These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Note

The language of Rule 1102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1103. Title	Rule 1103 — Title
These rules may be known and cited as the Federal Rules of Evidence.	These rules may be cited as the Federal Rules of Evidence.

Committee Note

The language of Rule 1103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

III

FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Effect of *Melendez-Diaz* on Federal Rules Hearsay Exceptions
Date: October 16, 2009

This memorandum discusses the Supreme Court's opinion last term in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), and its effect on some of the hearsay exceptions in the Federal Rules of Evidence. The memo specifically considers whether amendments to any of the hearsay exceptions are necessary in light of *Melendez-Diaz.*

The memo concludes that the Committee may wish to consider an amendment to Rule 803(10), and possibly an amendment to Rule 902(11). But it might be prudent to hold off (at least until the next meeting) on any proposal because:

1) *Melendez-Diaz* was a state case, and the lower federal courts have not yet had an opportunity to explore the implications of the case for the Federal Rules hearsay exceptions;

2) The Supreme Court this term, in *Briscoe v. Virginia,* is considering the constitutionality of a statute requiring the defendant to comply with notice-and-demand obligations before the government must produce a custodian of records or similar witness; and

3) Congress might be interested in some legislative remediation of the burdens on the government imposed by *Melendez-Diaz*, especially in illegal re-entry cases.

This memo is in two parts. Part One describes the *Melendez-Diaz* opinion and its implications for the records-based hearsay exceptions of the Federal Rules of Evidence. Part Two analyzes each of the major records-based exceptions to determine whether an amendment might be justified in light of *Melendez-Diaz.*

I. The Melendez-Diaz Opinion:

In *Melendez-Diaz*, a drug case, the trial court admitted three "certificates of analysis" showing the results of forensic tests performed on substances seized from the police car in which the defendant was riding. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contested 5-4 decision, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority stated that affidavits prepared solely for litigation are within the core definition of "testimonial" statements. And the documents at issue, "while denominated by Massachusetts law 'certificates,' are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths." The majority also noted that the *only* reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves."

The basic holding of *Melendez-Diaz* is that a live witness must testify to the results of forensic tests conducted primarily for litigation — admitting a certificate of results under a hearsay exception will violate the defendant's right to confrontation.

Other implications for the Federal hearsay exceptions are found in the parts of the majority's opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the resulting tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not *every* record involved in the forensic testing process will necessarily be found testimonial. And the footnote indicates that the Court is adhering to the standard for testimoniality employed in the previous case of *Davis v. Washington:* hearsay is not testimonial simply because the declarant could *anticipate* that it would be used in a criminal prosecution. Rather, the *primary motivation* for making the statement must be to use it in a criminal prosecution.

2. The majority approves the basic analysis of Federal courts after *Crawford* with respect to business and public records: if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared for purposes of litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

3. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that *merely authenticate proffered documents* are not testimonial.

4. As a counterpoint to the dissent's argument about prior practice having allowed certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record. The majority declared as follows:

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that ***any use of Rule 803(10) in a criminal case — to prove the absence of a public record by way of an affidavit of the official who checked for the record — is prohibited***. As shown in the *Crawford* outline in this agenda book, lower courts after *Crawford* have held that it does not offend the Confrontation Clause to prove the absence of a public record by introducing an affidavit of the official who searched for the record. The rationales behind these decisions are: 1) the underlying records are not testimonial, and so it would stand the Confrontation Clause on its head to hold the affidavit about the records to be testimonial; and 2) the affidavits are essentially ministerial and are not the kind of ex parte testimony used in the Raleigh case. But the first rationale is rejected by the passage quoted above — it does not matter that the underlying records are nontestimonial, because the affidavit is a substitute for in-court testimony and is prepared solely for litigation. And the second argument is rejected by the majority's emphasis in *Melendez-Diaz* that the Confrontation Clause prohibits *all* testimony, not just the paradigmatic confrontation violation.

5. In an attempt to underplay the burdens on the government imposed by having to produce a witness to prove up a forensic test, the Court stated that the government could constitutionally require the defendant to comply with a "notice-and-demand" procedure — meaning that a court could find a waiver of the right to confrontation if the defendant fails to give pretrial notice in accordance with the procedure.

II. Effect of Melendez-Diaz on the Federal Records-Based Exceptions:[1]

1. Rule 803(5) — Past Recollection Recorded.

Nothing in *Melendez-Diaz* or *Crawford* requires any change to Rule 803(5). That rule does not raise a confrontation problem because by definition the person who prepared (or adopted) the record must testify at trial. *Crawford* makes clear that the confrontation problem is solved if the declarant is produced to testify — even if that testimony is nothing more than "I can't remember." See, e.g., *Cookson v. Schwartz*, 556 F.3d 647 (7th Cir. 2009) (production of the declarant satisfies *Crawford* even though the declarant had no memory of the underlying events).

2. Rule 803(6) — Business Records

Generally speaking, the business records exception should present no confrontation issues under *Melendez-Diaz.* That is because the definition of a testimonial record, employed by the majority in *Melendez-Diaz*, is that it was prepared with the primary purpose of using it in a criminal prosecution. Under Rule 803(6), a record prepared primarily in anticipation of litigation is not admissible if it is offered by the party who prepared it — it is excluded under the untrustworthiness clause. See, e.g., *United States v. McPartlin*, 595 F.2d 1321 (5th Cir. 1979) (record prepared in anticipation of litigation not admissible under Rule 803(6)); *United States v. Bohrer*, 807 F.2d 159 (10th Cir. 1986) (contact card of interview, prepared by government investigator in anticipation of use in a prosecution, was not admissible under Rule 803(6): "Admission under the business records exception is not available for documents prepared for ultimate purposes of litigation, when offered by the party maintaining the documents.").

It follows that if *the government* prepares a record for purposes of a criminal prosecution, as in *Melendez-Diaz*, Rule 803(6) will comport with the constitution, as it will exclude a testimonial record. The majority in *Melendez-Diaz* specifically stated that the analyst's certificate would not

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[1] The following discussion concerns the records-based exceptions that are most likely to be invoked in a criminal trial. Other records-based exceptions include vital statistics (Rule 803(9)); records of religious organizations (Rule 803(11); marriage, baptismal, and similar certificates (Rule 803(12); family records (Rule 803(13); records of documents affecting an interest in property (Rule 803(14); statements in documents affecting an interest in property (Rule 803(15); ancient documents (Rule 803(16); market reports and commercial publications (Rule 803(17); and learned treatises (803(18). These exceptions are not discussed individually because it is extremely unlikely that any hearsay falling within any of these exceptions would trigger the two requirements for testimoniality under *Crawford* and *Melendez-Diaz*. Those cases provide that a record is testimonial only if: 1) the primary motivation for preparing the record is to use it in a criminal prosecution, and 2) the record was prepared by or with the participation of the government.

have been admissible under Rule 803(6) because it was prepared for purposes of litigation and was favorable to the preparing party — the government (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)).

But what if the record is prepared by a *private institution* in anticipation of a prosecution, and offered by the government against an accused? In that case — assuming the private institution is not operating under the auspices or at the direction of the government — the record is not offered in favor of the preparing party, and so there is no suspect motivation (no untrustworthiness) arising from the fact that it is prepared for litigation. A good example is a tox-screen by a hospital laboratory, indicating that the defendant was under the influence of narcotics. See *United States v. Ellis*,460 F.3d 920 (7th Cir. 2006) — a pre-*Melendez-Diaz* case — in which a drug test conducted by a hospital employee, at the request of the police department, was offered against the defendant. It was prepared with the awareness that it would be used in a prosecution, but it was nonetheless admissible under Rule 803(6) — because the test was conducted as part of the ordinary course of routine testing, and the "anticipation of litigation" factor did not disqualify it as it was not offered in favor of the preparing party (i.e., the hospital).

Is a private record like that in *Ellis* testimonial? The *Ellis* court held that it was not, relying on language in *Crawford* listing business records as a prime example of hearsay that is not testimonial. But that assessment might change after *Melendez-Diaz.* Notably, *Ellis* is cited by the *dissent* in *Melendez-Diaz* as an example of how the majority rule would change existing practice. And the circumstances of preparing the toxic screen in *Ellis* are similar to those in *Melendez-Diaz* — in the former case the test was conducted by a hospital technician, and in the latter it was conducted by technicians in the Department of Public Health.

That said, toxicology tests conducted by *private* organizations (as opposed to the government) are likely to be found non-testimonial if it can be shown that law enforcement was not involved in, directing, or managing the testing. Courts after *Crawford* have held uniformly that police officers must be involved in the preparation of the statement for it to be testimonial. That is, even if a person *knows* that their statement could be used in a criminal prosecution, it will not be testimonial unless the government is somehow involved in its preparation (e.g., through interrogation, preparation of an affidavit, etc.).

At this point, the most can be said is that it is possible that, under some circumstances, a privately prepared business record might be testimonial if there is a sufficient showing of a motive to prepare it for a prosecution and a sufficient indication of prosecutorial involvement in generating the record. But this rather slender and amorphous possibility does not seem to establish a justification for amending Rule 803(6) to accommodate *Melendez-Diaz* — especially because, after *Melendez-Diaz*, law enforcement will probably be making efforts to provide some separation between private testing labs and the prosecution.

General Disclaimer?

One option for change would be to add some general language to the exception, e.g., "the record is not admissible against a criminal defendant if it is testimonial and the declarant is not available for cross-examination." But there are at least two reasons to reject such general language:

- It states the obvious. By now, everyone should know that testimonial statements violate the Confrontation Clause if the declarant cannot be produced for cross-examination. In the past, the Committee was rightly about the possibility that a lawyer could think that a statement fitting a hearsay exception would thereby satisfy the Confrontation Clause — and should be warned if that is not the case. But *Crawford* has been around long enough for competent lawyers to be aware of the possibility that a statement may fit a hearsay exception and yet be subject to exclusion under the Confrontation Clause. If there is a trap, it's not for the unwary — it's for the comatose.

- If this kind of general disclaimer is necessary, it should not be placed in Rule 803(6). Rather, it raises a *general* concern and should be placed at the beginning of Rules 803, 804 and 807. But to do that would be very awkward and balky, because *Crawford* does not bar all testimonial hearsay — it bars testimonial hearsay only when the declarant 1) has not been cross-examined previously and 2) is not produced for cross-examination at the trial.

A general disclaimer on the bar imposed by *Crawford* and *Melendez-Diaz* does not fit neatly at the outset of the exceptions. Take Rule 803. A general disclaimer might look like this:

Rule 803:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness — unless [the following is/are?] testimonial and the declarant has not been previously cross-examined [on the subject matter of the statement?] and the proponent does not produce the declarant to testify at the trial :

It seems apparent that any marginal benefit in notifying unaware lawyers about the confrontation problem is outweighed by the awkwardness of any amendment to Rules 803, 804, and 807.

Another alternative is to provide a "confrontation disclaimer" in Rule 802, rather than in the exceptions. That alternative would look something like this:

Rule 802:

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; ~~or~~
- other rules prescribed by the Supreme Court~~.~~ ; or
- the United States Constitution [the constitutional right to confrontation?]

This change seems harmless and appears relatively easy to execute. But query the benefit. If the goal is to protect the unwary, how many unwary lawyers are going to be looking at Rule 802? Notably, in *United States v. Owens*, Justice Scalia mentioned that the parties before the Supreme Court — government and defendant — overlooked the applicability of Rule 802 to the case. [The parties argued over the "admissibility under Rule 801(d)(1)(C)" of a statement of prior identification, and Justice Scalia pointed out that if the statement was admissible, it would be so under Rule 802.] If parties before the Supreme Court ignore Rule 802, what hope is there for an unwary lawyer?

In the end, if the Committee believes that a general disclaimer is useful or necessary, the change if any should be made to Rule 802. As to Rule 803(6), there is no specific change that can be made at this point with any assurance that it will correctly describe which statements (if any) would be admissible under the rule and yet would be excluded by the Confrontation Clause.

Finally, note that the above discussion concerned whether a business record is testimonial under *Melendez-Diaz*. A separate question is whether a non-testimonial business record raises a confrontation problem when it is entered in court by way of a certificate rather than through a testifying custodian. The effect of *Melendez-Diaz* on proof of records through a certificate is discussed later in this memo.

3. Rule 803(8) — Public Records:

The Court in *Melendez-Diaz* held that a certificate of test results prepared by the Department of Public Health, at the behest of law enforcement, was testimonial because the only reason for making the record was to have it admitted in a prosecution. If that record had been offered in a federal prosecution, it would not have been admitted under Rule 803(8). This is because Rule 803(8) has language specifically tailored to prevent its use by the government in criminal cases. See Rule 803(8)(B) (excluding, in criminal cases, "matters observed by police officers and other law enforcement personnel"); Rule 803(8)(C) (admitting factual findings in a government report, but only in civil actions and proceedings against the government).

It's true that most federal courts have not construed the exclusionary language in Rule 803(8) as a complete bar on all law enforcement reports in criminal cases. The case law is described in the Federal Rules of Evidence Manual, §803.02[9][d]:

> Under the predominant view, the exclusionary language covers only those law enforcement-generated reports that are prepared under adversarial circumstances in preparation for the defendant's prosecution — and so are subject to manipulation by

> authorities bent on convicting a particular criminal defendant. [2] Where the risk of manipulation and untrustworthiness is minimal — in particular where the report contains unambiguous factual matter prepared under non-adversarial circumstances — courts have held that the public report should be admitted despite the apparently absolute language of the Rule.[3] But while a report that is ministerial in nature and made without contemplation of specific litigation is ordinarily held admissible, those law enforcement reports that *are* adversarial and evaluative in nature are ordinarily excluded, consistent with the exclusionary intent of Rule 803(8)(B) and (C). [4]

The case law therefore tracks the *Crawford/Melendez-Diaz* definition of what records are testimonial: a record that is prepared by or at the behest of law enforcement, with the primary motive that it will be used against the accused in a prosecution, is inadmissible under the Rule. In contrast, a record that is not prepared with a specific litigation motive (such as a routine tabulation of neutral data) is admissible under the Rule — and does not violate the Confrontation Clause because it is not testimonial. Thus the scope of the hearsay exception appears to be contiguous with the protection of the Confrontation Clause.

In sum, there appears to be no reason to amend Rule 803(8) in response to *Melendez-Diaz*, because the rule as written and as applied does not allow the admission of any public record that would be testimonial under *Melendez-Diaz.* This conclusion is supported by language in the majority opinion in *Melendez-Diaz,* where the Court stated that the analyst's certificate, found testimonial, could not have been admitted under Federal Rule 803(8):

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the

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[2]See, e.g., United States v. Enterline, 894 F.2d 287 (8th Cir. 1990) (``It is clear that the exclusion concerns matters observed by the police at the scene of the crime. Such observations are potentially unreliable since they are made in an adversary setting, and are often subjective evaluations of whether a crime was committed.").

[3]See, e.g., United States v. Dancy, 861 F.2d 77 (5th Cir. 1988) (a fingerprint card in a penitentiary packet, offered to show that the defendant was a convicted felon, was properly admitted under Rule 803(8)(B) because the preparation of the card was unrelated to a criminal investigation; the Rule excludes only records that report the observation or investigation of crimes).

[4] See, e.g., United States v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000) (Trial Court erred in admitting into evidence ``the on-the-scene investigative report of a crime by an INS official whose perceptions might be clouded and untrustworthy").

railroad's operations, it was "calculated for use essentially in the court, not in the business." The analysts' certificates -- like police reports generated by law enforcement officials -- do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel").

Authenticating a Public Record:

Unlike authenticating business records — discussed infra — public records do not appear to raise the confrontation problem of preparing a testimonial certificate for trial. Public records are ordinarily authenticated under Rule 902(1) (if under seal), 902(2) (if not under seal), 902(3) (if a foreign public document), or 902(4) if a copy. If the document is under seal, all that is required is a "signature purporting to be an attestation or execution." Presumably this is signature is entered at the time the report is prepared, and therefore it is, by definition, not prepared for purposes of litigation if the report itself is admissible under Rule 803(8).

For unsealed reports, Rule 902(2) requires a signature under seal that the signer has official capacity and that the signature is genuine. Similar attestations are required for foreign public documents under Rule 902(3). For copies, under Rule 902(4), a qualified person certifies the copy as correct. These attestations are usually made for purposes of litigation in order to qualify the record for admissibility. But even if the certification is done for purposes of litigation, the majority in *Melendez-Diaz* differentiates a certificate that does nothing more than authenticate a document from a certificate that purports to establish a fact.

Here is the relevant passage, which addresses an argument in the dissent that the common law permitted the use of certificates in criminal cases:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record — or a copy thereof — for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State v. Wilson*, 141 La. 404, 409, 75 So. 95, 97 (1917). The dissent suggests that the fact that this exception was narrowly circumscribed makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

Authentication under Rules 902(1)-(4) seems to fall comfortably within the certificates that the majority recognizes as non-testimonial. The certifications do nothing more than attest to the genuineness of the document. Thus, there appears to be no need to amend Rules 902(1)-(4).

4. Rule 803(10) — Absence of Public Record:

As discussed above, the analysis in *Melendez-Diaz* — as well as specific language in the opinion — indicates that admitting a certificate to prove the absence of a public record violates the accused's right to confrontation. The certificate is testimonial because its only purpose is to be used for litigation — typically, a search of pertinent records is conducted after litigation is brought, and its sole purpose is to obtain proof that a record pertinent to the litigation does not exist (e.g., that there is no record of permitted entry in an illegal re-entry case).

It is notable that the U.S. Attorney in the Southern District of Texas has conceded that the admission of a certificate to prove the absence of a public record (a CNR) in an illegal re-entry case was in violation of the Confrontation Clause after *Melendez-Diaz.* See Letter Brief of the Government, United States v. Martinez-Rios, Appeal No. 08-40809.

It would appear that there is a substantial practical reason to consider an amendment to Rule 803(10). The rationale is not grounded in protecting the unwary or some theoretical need to make the hearsay exceptions contiguous with the Confrontation Clause. Rather, an amendment could be found necessary to provide a means, consistent with *Melendez-Diaz,* for certificates of the absence of public records to be admitted in criminal trials. The alternative is to require the government to call officials to testify to their searches of records — this could be a substantial cost to the government and to the courts, especially in districts that hear a large number of illegal re-entry cases. Judges in border districts are already expressing concern that the need to call witnesses in lieu of presenting a CNR has increased the already substantial burdens of processing illegal re-entry cases.

The majority in *Melendez-Diaz* specifically states that a testimonial certificate *can* be admitted if the state provides a notice-and-demand procedure. The Court elaborated as follows:

> In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. See, e.g., Ga.Code Ann. § 35-3-154.1 (2006); Tex.Code Crim. Proc. Ann., Art. 38.41, § 4 (Vernon 2005); Ohio Rev.Code Ann. § 2925.51(C) (West 2006). Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. See Fed. Rules Crim. Proc.

> 12.1(a), (e), 16(b)(1)(C); Taylor v. Illinois, 484 U.S. 400, 411 (1988); Williams v. Florida, 399 U.S. 78 (1970). There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. See Hinojos-Mendoza v. People, 169 P.3d 662, 670 (Colo.2007) (discussing and approving Colorado's notice-and-demand provision). Today's decision will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause.

The *Melendez-Diaz* majority noted that some state statutes go further and allow certificates to be introduced so long as the defendant has the opportunity to call the official to the stand *in the defendant's case*. Justice Scalia stated that: "We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the simplest form of notice-and-demand statutes is constitutional * * * ."

If the Committee wishes to tread on the firmest constitutional ground, it might consider an amendment that would track the notice-and-demand procedures that were specifically validated by the majority in *Melendez-Diaz.* Of the three notice-and-demand provisions cited favorably by the *Melendez-Diaz* majority, the Texas provision is the most succinct.

If a notice-and-demand provision were added to Rule 803(10) — along the lines of the Texas statute — it might look something like this:

> **(10) Absence of a Public Record.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification <u>if:</u>
>
> <u>(A) the testimony or certification</u> is admitted to prove that
>
> (~~A~~ <u>i</u>) the record does not exist; or
>
> (~~B~~ <u>ii</u>) a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind<u>; and</u>
>
> <u>(B) in a criminal case, the prosecutor provides written notice at least [multiple of 7] days before trial of the intent to offer a certification, and the defendant does not object in writing at least [multiple of 7] days before trial.</u> [5]

The Committee Note might look like this:

[5]Thanks to Professor Kimble for restyling the reporter's hackneyed attempt.

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), in which the Court held that certificates prepared by the government for the sole purpose of use in a criminal prosecution are testimonial and violate the accused's right to confrontation. The *Melendez-Diaz* Court declared, however, that a testimonial certificate could be admitted if the accused is given advance notice and an opportunity to demand the presence of the official who prepared the certificate. The amendment incorporates a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court.

———

As noted above, some states provide that the certificate is admissible so long as the defendant is given the right to subpoena the official who prepared it and to call the official as a witness in the defendant's case. The Supreme Court is considering the constitutionality of the "subpoena" alternative this term in *Briscoe v. Virginia*. If the Court adheres to its analysis in *Melendez-Diaz*, it should strike down the Virginia statute — because the *Melendez-Diaz* Court emphasized that the right to confrontation could not be satisfied by giving the defendant the right to call the declarant. It may be, however, that the Court will not strictly adhere to its thinking in *Melendez-Diaz*: the Court was sharply divided, and Justice Souter, who was a member of the majority, has been replaced by Justice Sotomayor, whose published opinions show a much more moderate approach to the *Crawford* line of cases.

If the Court does affirm the lower court in *Briscoe* and permit the confrontation problem to be solved by allowing the defendant to call the witness who prepared the certificate, it would appear that no amendment to Rule 803(10) would be necessary. Rule 803(10) need not provide that the defendant has a right to subpoena a witness, as that right is independently granted by Criminal Rule 17. It could be argued, however, that a reference to the subpoena power in Rule 803(10) might be useful given the constitutional infirmity of the rule after *Melendez-Diaz.* If so, the amendment could look like this:

The subpoena alternative:

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that:

(A) the record does not exist; or

(B) a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.

<u>But in a criminal case, the defendant may call the person who prepared a certification, and examine that person as if on cross-examination. The process costs and witness fees will be</u>

paid in the same manner as those paid for witnesses the government subpoenas.

[The last sentence is taken from Criminal Rule 17(b).]

The notice-and-demand provision is clearly constitutional, and if the Committee wishes to adopt that approach, then an amendment can be proposed for Standing Committee consideration as early as the Spring 2010 meeting. But if the Committee would prefer the subpoena alternative, then it obviously would make sense to wait until the Supreme Court decides *Briscoe*.

The choice of notice -and-demand vs. subpoena — assuming both are constitutional — is one of policy. The subpoena alternative has the advantage of saving the government from having to call, in hundreds of cases, witnesses who will do little more than testify to undisputed facts. But it imposes a number of costs on the defendant. Under the subpoena alternative:

- the defendant assumes the risk that the official will be unavailable to testify.

- the defendant runs the risk of confusing the jury by having to call the official in his own case.

- the defendant ends up refreshing the jury's recollection about the prosecution's evidence.

Another point of caution for the Committee to consider, as mentioned above, is that DOJ might be interested in pursuing a statutory remedy, as opposed to going through the rulemaking process. Any effort to amend Rule 803(10) will need to monitor statutory developments.

5. Rule 902(11) — Authenticating Business Records

Rule 902(11) provides a procedure for admitting domestic business records without live testimony. (18 U.S.C. § 3505 provides the same procedure for foreign business records). This certification procedure would seem to raise problems under *Melendez-Diaz* because the certificate is prepared solely for litigation. But there are at least two reasons to think that an amendment to Rule 902(11) might be unnecessary, or at least should await case law development on the subject.

First, as discussed above, the majority in *Melendez-Diaz* seemed to distinguish a certificate which does nothing more than authenticate a document from a certificate that purports to establish a fact.

Here again is the relevant passage, which addresses an argument in the dissent that the common law permitted the use of certificates in criminal cases:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record — or a copy thereof — for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State v. Wilson*, 141 La. 404, 409, 75 So. 95, 97 (1917). The dissent suggests that the fact that this exception was narrowly circumscribed makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

This passage could be read to mean that certificates authenticating business records under Rule 902(11) — and, for foreign business records, under 18 U.S.C. § 3505 — are not testimonial, because such certificates authenticate pre-existing records rather than create a new record. The viability of a 902(11)-type certificate is muddled, however, because that certificate *does more* than simply certify the authenticity of the record. It also certifies that the record was made at or near the time of the occurrence recorded, and was kept in the regular course of regularly conducted activity. It might be notable that Justice Kennedy, in dissent, questioned whether Rule 902(11) could continue to be used in criminal cases — though he raised the issue as a "sky is falling" rhetorical device, and the majority spent a lot of time emphasizing the narrowness of its opinion. The bottom line is that certification of business records in criminal cases is in some doubt after *Melendez-Diaz*. But strong arguments can be made that Rule 902(11) and 18 U.S.C. § 3505 remain constitutionally sound.

A second argument in favor of taking a "wait and see" attitude toward amending Rule 902(11) is that certificates of business records are prepared by private parties, not by the government. That distinguishes them from the certificates found objectionable in *Melendez-Diaz*. Since *Crawford*, the lower courts have consistently held that a statement cannot be testimonial unless it was generated with some government participation. As applied to certificates qualifying domestic business records, the degree of government participation will depend on the facts — and it might make sense to see how the case law develops with respect to records prepared by private parties and used by the government in a criminal case.

Let's assume, arguendo, that Rule 902(11) is unconstitutional under *Melendez-Diaz*. If that were so, then the fix would be the same as that applied to Rule 803(10) — either a notice and demand procedure, or a reliance on the defendant's ability to subpoena the witness (assuming this procedure is found constitutional in *Briscoe*).

As to a notice-and-demand procedure, Rule 902(11) is already halfway there — it contains

a requirement that the adversary be notified of the intent to offer a certificate. So all that would be needed would be to add a demand requirement.

Rule 902(11) with a demand requirement:

> **(11) Certified Domestic Records of a Regularly Conducted Activity**. The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. ~~Before~~ At least [multiple of 7] days before the trial or hearing, the proponent must give an adverse party ~~reasonable~~ written notice of the intent to offer the record. And if in a criminal case the record is not admissible if the defendant objects in writing to the certification at least [multiple of 7] days before trial.

The problem with a notice-and-demand procedure is that it returns to the practice that existed before the rule was enacted. Parties could stipulate that a record could be entered without the need to produce a records custodian. But the Advisory Committee found that the stipulation procedure, in many cases, did not work, and parties would be forced to call records custodians for no legitimate purpose. It would therefore seem prudent to wait to add a notice-and-demand procedure until 1) there is a definitive indication that a Rule 902(11) certification is in fact testimonial; and 2) there is a definitive indication that a subpoena alternative is unconstitutional.

If the Court in *Briscoe* decides that the defendant's ability to subpoena the witness allows the certificate to be admitted, then the same analysis as discussed for Rule 803(10) would apply to Rule 902(11): 1) probably no amendment is necessary because the subpoena power is already established in Criminal Rule 17; and 2) if some reference was thought necessary for emphasis, then it might look like this:

Rule 902(11) with a subpoena requirement:

> **(11) Certified Domestic Records of a Regularly Conducted Activity**. The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. ~~Before~~ At least [multiple of 7] days before the trial or hearing, the proponent must give an adverse party ~~reasonable~~ written notice of the intent to offer the record. In a criminal case the defendant may call the person who prepared a certification, and examine that person as if on cross-examination. The process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

Obviously, a proposal to amend the rule to include a subpoena procedure must await the Supreme Court's imprimatur in *Briscoe.*

III. Conclusion

The result in *Melendez-Diaz* does not require or justify an amendment to Rules 803(5), (6) or (8). Nor is any amendment necessary to the process for authenticating public documents.

It would appear, however, that *Melendez-Diaz* does invalidate the process of proving the absence of public records that has been undertaken in hundreds of criminal cases. If the burden of calling officials to prove the absence of public records is considered too great, then procedural requirements can be added to Rule 803(10). If the chosen procedure is for notice-and-demand, then an amendment can be proposed for the next meeting. If the chosen procedure is for the defendant to subpoena the official, then the amendment must await the Supreme Court's decision in *Briscoe.*

Finally, the procedure for authenticating business records in Rule 902(11) may remain valid after *Melendez-Diaz.* Any amendment to Rule 902(11) should await further case law development.

IV

FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: October 16, 2009

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases considering whether certain hearsay is "testimonial" are grouped by subject matter.

Summary

A quick summary of results on what has been held "testimonial" and what has not, so far, might be useful:

Hearsay Found Testimonial:

1. Confession of an accomplice made to a police officer.

2. Grand jury testimony.

3. Plea allocutions of accomplices, even if specific references to the defendant are redacted.

4. Statement of an incarcerated person, made to a police officer, identifying the defendant as taking part in a crime.

5. Report by a confidential informant to a police officer, identifying the defendant as involved in criminal activity.

6. Accusations made to officers responding to a 911 call, after the emergency has subsided.

7. Statements by a child-victim to a forensic investigator, when the statements are referred as a matter of course by the investigator to law enforcement.

8. Statements made by an accomplice while placed under arrest, but before formal interrogation.

9. False alibi statements made by accomplices to the police (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

10. A police officer's count of the number of marijuana plants found during the search of the defendant's premises.

Hearsay Found Not Testimonial:

1. Statement admissible under the state of mind exception, made to friends.

2. Autopsy reports.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's interpretation of Rule 804(b)(3) in *Williamson v. United States*).

4. Letter written to a friend admitting criminal activity by the writer and the defendant.

5. Statements by coconspirators during the course and in furtherance of the conspiracy, when not made to the police or during a litigation.

6. Certificate of nonexistence of a record, prepared by government authorities in anticipation of litigation. ***(Though these cases were decided before Melendez-Diaz, infra, and are no longer good authority).***

7. Warrants of deportation.

8. Entries into a regulatory database.

9. Statements made for purpose of medical treatment.

10. 911 calls reporting crimes.

11. Statements to law enforcement officers responding to the declarant's 911 call reporting a crime.

12. Accusatory statements in a private diary.

13. Odometer statements prepared before any crime of odometer-tampering occurred.

14. A present sense impression describing an event that took place months before a crime occurred.

15. Business records — including medical records prepared with a view to litigation, and certificates of authenticity prepared for trial. ***(Though these cases preceded Melendez-Diaz and may be questionable).***

16. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

17. Judicial findings and orders in one case, offered in a different case.

18. Informal statements made with no law enforcement officers present.

Conclusion as to Rulemaking:

It is clear that some types of hearsay will always be testimonial, such as grand jury statements, plea allocutions, etc. It is also clear that some types of statements will never be testimonial, such as personal diaries, statements made before a crime takes place, and informal statements to friends without any contemplation that the statements will be used in a criminal prosecution.

Between these two poles there is some uncertainty, though the Supreme Court's decision in *Davis* as well as dicta in *Giles* (both discussed below) has been applied by the circuit courts to narrow the definition of "testimonial" and thus to resolve much of that uncertainty. Questions remain about whether statements to a person who is not a law enforcement official can ever be testimonial; whether and when statements made to law enforcement officials responding to an emergency become testimonial; and whether testimonial statements violate the Confrontation Clause when they are offered only as part of the basis of an expert opinion.

The Court's recent decision in *Melendez-Diaz* has answered a few questions but raised many more. The Court decided that forensic test results could not be introduced without the testimony of a live witness — though that was generally held to be required under Federal Rule 803(8)(B) and

(C) in any case. What is less clear is whether other kinds of certificates will be considered testimonial — particularly certificates qualifying business records under Rule 902(11) and the statutory counterpart for foreign records. In dictum in *Melendez-Diaz*, the majority seemed to indicate that a certificate that simply authenticated a record would not be considered testimonial. In contrast, another dictum in *Melendez-Diaz* indicates that a certificate proving the absence of a public record, otherwise admissible under Rule 803(10), *would* be testimonial.

There is now no question about the viability of *Roberts*. It is dead. The Court unanimously held in *Bockting, infra*, that the Confrontation Clause imposes no limitation on the admissibility of hearsay that is not testimonial. It could be argued, then, that rulemaking has become critical after *Bockting*, because rulemaking is the only way to regulate the reliability of hearsay if it is not testimonial. So for example, the proposed amendment to Rule 804(b)(3) appears to have renewed relevance after *Bockting*, as it requires an important showing of reliability that is no longer mandated by the Confrontation Clause.

The Committee has in the past proposed amendments when an Evidence Rule is subject to an application that would violate the Constitution. But most of the hearsay exceptions seem sound given the case law after *Davis*. For example, the cases have essentially held that if a statement fits the excited utterance exception, it is for that reason non-testimonial after *Davis* — because to be admissible it will have to be in response to an emergency as opposed to an attempt to generate evidence for a criminal trial. Courts have reached similar conclusions with respect to business records, public records, co-conspirator statements, and declarations against interest: the factors that make hearsay statements admissible under these exceptions by definition mean that the statements cannot be testimonial. As stated above, Rule 803(10) is probably unconstitutional as applied after *Melendez-Diaz*, and the certification process for qualifying a business record is also in some question.

Cases Defining "Testimonial" Hearsay After Crawford, Arranged By Subject Matter

Admissions

Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

The *Lopez* court probably had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. ***See also United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*).

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as an admission by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Bruton — Testimonial Statements of Co-Defendants

Bruton* line of cases not altered by *Crawford*: *United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton*, not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury.

Admissions not covered by *Crawford,* but *Bruton* remains in place to protect against admission against a non-confessing co-defendant: *United States v. Ramos-Cardenas,* 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant; nor did it displace the case law under *Bruton*. The court elaborated as follows:

> [W]hile *Crawford* certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton, Richardson* and *Gray.*

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them.

Bruton* and its progeny survive *Crawford* — co-defendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper, 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The court concluded that because "the Supreme Court has so far taken a 'pragmatic' approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence,

he could not 'bear testimony' against Mason."

Co-Conspirator Statements

Co-conspirator statement not testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial).

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3d Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford*. Such statements were not within the examples of statements found testimonial by the Court in *Crawford*—they were not grand jury testimony, prior testimony, plea allocutions or statements made during interrogations. Even under the broadest definition of "testimonial" discussed in *Crawford* — reasonable anticipation of use in a criminal trial or investigation — these statements were not testimonial, as they were informal statements among coconspirators. **Accord** ***United States v. Bobb,*** 471 F.3d 491 (3d Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: ***United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The Court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that argument would mean that all hearsay is testimonial. The court observed that "*Crawford's* emphasis clearly is on whether the statement was 'testimonial' at the time it was made."

Statement by an anonymous coconspirator is not testimonial: ***United States v. Martinez,*** 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford.* The court stated that "a reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused

in investigating and prosecuting the crime." ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis*, "co-conspirators' statements made in pendency and furtherance of a conspiracy [are] not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)).

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,* 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that "*Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* — which as here involved a coconspirator's statement made to a government informant — to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found to be testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators)**.**

Statements in furtherance of a conspiracy are not testimonial: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial).

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley,* 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at

common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*).

Statements made during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Underwood,*** 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court explained as follows:

> In this case, the challenged evidence consisted of recorded conversations between the confidential informant and Darryl in which arrangements were made for the confidential informant to purchase cocaine. This evidence is neither testimony at a preliminary hearing, nor testimony before a grand jury, nor testimony at a former trial, nor a statement made during a police interrogation. Moreover, the challenged evidence does not fall within any of the formulations which *Crawford* suggested as potential candidates for "testimonial" status. Darryl, the declarant in the challenged evidence, made statements to Hopps in furtherance of the criminal conspiracy. His statements clearly were not made under circumstances which would have led him reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.
>
> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "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." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 233 (2d Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. Under *Williamson v. United States*, statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson*, because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was non-testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends admissible under Rule 804(b)(3) and not testimonial).

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,* 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, be extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor,* 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without

compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued specifically that under *Davis,* a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution–and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the husband's primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is 'testimonial' only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery.

Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved statements made by accomplices to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against interest, its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* , 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that

Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes."

Accomplice confession to law enforcement is testimonial, even if it implicates the accused only indirectly: *United States v. Rashid,* 383 F.3d 769 (8th Cir. 2004): The court held that an accomplice's confession to law enforcement officers was testimonial and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference.

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Accomplice statements to cellmate are not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made a number of statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,* 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v.*

Washington* and *Hammon v. Indiana, 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis*, the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court emphasized the limited nature of its holding. It noted that it was not providing an "exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." Among other things, the Court stated that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial." Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, we do not hold the opposite – that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements**.**

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that "under the *Davis* guideposts" the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police

assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The statements were not "testimonial" within the meaning of *Crawford v. Washington.* The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." Once the initial danger has dissipated, however, "a person who speaks while still under the stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

> **Note: While the *Brito* decision preceded the Supreme Court's decision in *Davis/Hammon,* the result appears to be completely consistent with the Supreme Court's application of *Crawford* to 911 calls. When the statement is in response to an emergency, it is not testimonial.**

911 call — including statements about the defendant's felony status—are not testimonial: *United States v. Proctor,* 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the *Davis* "primary purpose" test and evaluated the call in the following passage:

Viewing the facts of this case in light of *Davis*, Yogi's statements to the 911 operator were nontestimonial. Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency-not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi and Fairley. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: *United States v. Arnold,* 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was properly concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation. The court also made the following

points:

1. The fact that Tamica left the scene to make the 911 call was irrelevant. While in *Davis,* the Court mentioned the fact that the *defendant* had left the scene as indicating that the emergency had passed, that reasoning does not apply when the *victim* leaves the scene and has no idea whether or not the defendant is following her.

2. Asking the victim to describe the gun did not amount to interrogation sufficient to make Tamica's answer testimonial: "Asking the victim to describe the gun represented one way of exploring the authenticity of her claim, one way in other words of determining whether the emergency was real. And having learned who the suspect was and having learned that he was armed, [the officers] surely were permitted to determine what kind of weapon he was carrying and whether it was loaded -- information that has more to do with preempting the commission of future crimes than with worrying about the prosecution of completed ones. What officers would not want this information -- either to measure the threat to the public or to measure the threat to themselves? And what officer under these circumstances would have yielded to the prosecutor's concern of building a case for trial rather than to law enforcement's first and most pressing impulse of protecting the individual from danger?"

3. Tamica's statements upon Arnold's return were clearly not testimonial because they were prompted by Arnold's reappearance and not by any questioning by police officers: "This was not a statement prepared for court."

4. Because the statements were not testimonial, the Confrontation Clause had no applicability. This is because after *Davis*, the Confrontation Clause is solely concerned with testimonial hearsay, "meaning that the only admissibility question in this setting is whether the statement satisfies the Federal (or State) Rules of Evidence."

911 call is non-testimonial under *Davis/Hammon: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements in light of *Davis/Hammon* as follows:

When viewing the facts in light of *Davis*, we find that the anonymous caller's statement to the 911 operator was nontestimonial. In *Davis*, the caller contacted the police after being attacked, but while the defendant was fleeing the scene. There the Supreme Court stressed that, despite the immediate attack being over, the caller "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" Similarly, the caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot

> outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

911 calls and statements made to officers responding to the calls are not testimonial: ***United States v. Brun,*** 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford v. Washington.* The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

> **Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers**

are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime.

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave,* 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that even if *Crawford* were retroactive, the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. While the *Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it gave examples of the type of statements that are testimonial and with which the Sixth Amendment is concerned — namely, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." We do not think that Elg's statements to the police she called to her home fall within the compass of these examples. Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> **Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime.**

Expert Witnesses

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry,* 472 F.3d 910 (D.C. Cir. 2007): The court declared that *Crawford* "did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703." ***See also United States v. Law,*** 528 F.3d 888 (D.C. Cir. 2008)**:** Expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, *Crawford* did not involve expert witness testimony. "Thomas testified based on his

experience as a narcotics investigator; he did not related statements by out-of-court declarants to the jury."

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly related to the jury*: United States v. Lombardozzi,* 491 F.3d 61 (2d Cir. 2007): In an extortion case, the government called a criminal investigator who testified as an expert to the structure of La Cosa Nostra and to the defendant's affiliation with organized crime. The expert based his opinion as to the defendant in part on testimony from cooperating witnesses and confidential informants. The defendant argued that the introduction of the expert's testimony violated *Crawford* because it was based in part on testimonial hearsay. The court observed that *Crawford* is inapplicable if testimonial statements are not used for their truth, and noted the circuit's previous determination "that it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Forfeiture

Constitutional standard for forfeiture — like Rule 804(b)(6) — requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 128 S.Ct. 2678 (2008): The Court in an opinion by Justice Scalia held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had

assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. Justice Scalia found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding, rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate a retaliatory intent. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2d Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have

actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2d Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2d Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2d Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Informal Circumstances, Private Statements, etc.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of some of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2d Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were

the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Statements made by victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules."

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken,* 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime — but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that she was speaking to a government agent. It explained as follows:

> McNeese's attempt to trick Johnson into revealing the location of the bodies. McNeese was acting as a government agent when he received the maps from Johnson. McNeese most likely anticipated Johnson's maps would be used at a later trial. However, we conclude that the proper focus is on Johnson's expectations as the declarant, not on McNeese's expectations as the recipient of the information. Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright,* 536 F.3d 819 (8th Cir. 2008): The defendant was charged with, among other

things, shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a conversation he had on the night of the shooting with the other victim. This was a private conversation before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. The court held that even if *Crawford* were retroactive (a proposition later rejected by the Supreme Court), it would not help the defendant. The victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: *United States v. Brown,* 441 F.3d 1330 (11th Cir. 2006): The defendant was convicted of murder of a federal employee. At trial, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked whether the defendant had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Interrogations, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero,* 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial", it clearly covers sworn statements by accomplices to police

officers.

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez,* 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth — to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* for the following reasons:

> First, the statement was given during a police interrogation, which meets the requirement set forth in *Crawford* where the Court indicated that the term "testimonial" at a minimum applies to "police interrogations." Second, the statement is also considered testimony under *Crawford's* reasoning that a person who "makes a formal statement to government officers bears testimony." Third, we find that Shellee's statement is testimonial under our broader analysis in *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004). . . We think that any reasonable person would assume that a statement that positively identified possible suspects in the picture of a crime scene would be used against those suspects in either investigating or prosecuting the offense.

Reporter's Note: In *Cromer,* discussed in *Pugh*, the court held that a statement of a confidential informant to police officers, identifying the defendant as being a drug dealer, was testimonial, because it was made to the authorities with the intent that it would be used against the defendant. *See also United States v. McGee,* 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement . . . implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the introduction of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Police officer's count of marijuana plants found in a search is testimonial: *United States v. Taylor,* 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer as to the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview pursuant to a forensic interrogation technique to detect sexual abuse. The Court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court found that the only difference between the questioning in this case and that in *Crawford* was that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same." But the court found that this was "a distinction without a difference" because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

Statements made by a child-victim to a forensic investigator are testimonial: *United*

States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial).

> **Note: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Davis*. There, the Court declared that it would find an excited utterance to be testimonial only if the *primary* purpose was to prepare a statement for law enforcement rather than to respond to an emergency.**

Compare United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.").

Statements made by a child-victim to a detective are testimonial: *Bockting v. Bayer,* 399 F.3d 1010 (9th Cir. 2005), *rev'd on other grounds,* 127 S.Ct. 1173 (2007): The court found that statements of a child-victim of sexual abuse, made in an interview with a police detective, were testimonial within the meaning of *Crawford*. The court also held that *Crawford* was retroactive to cases on habeas review — that ruling that was reversed by the Supreme Court, see *infra*.

Machines

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of

a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine — that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alchohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." The court noted that the notes of a chemist, evaluating the data from the machine, were testimonial, but it found no plain error in the admission of these notes. The court also observed that it is "problematic" to entertain a *Crawford* claim for plain error because it some cases it may be more advantageous for the defendant to contest hearsay than live testimony. It explained that hearsay "is usually weaker than live testimony" and in this case the defendant could argue that the government failed to produce the person who actually did the test, and that flaws in procedures may have been omitted from the lab notes.

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a cd of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the cd was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the

purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

Medical Statements

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,* 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Even under a broader definition of "testimonial", Taylor could not have reasonably expected that his statements would be used in a later trial, as they were made under a promise of confidentiality. Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Not Offered for Truth

Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his

conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* – as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a party admission, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's admissions. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Statements by informant to police officers, offered to prove the "context" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the Constitution was not violated because the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

> The government's articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

Accomplice's confession, when offered to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay — as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" — for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitization of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Confrontation Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case."

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan,* 419 F.3d 172 (2d Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

The *Logan* court declared in dictum that the false alibi statements were testimonial within the meaning of *Crawford.* The statements were made during the course of and in furtherance of a conspiracy, and ordinarily such statements are not testimonial, as the Court stated in *Crawford*. But

in this case, the accomplices "made their false alibi statements in the course of a police interrogation, and thus should reasonably have expected that their statements might be used in future proceedings." The court concluded that in light of *Crawford's* "explicit instruction" that statements made during police interrogation are testimonial "under even a narrow standard, the government's contention that these statements were non-testimonial is unconvincing."

> **Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2d Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart,* 433 F.3d 273 (2d Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other. The government offered these statements to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford*, even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort

> to obstruct would fail from the outset. . . . The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Accomplice statement to police officer was testimonial, but did not violate the Confrontation Clause because it was not admitted to show it was false: *United States v. Trala,* 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3d Cir. 2005) (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford*. ***See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness — by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime — did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate *Crawford*, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." The court found the error in admitting the hearsay to be harmless.

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: *United States v. Gibbs,* 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. These firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched." ***See also United States v. Deitz,*** 577 F.3d 672 (6th Cir. 2009) (testimony about accusations by confidential informants did not violate the defendant's right to confrontation because it was offered only to explain why officers followed the defendant).

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": *United States v. Nettles,* 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government arranged to put him in contact with an undercover informant who purported to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine: "We note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation

with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was an admission, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth").

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert"identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted."

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth — that the witness saw the man he described pointing a gun at people — but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain

the officers' actions in the course of their investigation — "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the Court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth — indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,* 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,* 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the confrontation clause, even though the statement was testimonial.

It is notable that the court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."

Present Sense Impression

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford*, but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Records, Certificates, Etc.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v.*

Massachusetts, 129 S.Ct. 2527 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* — beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation — are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of many lower courts that have admitted autopsy reports and other certificates after *Crawford* — these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case." Again, many lower courts after *Crawford* have distinguished between ministerial affidavits on collateral matters from Raleigh-type ex parte affidavits; this reasoning is in conflict with *Melendez-Diaz*.

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all, because a machine can't make a "statement", and in terms of confrontation, a machine does not provide "testimony." This case law appears to survive the Court's analysis in *Melendez-Diaz.*

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

6. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that merely authenticate proffered documents are not testimonial.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the absence of a public record.

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case is prohibited.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti,* 519 F.3d 319 (D.C. Cir. 2007): The Court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Note: While 902(11) may still be viable after *Melendez-Diaz,* some of the rationales used by the *Adefehinti* court are suspect. First, the *Melendez-Diaz* Court seems to reject the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority rejected the government's argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

On the other hand, the *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. But while Rule 902(11) does have a notice and procedure, but there is no provision for a demand for production of government production of a witness. Essentially the *Adehefinti* court interpreted the notice procedure to be the subpoena alternative that is being reviewed by the Supreme Court this term in *Briscoe v. Virginia.*

It can also be argued that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial. But the problem with that argument is that the certificate does more than establish the genuineness of the business record.

For a further discussion of the possibilities of amending Rule 902(11) in light of *Melendez-Diaz,* see the memo in the agenda book.

Warrant of deportation is not testimonial: ***United States v. Garcia***, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

Other circuits have reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation s recorded routinely and not in preparation for a criminal trial").

Note: Warrants of deportation probably still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition the crime has not been committed at the time it's prepared. Warrants of deportation are more akin to certificates of maintenance of forensic equipment, which the Court found to be nontestimonial in *Melendez-Diaz.*

Proof of absence of business records is not testimonial: ***United States v. Munoz-Franco,*** 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> Although the Court has yet to articulate a precise definition of "testimonial," it is beyond debate that the Board minutes are nontestimonial in character and, consequently, outside the

class of statements prohibited by the Confrontation Clause. The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved.

Autopsy reports are not testimonial: *United States v. Feliz,* 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8)(B). The court concluded that to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford*. Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6) cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and *Davis*. The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial." With respect to Rule 803(8)(B), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found inadmissible:

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

Note: The court's emphasis on a practical result is problematic under the majority's analysis in *Melendez-Diaz.* The dissenters in *Melendez-Diaz* argued vehemently that requiring live testimony of the analyst would be impractical and would impose substantial and sometimes insurmountable obligations on the government. The majority's response was that it had no authority to consider burdens, because the certificate was testimonial and admission of testimonial hearsay in the absence of cross-examination violates the Confrontation Clause.

This does not mean, however, that autopsy reports are necessarily testimonial after *Melendez-Diaz.* The forensic report in *Melendez-Diaz* was prepared *solely* for litigation and so fit squarely within the Court's definition of "testimonial." Under *Davis*, it is not enough that a report might foreseeably be used in a litigation — use in litigation has to be the primary purpose of the report. Under that test, a good argument can still be made that autopsy reports are not testimonial. And notably, the *Melendez-Diaz* Court agreed with the argument that if a report is admissible under Rule 803(6) or (8), it is by that fact nontestimonial — because in order to be admissible, it can't be prepared primarily for purposes of litigation.

Certificate of the non-existence of a public record found not testimonial: *United States v. Rueda-Rivera,* 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The court found that the record was not "testimonial" under *Crawford*, declaring as follows:

> The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.

Other courts have found that certificates proving the absence of public records are not testimonial. See, e.g.: United States v. Urqhart, 469 F.3d 745 (8th Cir. 2006) (arguing that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford*."); ***United States v. Cervantes-Flores,*** 421 F.3d 825 (9th Cir. 2005) (noting that while the *certificate* was prepared for litigation, the underlying records were not — though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence would still be so because the certificate is prepared solely for purposes of litigation).

Note: For reasons discussed in the analysis of *Melendez-Diaz, supra,* it is likely that CNR's are testimonial, and that the above cases are no longer good law. Certificates offered to prove the absence of a public record are prepared solely for purposes of litigation. Nor is it relevant under *Melendez-Diaz* that the records are not about contested historical facts like the *ex parte* testimony in the Raleigh case.

For a discussion about a possible amendment to Rule 803(10), see the memo in the agenda book.

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

> ***Note:*** **The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

> **Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared for litigation and no certificate or affidavit was prepared for use in the litigation.**

Post office box records are not testimonial: *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz.*

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical report, the court reasoned as follows:

> Given the focus of the courts of appeals and our own precedent on the declarant's reasonable expectations of whether a statement would be used prosecutorially, Ellis may appear to be on strong ground in arguing that the results of his medical tests were testimonial. It must have been obvious to Kristy (the laboratory technician at the local hospital) that her test results might end up as evidence against Ellis in some kind of trial. . . .
>
> Nevertheless, we do not think these circumstances transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause. There is no indication that the observations embodied in Ellis's medical records were made in anything but the ordinary course of business. Such observations, the Court in *Crawford* made clear, are nontestimonial. And we do not think it matters that these observations were made with the knowledge that they might be used for criminal prosecution. Prior to the Court's decision in *Davis*, two other courts of appeals decided that certificates of nonexistence of record ("CNR"), admitted under Rule 803(10) and used to prove an alien did not receive permission from the Attorney General to reenter the country, were nontestimonial despite the fact they were prepared by the government in anticipation of a criminal prosecution. . . . The focus of these decisions was that the preparation of these CNRs was routine, and the statements in them were simply too far removed from the examples of testimonial evidence provided by *Crawford*.

As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. Therefore, when these professionals made those observations, they--like the declarant reporting an emergency in *Davis*--were "not acting as . . . witness[es];" and were "not testifying." See *Davis*, 126 S. Ct. at 2277. They were

employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are certainly similar to those in *Melendez-Diaz.* That said, toxicology tests conducted by private organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz,* the less the tester knows about the use of the test, and the less involvement by the government, the better.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.
>
> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. See the separate memo in the agenda book on the advisability of amendment Rule 902(11) and other Federal Rules in light of

Melendez-Diaz.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson,* 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation.

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that the her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Foreign business records are not testimonial: *United States v. Hagege,* 437 F.3d 943 (9th Cir. 2006): In a prosecution for bankruptcy fraud and related offenses, the trial court admitted foreign business records under 18 U.S.C. § 3505. Similar to Rule 803(6), section 3505 allows the foundation requirements for the business records exception to be established by certification. The defendant argued that admission of the foreign business records violated his right to confrontation after *Crawford.* The court rejected this argument and affirmed the convictions. It relied on the

statement in *Crawford* that business records are an example of the kind of statements "which by their nature are not testimonial." The court noted that "[t]he foreign certifications attesting to the authenticity of the business records were not admitted into evidence. Thus, we do not consider whether admission of the foreign certifications would have violated the Confrontation Clause under *Crawford*."

Note: This result is unaffected by *Melendez-Diaz,* as it involves only the business records, and not the foreign certification. (Certifications that do nothing but authenticate another document may still be nontestimonial, as discussed above.)

Absence of records in database is not testimonial; and drug ledger is not testimonial: *United States v. Mendez,* 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford*, "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is only about the absence of public records — records that were not prepared in testimonial circumstances. If that absence had been proved by a *certificate,* then the Confrontation Clause, after *Melendez-Diaz,* would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . .In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction — those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens,* the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial — even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined.

Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford

Supreme Court

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting,* 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

See also United States v. Barraza, 576 F.3d 798 (8th Cir. 2009) (defendant could not rely on

Roberts test to exclude non-testimonial hearsay admissible under Rule 803(3) as a statement of the victim's state of mind).

V

FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Physician interest group suggestions for amendments to the Evidence Rules
Date: October 15, 2009

A "physician interest group" has submitted a letter advocating a number of amendments to the Evidence Rules. The Advisory Committee has a statutory obligation to consider comments from members of the public and to respond to those making comments.

This memo is intended to assist the Evidence Rules Committee in forming a response to the package of suggestions. [The letter from the interest group is attached to this memorandum.]

The bottom line is that none of the suggestions for change appear to provide a benefit that would outweigh the substantial cost of an amendment to the Evidence Rules.

1. Suggestion for a New Rule Establishing a Physician-Patient Privilege

The physician interest group requests that the Evidence Rules Committee propose a physician-patient privilege as an amendment to the Evidence Rules — presumably a new Rule 503. It states that "the Advisory Committee on Evidence Rules does not seem averse to adding specific privilege provisions, recently proposing Rule 502 regulating certain aspects of the lawyer-client privilege that became law."

As the interest group recognizes, there is no privilege under federal common law for communications made between patients and physicians. The Supreme Court established a privilege for communications between patients and *psychotherapists and clinical social workers* in *Jaffee v. Redmond,* 518 U.S. 1 (1996). But the Court in *Jaffee*, in establishing that privilege, emphasized that the entire relationship between psychotherapist and patient is based on a free flow of communication and a reliance on confidentiality; and it distinguished the physician-patient privilege,

which was not so centrally based on the need for confidentiality. To date, no federal case has recognized a physician-patient privilege under federal common law.

The interest group recognizes that there are a number of possible exceptions to a physician-patient privilege that will have to be worked out, such as: should it be absolute or qualified? The interest group promises to provide further findings concerning the proper scope of the privilege but concludes that in any event, the privilege should be codified in the Federal Rules of Evidence.

Reporter's Comment: It's fair to state that the Rule 502 experience does not cut in favor of proposing new privileges. Quite the contrary. Rule 502 created no new privileges, in fact it set forth no rule or standard about what was privileged and what was not. Indeed, Rule 502 was all about waiver and yet it did not even purport to establish when a privilege was waived. Rule 502 was thus a limited rule and was essentially uncontroversial, supported by both plaintiffs and defendants' groups. And yet the Rule was held up by staffers and almost foundered in Congress. If it had been delayed another week (pre-TARP) it probably would never have been enacted.

It seems clear that establishing a doctor-patient privilege would be more controversial than Rule 502. The impression given in the Rule 502 process was that if there was any opposition *at all* from interests aligned with either political party, the legislation was doomed. Substantive privilege law raises questions of politics, lobbying, and interests that are far removed from the rulemaking process.

It can also be argued that the benefit of enacting a federal physician-patient privilege is only marginal. To the extent the federal case is in diversity, the doctor-patient privilege is *already* applicable because every state has such a privilege and the state law of privilege is controlling in diversity cases. So the cost and the risk of proposing a new privilege would pay off only in those (probably few) federal question cases in which a communication to a doctor is relevant. And this set of cases would be narrowed because some statutes *already* protect certain doctor-patient communications at the federal level. See, e.g., HIPAA, and 42 U.S.C. §290ee-3(a) (prohibition on revealing confidential information in a drug abuse prevention program).

If a physician-patient privilege were proposed, a number of daunting drafting alternatives would be raised. Among them:

- Is the privilege qualified or absolute?
- Is there an exception for dangerous patients, and if so, in what cases should it apply?
- Does the privilege apply if non-medical personnel are present? What about medical personnel who are not doctors?
- Under what circumstances, precisely, is the privilege waived? (The waiver question has spawned significant and often conflicting case law in the states).
- Is there an exception for reporting child abuse, domestic abuse, or any other crime?
- Must the information be related to the condition for which the patient is being treated?
- Does the privilege protect only communications or does it also protect physical conditions

and manifestations? (States are divided on this question).

It would appear, therefore, that the costs of proposing and promulgating a physician-patient privilege far outweigh any benefits to a codified rule of privilege. If, however, the Committee believes that proposing a physician-patient privilege is a worthwhile project, then a draft rule will be prepared for the next meeting.

2. Suggestion for a New Rule Establishing a Peer-Review Privilege:

The physician interest group proposes an evidence rule that would provide a privilege for confidential communications made during the peer review process, e.g., when a committee of physicians evaluates the work of a colleague. The interest group states that a peer-review privilege "is recognized by many states but it does not exist in federal common law." It concludes that "the establishment of a peer-review privilege on the federal level will serve the legitimate interests of the medical community and the public good."

The Supreme Court *unanimously* refused to recognize a common-law privilege for peer review in *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990). That case involved a Title VII inquiry into the denial of tenure. The Court reasoned that the interest in rooting out discrimination outweighed the interest in protecting the confidentiality of the tenure review process. The Court was especially concerned with the possible breadth of a peer-review privilege:

> Acceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers? It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms. We perceive no limiting principle in petitioner's argument.

Reporter's Comment: The prior discussion on the physician-patient privilege sets forth the arguments against proposing *any* substantive privilege. But there are additional reasons that cut against proposing a peer-review privilege. Most importantly, the effort would essentially seek to overrule a unanimous Supreme Court opinion. The Evidence Rules Committee has never proposed an amendment that would overrule a Supreme Court opinion.[1] And it should also be noted that a peer-review privilege is likely to be strenuously opposed by the plaintiffs' bar — making it very

[1] Notably, in the 1990's a number of Committee members undertook an effort to propose an amendment that would have overruled the result in *Bourjaily v. United States.* But by the time it was actually proposed (an enacted in 1997), the amendment actually *codified and extended Bourjaily.*

difficult if not impossible to get it through Congress.

Another problem with the proposal is line-drawing. As the *EEOC* Court notes, any number of professions employ a peer review process and each of those professions would clamor for protection. Why should physicians get special treatment? That's the kind of lobbying/special interest question that gets played out in Congress, not in the Rules process.

When the political problem of proposing *any* substantive privilege rule is added to the appearance problem of trying to overrule a Supreme Court opinion (at least as applied to physicians) it seems that the costs involved in such a process outweigh any possibility of successful implementation of a useful rule of privilege.

3. Proposed Amendment to Rule 407:

The physician's interest group contends that the protection of Rule 407 has been undermined by the use of subsequent remedial measures for two purposes: 1) to prove feasibility, and 2) for impeachment. The group recognizes that feasibility and impeachment are two designated proper purposes for subsequent remedial measures under Rule 407. But it argues that "the exceptions have all but swallowed the rule." The group proposes that "Rule 407 be amended to minimize abuse of the permissible use of evidence of remedial measures."

Reporter's Comment: The case law does not bear out the interest group's assertion that the Rule 407 exceptions have swallowed the rule. The courts have in fact recognized the danger of overuse of the exceptions and have acted to prevent their overuse. Courts have carefully limited the feasibility and impeachment exceptions so that they can be controlled by the defendant, and subsequent remedial measures can thereby be kept out of the trial. What follows is a discussion taken in part from the Federal Rules of Evidence Manual on the feasibility and impeachment exceptions:

> ***Feasibility:*** Rule 407 by its terms is not applicable if the feasibility of making a suggested change to a product or condition *is controverted* by the defendant. With respect to physicians: assume that the plaintiff has been injured in an operation and claims negligence. Ordinarily the plaintiff will have to suggest some alternative action or procedure that the doctor should have undertaken that would have prevented the injury. If the defendant claims that the alternative suggested was not feasible — perhaps because it was physically impossible or it was not within the state of the art at the time — then feasibility is controverted and the Rule does not prevent the admission of subsequent changes.
>
> The feasibility "exception" to Rule 407 is rarely applicable, however, because feasibility is a weak defense if the defendant has in fact made a change to the process or

condition after the plaintiff's injury. It is difficult, if not foolhardy, to argue that a suggested change was prohibitively expensive, physically impossible or beyond the state of the art when the change was in fact made after the injury. Consequently, most defendants concede or do not contest feasibility when subsequent remedial measures have been taken.[2] A concession or refusal to contest the issue prevents the plaintiff from arguing that feasibility is *controverted*, and therefore precludes the use of subsequent remedial measures to prove feasibility.[3] The defendant remains free to defend on the ground that the suggested change, while feasible, would not have made the process or condition significantly safer; or would have resulted in other disadvantages such that the defendant's original conduct was reasonable; or was not required at the time of the incident because the need for a change could not reasonably have been foreseen. As one court has put it, "where a defendant argues about the trade-offs involved in taking precautionary measures, it is not placing *feasibility* in controversy."[4]

In sum, the feasibility exception has not swallowed the Rule 407 exclusion. As long as the

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See, e.g., Cameron v. Otto Bock Orthopedic Indus. Inc., 43 F.3d 14 (1st Cir. 1994) (``Dear Customer" letters sent out after the plaintiff's accident were properly excluded; the defendant offered to stipulate to the feasibility of providing the information set forth in the letters, so the letters were not admissible to prove feasibility).

3

See, e.g., Mills v. Beech Aircraft Corp., 886 F.2d 758, 764 (5th Cir. 1989) (revised manual, offered to show the feasibility of providing a better installation instruction, held properly excluded under Rule 407: ``The feasibility exception to Rule 407 does not apply when feasibility is not in controversy. The defendants in the present case did not contest the feasibility of a better installation instruction, but rather maintained that the instructions in the [original] manual were acceptable."); Probus v. K-Mart, Inc., 794 F.2d 1207, 1210 (7th Cir. 1986) (subsequent remedial measures were properly held not admissible to prove feasibility where ``the plaintiff does not contend that the defendants testified that the material used in the end cap was either the best material available or that the use of another material would not have been feasible").

4

Gauthier v. AMF, Inc., 788 F.2d 634, 638, *amended*, 805 F.2d 337 (9th Cir. 1986):

> In this case, AMF conceded that the safety devices were technologically and economically feasible but then argued that they concluded that the safety problem was not great enough to warrant the trade-off of consumer frustration, increased complexity of the product, and risk of consumer efforts to disconnect the safety device.

defendant does not actively put feasibility in controversy, the subsequent remedial measure will be excluded. And it is only fair that if the defendant *does* affirmatively claim that a process or change is not feasible, the plaintiff should be allowed to rebut with evidence of the fact that the allegedly infeasible action was actually taken by the defendant at a later date.

Impeachment: Impeachment of witnesses is specifically listed as a permissible purpose for admitting subsequent remedial measures. The mode of impeachment contemplated is that of contradiction — the subsequent remedial measure may be relevant to contradict testimony from the defendant's witness, thus making that witness less credible before the jury.

The problem is that almost any testimony given by defense witnesses could be contradicted at least in some minimal way by a subsequent remedial measure. If the defendant's expert testifies that a doctor's process was reasonable, a subsequent remedial measure *could* be seen as contradicting that testimony. If the defendant is asked on cross-examination whether the defendant thinks that all reasonable safety precautions had been taken at the time of the injury, and answers in the affirmative, then a subsequent remedial measure *could* be seen as contradicting that testimony.

If the impeachment exception means simple contradiction, then the physician's interest group is correct: the impeachment exception to Rule 407 would threaten to swallow the Rule itself, because almost any testimony from the defendant would trigger it. But contrary to the assertion of the interest group, the impeachment exception has been *narrowly* applied, precisely to prevent it from swallowing the rule of exclusion. [5] Accordingly, the courts have held that a subsequent remedial measure is not admissible for impeachment if it is offered for simple contradiction of a defense witness's testimony. [6]

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[5] See, e.g., Harrison v. Sears, Roebuck & Co., 981 F.2d 25 (1st Cir. 1992) ("Rule 407's impeachment exception must not be used as a subterfuge to prove negligence or culpability"; a desire merely to undercut an expert's qualifications cannot be sufficient to trigger the impeachment exception, or else the exception could swallow the rule of exclusion).

[6] See, e.g., Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992) (the impeachment exception does not apply merely because the expert testified that the product was of an excellent and proper design; if the impeachment exception applied to simple contradiction, the exception would swallow the rule); Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984) (no impeachment with subsequent remedial measures was permissible where defense witnesses merely testified to the safety of the product under

On the other hand, if the defendant's witnesses testify in superlatives — e.g., “this is the safest product on the market” or “the doctor should have got a genius award for doing the operation the way he did” — then the evidence of a subsequent remedial measure provides more than simple contradiction. It shows that the witness puffed and exaggerated while on the stand. As such, the remedial measure provides a more direct and probative form of impeachment, which justifies, according to the courts, a limited exception to the rule excluding subsequent remedial measures. [7] Likewise, if defense witnesses testify that the product or condition has not been changed since the injury, then evidence of subsequent remedial measures provides a more direct and probative, and hence a permissible, form of impeachment through contradiction. [8]

It follows that defendants can keep out subsequent remedial measures offered for impeachment by simply avoiding testimony that is outrageous or directly contradictory of a subsequent change. It’s hard to argue that a defendant should be permitted to claim that the process was the safest known to humanity, and it has never been changed, and then rely on Rule 407 to exclude a highly probative remedial measure. That is turning the shield of Rule 407 into a sword.

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normal circumstances).

[7] See, e.g., Wood v. Morbark Indus., 70 F.3d 1201 (11th Cir. 1995) (post-accident change to the design of a woodchipper was admissible for impeachment where the president of the corporate defendant testified that the woodchipper contained ``the safest length chute you could possibly put on the machine"); Muzyka v. Remington Arms Co., 774 F.2d 1309 (5th Cir. 1985) (subsequent remedial measures, offered for impeachment purposes, were erroneously excluded where defense witnesses testified that the product ``embodied the ultimate in gun safety" and that it was ``*the* best and *the* safest rifle of its kind on the market"; the jury was improperly denied ``evidence in impeachment of the experts who spoke in those superlatives").

[8] See, e.g., Harrison v. Sears, Roebuck & Co., 981 F.2d 25, 31 (1st Cir. 1992) (``A more direct impeachment use of subsequent remedial measure evidence would exist if Appellees' witness stated that he did not change the product after the alleged accident was brought to his employer's attention.").

In conclusion, there appears to be no need or justification for amending Rule 407 to narrow, or abrogate, the exceptions for feasibility and impeachment.

4. Proposed Amendment to Require a Jury Instruction to Give Added Weight to a Specialist's Testimony:

The physician's interest group believes that "the rules should permit the jury to give added weight to the testimony of an expert with an advanced level of experience, training, education or certification relevant to the fact at issue in the case." The group proposes that "rule 702 should be amended by adding a proviso at the end thereof, permitting a jury to give added weight to the testimony of specialists." In a footnote, the interest group states that "care must, of course, be taken to either limit its application to medical cases or to avoid any unintended consequences in non-medical cases."

Reporter's Comment: It is axiomatic that the Evidence Rules deal with the admissibility, and not the weight, of the evidence. The only Evidence Rule that even *refers* to the weight of the evidence is Rule 104(e), and it only does so to emphasize that the judge and the rules deal with admissibility, while questions of weight are left to the jury.

Nor is there any Evidence Rule that purports to regulate a trial court's instructions about the weight of the evidence. Indeed, the Advisory Committee proposed a Rule 105 that would have permitted the judge to sum up the evidence and comment to the jury upon the weight of the evidence. That rule was rejected by the House, at least partly on the ground that issues concerning the weight, as opposed to the admissibility, of evidence were not properly placed in the Evidence Rules. [9]

Notably, the Senate went along with the House's deletion of proposed Rule 105, "with the understanding that the present Federal practice, taken from the common law, of the trial judge's discretionary authority to comment on and summarize the evidence is left undisturbed." So the history can be read to support the contention that a jury instruction on the weight of the evidence is not properly placed in the Evidence Rules — and at any rate an Evidence Rule is unnecessary because judges have discretion to provide such an instruction.

It would seem that the proper target for the interest group's suggestion is a model jury instruction, not the Federal Rules of Evidence.

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[9] Another reason for rejecting the proposal was that many states did not permit such judicial comment; and lawyers from those states did not want a Federal Rule that could serve as a model for changing the existing state practice.

Beyond the question of placement, the "specialist" instruction would be difficult to craft within an Evidence Rule. The interest group suggests that the instruction should be limited to "medical cases" and should be required when the expert has an "advanced level of experience, training, education or certification." But those specifications lead to a number of questions:

> 1. What is a "medical" case and how would you define a "medical" case in an evidence rule? (Notably, no other rule limits applicability of an Evidence Rule by subject matter of the case.)
>
> 2. Why should the instruction be limited to "medical" cases — why isn't it equally necessary in toxic tort cases, product design cases, discrimination cases, criminal cases, etc.?
>
> 3. What does an "advanced level of experience" mean? Who makes the finding that the expert is sufficiently "advanced" in order to trigger the instruction? If it is the judge, isn't the judge taking the credibility assessment away from the jury?
>
> 4. What does "added weight" mean? How much is to be added? What's the baseline to which it is added?

Given these difficult questions, it's probably no surprise that none of the circuits have a pattern instruction that looks anything like the one proposed by the physician's interest group. The closest instruction is of the type found in Third Circuit 2.11, which provides as follows:

> You have heard [will hear] testimony containing opinions from [name of witness]. In weighing this opinion testimony, you may consider [his/her] qualifications, the reasons for [his/her] opinions, and the reliability of the information supporting those opinions, as well as the factors I have previously mentioned for weighing the testimony of any other witness. The opinion of [name of witness] should receive whatever weight and credit, if any, you think appropriate, given all the other evidence in the case.

The Third Circuit considered an instruction like the one proposed by the physician's interest group, and rejected it, because of the difficulty of instructing on "added weight" and "advanced level of experience." (I know, because I wrote the instructions on this subject for the Third Circuit.). So if the interest group proposal is too difficult to implement even in the context of a model jury instruction, it seems especially out of place in Rules of Evidence that deal with admissibility and not weight.

5. Proposal for a Mandatory Reliability Hearing on Experts

The physicians' interest group criticizes the current state of the law on *Daubert* hearings,

claiming that "sometimes inadequate attention is given to proper procedures for determining the reliability of expert opinions." It concludes that "a matter as important as the reliability of expert testimony deserves a formal pre-trial hearing, preferably in advance of the bar date for summary judgment motion." The interest group proposes "the addition of a new Rule 707 imposing such procedural requirement."

Reporter's Comment:

The Evidence Rules are sparse on procedure. Presumably that is because there are better places to put procedural rules — such as the Federal Rules of Civil and Criminal Procedure! There is only one Evidence Rule that requires a judge to hold a hearing — Rule 412. The justification for placing a relatively detailed procedural requirement in Rule 412 was that the rules of Civil and Criminal Procedure did not have any specific provisions on rape cases, so it was better to place all rules on this subject matter in a single rule. In contrast, the interest group proposal is not limited by subject matter; and both the Civil and Criminal Rules provide other procedural regulation of expert testimony. See Civil Rule 26 and Criminal Rule 16.

It seems fair to state that procedural details should be placed in Evidence Rules only as a last resort. Lawyers look for procedural rules in the Civil or Criminal Rules in the first instance, so procedural rules should generally be placed there. That approach was recognized in the 2000 amendment to Evidence Rule 702. The Advisory Committee considered a number of procedural requirements that could be added to the amendment — including mandatory *Daubert* hearings — and concluded that it was not appropriate to impose such procedural requirements in the Rule. The Advisory Committee Note explains as follows:

> The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The* Daubert *Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

Besides problems of location, the interest group proposal may be questioned on the merits. Requiring a mandatory *Daubert* hearing may well lead to unnecessary expenditure of time and money. For example, in *Louis Vuitton v. Dooney and Bourke*, 525 F.Supp.2d 558 (S.D.N.Y. 2007), the Special Masters reviewing *Daubert* motions considered holding a *Daubert* hearing and found

that it would be a waste of time. They explained as follows:

> The failure to hold a *Daubert* hearing may be an abuse of discretion when the admissibility ruling is tantamount to a ruling on summary judgment and there are substantial disputed issues of fact that are pertinent to the reliability inquiry. *See, e.g., Padillas v. Stork-Gamco, Inc.,* 186 F.3d 412, 418 (3d Cir. 1999). * * *
>
> A *Daubert* hearing is unnecessary, however, when the evidentiary record pertinent to the expert opinions is already well-developed. For example, in *Miller v. Baker Implement Co*., 439 F.3d 407 (8th Cir. 2006), the court found that the trial judge did not abuse discretion in excluding the plaintiff's expert testimony without a *Daubert* hearing. It noted that the plaintiff submitted affidavits, a detailed explanation of the proposed expert testimony and a legal memorandum addressing the expert evidence issues. The court noted that while *Daubert* hearings "may be necessary in some cases, the basic requirement under the law is that parties have an opportunity to be heard before the district court makes its decisions." *Miller v. Baker Implement,* 439 F.3d at 412. *See also Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 249 (6th Cir. 2001) (*Daubert* hearing not required where the record was extensive and the *Daubert* issue was fully briefed by the parties).
>
> In this case, the parties have extensively briefed the issues pertinent to each expert's testimony. Each of the challenged experts has been subject to a lengthy deposition. Each of the expert's reports (as well as each of the reports of experts challenging the reliability of some of those reports) has been submitted to the court. It is difficult to think of anything missing from the presentation by the parties that could be pertinent to these *in limine* motions. Accordingly, we find that a *Daubert* hearing is unnecessary.

If the Special Masters were *required* to hold a *Daubert* hearing, they would likely have heard days of testimony that did nothing more than rehash everything that had already been stated. They would certainly have heard lawyer argument that had already been made in briefs, replies, sur-replies, and sur-sur- replies. It is difficult to see the merit in a rule requiring hearing when the actual need for it is quite fact-specific and nuanced. Essentially the interest group wants a mandatory rule where courts have found, time and time again, that courts require discretion to deal with the situation before them.

The proposed rule of evidence would reverse the law in every circuit — all the circuits have held that the decision to hold a *Daubert* hearing is within the discretion of the judge. No amendment to the Evidence Rules has ever been proposed that would have such a dramatic and disruptive effect across the entire federal court system. Moreover, the proposed amendment would take away the judicial discretion that courts have found necessary to deal with *Daubert* issues, and so it can be expected that it will be opposed by many members of the judiciary, not to speak of plaintiffs' counsel.

Finally, the need for the amendment is questionable. If the concern is that a court will refuse to hold a *Daubert* hearing when one is truly necessary, the answer is that the court's discretion is

not unlimited. There are a number of cases in which appellate courts have found abuse of discretion for failure to conduct a proper *Daubert* hearing. See, e.g., *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (*Daubert* hearing required where the paper record was so limited that the court could not have adequately evaluated the expert's methods); *Elcock v. Kmart Corp.* 233 F.3d 734 (3d Cir. 2000) (same); *Dodge v. Cotter Corp.*, 328 F.3d 1212 (11th Cir. 2003) (error in truncating the hearing so that it was "little more than a cursory review of the contested issues").

In sum, the proposal for an Evidence Rule that would mandate *Daubert* hearings can be questioned both in terms of placement in the Evidence Rules and on the merits.

Conclusion:

There is a good argument to be made that none of the suggestions from the physicians' interest group warrant a proposal for an amendment to the Evidence Rules. But if the Committee disagrees, a draft of any or all of the proposals can be prepared for the next meeting.

LAZARUS & ASSOCIATES
ATTORNEYS AT LAW

SUITE 400, 1850 M STREET, N W
WASHINGTON, D C 20036-5803

08-EV-A

KENNETH A LAZARUS
(LAZARUSLAW@AOL COM)

TEL (202) 457-0380
FAX (202) 452-1822

December 18, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Rules Amendments
For Consideration by the Advisory
Committee on Evidence Rules

Dear Mr. McCabe:

Professor Paul Rothstein of Georgetown University Law Center and I represent a physician interest group relevant to the Federal Rules amendment process, covering both the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Our physician interest group includes the American Medical Association, the American Academy of Neurology Professional Association, the American College of Obstetricians and Gynecologists, the American Academy of Otolaryngology – Head and Neck Surgery, the American Osteopathic Association, the Medical Group Management Association, the Physician Insurers Association of America and the American Association of Neurological Surgeons.

As the Advisory Committee on Evidence Rules moves toward the completion of its project to restyle the Federal Rules of Evidence, we offer for its consideration in formulating a new agenda a series of proposed amendments that we believe would further the interests of the public by promoting the efficiency and accuracy of trials and basic adversarial fairness in cases involving physicians

I. Evidentiary Privileges

In the original enactment of the Federal Rules of Evidence, Congress rejected an initially proposed codification of a broad range of specific evidentiary privileges It never disapproved the privileges on the list. Rather, it simply elected not to codify them. Pub. L. 93-595. The ultimate solution was a single privilege rule (Rule 501) creating a jurisdictional bifurcation that is unusual for the Federal Rules of Evidence and providing

(a) a common-law evolutionary process (judge-made law) that is controlling for privileges in pure federal-law cases; and (b) reliance upon state privilege law for "diversity" cases.

As a result of the reliance on common-law regarding privileges, the benefits flowing from the codification of federal evidentiary rules - easy availability, uniformity and orderly development - are not provided to lawyers and judges in the privilege area. Evidentiary law regarding privilege continues to grow in a haphazard and disjointed fashion, varying from circuit to circuit and, at times. from district to district Clients continue to pay for extensive legal research on privilege issues for no good purpose.

Despite Congressional rejection of the specific privilege approach, the Advisory Committee on Evidence Rules does not seem averse to adding specific privilege provisions, recently proposing Rule 502 regulating certain aspects of the lawyer-client privilege that became law.

We propose the delineation of specific evidentiary privileges.

A. Physician-Patient Privilege (New Rule)

The physician-patient relationship, unlike that of attorney-client, did not give rise to a testimonial privilege at common law. However, in 1828, New York became the first jurisdiction to alter the common-law rule by establishing a general statutory privilege covering physician-patient communications. Since that time, many, perhaps most, states have followed New York's lead and enacted similar statutory provisions *See* N.Y.C P.L.R. § 4504 (a). With respect to the advisability of a general physician-patient privilege, *see* Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L J 125 (1973); *see also* Testimony of Professor Charles L. Black, Hearings on Proposed Rules of Evidence, 93d Cong., 1st Sess , Vol. 2 at 241-42 (1973) (arguing in support of a privacy basis for protection of physician-patient discussions).

Generally, federal common law, following Rule 501 of the Federal Rules of Evidence, does not provide a physician-patient privilege *See* Gilbreath v. Guadalupe Hosp Foundation Inc., 5 F.3d 785 (5th Cir.1993). However, the Supreme Court has created a more limited psychotherapist-patient privilege that is now a part of federal jurisprudence. Jaffee v. Redmond, 518 U.S. 1 (1996). On the status of physician-patient and psychotherapist-patient privilege in federal law, *see* generally P. Rothstein & S. Crump, Federal Testimonial Privileges, Ch. 3 (2007-2008 Edition, West Publishing)

Our group believes that there is something very important at stake in

communications between a patient and his physician. If a patient knows that his confidences may someday be disclosed, he may hesitate to tell all facts necessary to obtain appropriate treatment. Additionally, patients routinely go to their physicians expecting the highest degrees of privacy and confidentiality. Physician ethical codes honor such privacy and confidentiality. *See* AMA Code of Medical Ethics § 5.05 (1994 ed.) ("information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree") At the same time, however, our group is sensitive to competing demands, including the search for truth that is inherent in the judicial process and certain calls for transparency incident to the efficient administration of our health-care systems. There are situations when it is in the public interest to disclose a patient-physician communication, *see, e.g.,* 45 CFR § 164 512, the HIPAA rule, authorizing disclosure in prescribed circumstances..

Accordingly, our group is undertaking a review of the proper scope of the physician-patient privilege. Should it be limited to the psychotherapist-patient relationship or should it be more broadly defined? Further, should it be absolute or limited in nature, yielding to higher interests in prescribed circumstances, consistent with the treatment accorded attorney-client communications under the federal common law. *See* Wells v. Rushing, 755 F.2d 376 (5th Cir. 1985); Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242 (D C Cir. 1977)

Regardless of the scope of the privilege, we believe that it should be codified in the context of the Federal Rules of Evidence. We shall share with you the results of our review regarding the proper scope of the privilege in due course

B. Peer-Review Privilege (New Rule)

"Peer review," as it relates to medical practice, is the system by which groups or committees of physicians review the work of a colleague to evaluate the soundness of the colleague's medical decisions in any given situation, normally in a hospital setting The practice helps to root out physician error which in turn, is intended to lead to better quality health care for patients. The practice is invaluable to the teaching and delivery of medical care. Physicians have an obvious interest in maintaining the confidentiality of peer review so as to encourage candor by those who review the physician's work, and to prevent such reviewers from becoming unnecessarily involved in a civil suit arising out of such reviews Patient privacy interests and rights are also implicated. We believe that he public interest is advanced by the recognition of confidentiality regarding such reviews.

An evidentiary peer-review privilege is recognized by many states but it does not

exist in federal common law. University of Pa. v EEOC, 493 U.S 182 (1990). For a helpful discussion of the interplay between state and federal law relating to the peer-review privilege, *see* Nilavar v. Mercy Health System-Western Ohio, 210 F.R.D 597 (S D.Ohio 2002).

We believe that the establishment of a peer-review privilege on the federal level, will serve the legitimate interests of the medical community and the public good.

II. Remedial Measures Amendment (Amendment to Rule 407)

Following injury or harm to a patient allegedly caused by the negligence of a physician, the physician may adopt remedial measures to minimize the recurrence of such injury or harm in order to improve patient safety and welfare. Such remedial measures might include modifications of surgical techniques or the establishment of additional screening criteria, preliminary to surgery.

Rule 407 of the Federal Rules of Evidence, in its current form, provides that evidence of subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. However, the rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures (if controverted) or impeachment.

The exclusion of evidence of a party's subsequent remedial measures as proof of the party's negligence or culpable conduct is based on the sound policy of encouraging parties to undertake beneficial safety measures Kelly v Crown Equipment Co., 970 F 2d 1273, 1276 (3d Cir 1992). But the admissibility of remedial measures, particularly to establish something as wide-open as "feasibility" or for purposes of "impeachment," almost completely undermines the salutary purpose of Rule 407. Although routinely admitted for authorized purposes, juries take proof of remedial measures as admissions of guilt. Thus, it appears to us that the exceptions have all but swallowed the rule. [1]/

[1]/ It should be noted that when Rule 407 does not bar the introduction of subsequent remedial measure evidence, it may still be ruled inadmissible under Rule 403 but only if the trial court expressly determines that the probative value of its permissible use is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

We propose that Rule 407 be amended to minimize abuse of the permissible use of evidence of remedial measures.

III. Expert Testimony Rules

We also offer for your consideration two proposed amendments to the Rules governing the utilization of expert testimony.

A. Added Weight For Testimony of Specialists (Amendment to Rule 702)

Lay witnesses may only testify to facts within their personal knowledge. Qualified experts, on the other hand, may present their opinions as evidence in a case

Rule 702 governs the admissibility of expert testimony. Because the resolution of many cases requires an understanding of scientific, technical or other types of specialized information, experts traditionally have been permitted to provide their opinions to jurors, applying their expertise to the facts in the case As long as an expert's opinions are determined by the court to be sufficiently reliable, they may be considered by the jury, basically on an equal footing with the opinions of any opposing expert. Of course, the qualifications of all experts are fair game for cross examination under existing law.

In medical malpractice cases, opinion testimony has particular significance and it is our view that the Rules should permit the jury to give added weight to the testimony of an expert "with an advanced level of experience, training, education or certification relevant to the fact at issue in the case." Thus, in an invasive cardiology malpractice case, the opinion testimony of a practicing, board-certified, invasive cardiologist could be given more weight by the jury than the opinion testimony of a non-practicing, general practitioner

Accordingly, we propose that rule 702 be amended by adding a proviso at the end thereof, permitting a jury to give added weight to the testimony of specialists, along the lines described above [2]/
Peter G. McCabe

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[2]/ In actually crafting such a rule, care must, of course, be taken to either limit its application to medical cases or to avoid any unintended consequences in non-medical cases.

B. Mandatory Reliability Hearing on Experts (Creation of New Rule 707)

Rule 702 incorporates the principle articulated in a series of cases beginning with Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); *see also* Kumho Tire Co. v Carmichael, 526 U.S. 137 (1999). Those cases hold that trial judges should admit expert testimony only if they first determine that the opinions proferred by the expert are reliable. Standards are provided for such determination In this respect, trial judges are expected to serve as "gatekeepers" for expert testimony. Under current law, the choice of the particular procedure to be utilized in determining reliability is generally left to the discretion of the trial judge. *See* United states v. Nichols, 169 F 3d 1255 (10th Cir. 1999), *cert. denied,* 526 U.S. 1007 (1999).

Uneven and sometimes inadequate attention is given to proper procedures for determining the reliability of expert opinions. Some courts base their rulings merely on the paper record in a case. Others do not take up the matter until the eve of trial. On occasion, a case is well into trial before it is discovered that "expert" testimony is properly excludable, technically unsound or representative of so-called "junk science " In the view of the practicing physicians that we represent, a matter as important as the reliability of expert testimony deserves a formal pre-trial hearing, preferably in advance of the bar date for summary judgment motions. Accordingly, we propose the addition of a new Rule 707 imposing such procedural requirement.

IV. Closing Note

Professor Rothstein and I are available to discuss our proposals with Professor Capra, other Reporters and/or members of the Advisory Committee. Our group appreciates the splendid work of the Advisory Committees and we want you to know that we intend to continue our active participation in the rules formulation processes.

Your consideration of our views is very much appreciated.

Sincerely,

Kenneth A Lazarus

cc: Professor Paul Rothstein, Georgetown University Law Center
Judge Lee H. Rosenthal, Chairman, Committee on Rules of Practice and Procedure
Judge Robert L. Hinkle, Chairman, Advisory Committee on Evidence Rules
Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules
George E. Cox, III, Esq., American Medical Association
Liza Assatourians, Esq., American Medical Association
Michael Amery, Esq., American Academy of Neurology Professional Association
Lucia DiVenere, American College of Obstetricians and Gynecologists
Amy Nordeng, J.D., Medical Group Management Association
Shawn Martin, American Osteopathic Association
Katie Orrico, Esq., American Association of Neurological Surgeons
Michael Stinson, Physician Insurers Association of America
Joy L. Trimmer, Esq., American Academy of Otolaryngology-Head and Neck Surgery

VI

FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Intercircuit conflict in applying Rule 804(b)(1)
Date: October 16, 2009

A circuit split has developed in the application of Rule 804(b)(1) — the hearsay exception for prior testimony — in a relatively narrow fact situation: the prosecutor calls a witness before the grand jury, and the witness gives testimony favorable to the defendant. At trial, the witness is unavailable (usually because he declares the Fifth Amendment privilege and the government refuses to immunize him) and the defendant offers the grand jury testimony under Rule 804(b)(1).

The 2nd and 1st Circuits have held that exculpatory grand jury testimony is usually inadmissible under Rule 804(b)(1). The D.C. and the 6th and 9th Circuits have held that such testimony is usually admissible.

A circuit split on the meaning of an Evidence Rule is a potential justification of an amendment of that Rule. This memo discusses the split in the circuits and provides some analysis on whether an amendment to Rule 804(b)(1) might be warranted. The memo concludes that an amendment to the Rule is probably not justified at this point.

Rule 804(b)(1):

The restyled Rule 804(b)(1) provides as follows:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

The dispute in the courts is over whether the government has a "motive to develop" exculpatory testimony at the grand jury that is "similar" to the motive it would have at trial.

2nd and 1st Circuit Position:

The leading Second Circuit case is *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993), in which two witnesses gave grand jury testimony that favored the defendant, then each declared their privilege and refused to testify at trial. The *DiNapoli* Court rejected the extreme views of both the government and the defendant — the government arguing that the prosecution *never* has a similar motive to develop testimony at the grand jury as it would have at trial, and the defendant arguing that the prosecution *always* has a similar motive to develop grand jury testimony as it would have at trial. The Court analyzed the question of similar motive as follows:

> The proper approach … in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding has at a prior proceeding an interest of *substantially similar intensity* to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings — both what is at stake and the applicable burden of proof — and, to a lesser extent, the cross-examination at the prior proceeding — both what was undertaken and what was foregone — will be relevant though not conclusive on the ultimate issue of similarity of motive. (Emphasis added).

Applying these principles to the facts, the *DiNapoli* Court found that the government did not, in the instant case, have a similar motive to develop the testimony of the witnesses at the grand jury as it would have had at the trial. The Court noted that at the time the witnesses gave exculpatory testimony at the grand jury, there was no doubt about probable cause as to any of the defendants in the case, because they had already been indicted, and the grand jury was simply investigating whether other targets should be indicted. As the Court put it, ``the grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the [conspiracy] existed and that the defendants had participated in it to commit crimes." In contrast, at trial, where the government has the burden to prove the defendants guilty beyond a reasonable doubt, the prosecutor would have had a substantial incentive to attack the testimony of exculpatory witnesses.

While the *DiNapoli* Court refused to establish a bright-line rule, it is clear that, under the Court's decision, exculpatory grand jury testimony will only rarely be admissible against the government under Rule 804(b)(1). A similarity of motive is likely to be found only where the indictment is in doubt because the case as to probable cause is close. *See, e.g., United States v. Peterson*, 100 F.3d 7 (2d Cir. 1996) (exculpatory grand jury testimony was not admissible as prior testimony where the evidence before the state grand jury ``provided ample probable cause to indict Peterson" and therefore there was no reason for the government to attack Peterson's exculpatory

testimony in the same manner as it would have done at trial).

The First Circuit is in accord with the Second Circuit's view that the government's motive to develop testimony at the grand jury is usually not similar to the motive to develop testimony at trial. See *United States v. Omar*, 104 F.3d 519, 522-24 (1st Cir.1997)

D.C. and 6th and 9th Circuit View.

In contrast, the D.C. and 6th and 9th Circuits appear to use a bright-line rule that exculpatory grand jury testimony is *always* admissible against the government at trial — i.e., that there is always a similar motive to attack the exculpatory testimony at these two proceedings. *See, e.g., United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990); *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997). This view is explained by the 9th Circuit, which adopted the D.C. Circuit view, in the recent case of *United States v. McFall*, 558 F.3d 951 (9th Cir. 2009). The *McFall* court analyzed the "similar motive" question in the following passage:

> The question is whether the government's motive in examining Sawyer [the exculpatory witness] before the grand jury was sufficiently similar to what its motive would be in challenging his testimony at McFall's trial. Prosecutors need not have pursued every opportunity to question Sawyer before the grand jury; the exception requires only that they possessed the motive to do so.
>
> * * *
>
> As a threshold matter, we must determine at what level of generality the government's respective motives should be compared, an issue that has divided the circuits. See 2 McCormick on Evid. § 304 (6th ed.2006) (noting that the circuits appear to be in disagreement over "whether in typical grand jury situations exculpatory testimony meets" Rule 804(b)(1)'s similar motive requirement). In *United States v. Miller*, 904 F.2d 65, 68 (D.C.Cir.1990), the D.C. Circuit compared the government's respective motives at a high level of generality. The *Miller* Court concluded that "[b]efore the grand jury and at trial" the testimony of an unavailable co-conspirator "was to be directed to the same issue — the guilt or innocence" of the defendants — and thus, the government's motives were sufficiently similar. Id.; accord *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997) (citing *Miller* with approval). McFall's trial counsel made a similar argument before the district court, contending that the government's primary goal in questioning Sawyer before the grand jury was to incriminate McFall. At trial, the government's motivation would, of course, have been the same.
>
> In *United States v. DiNapoli*, 8 F.3d 909 (2d Cir.1993) (en banc), in contrast, the Second Circuit required comparison of motives at a fine-grained level of particularity. See id. at 912 ("[W]e do not accept the proposition ... that the test of similar motive is simply

whether at the two proceedings the questioner takes the same side of the same issue."); see id. (stating that the proper test for similarity of motive is whether the questioner had "a substantially similar degree of interest in prevailing" on the related issues at both proceedings) (emphasis added); accord *United States v. Omar*, 104 F.3d 519, 522-24 (1st Cir.1997) (concluding that the government will rarely have a similar motive in questioning a witness before a grand jury as it would have at trial).

* * *

The government's motivation in questioning Sawyer before the grand jury was likely not as intense as it would have been at trial, both because it had already indicted McFall, and because the standard of proof for obtaining a conviction is much higher than the standard for securing an indictment. We cannot agree, however, with the Second Circuit's gloss on Rule 804(b)(1). As one of the dissenters in *DiNapoli* (an en banc decision) noted, the requirement of similar "intensity" of motivation conflicts with the rule's plain language, which requires "similar" but not identical motivation. Id. at 916 (Pratt, J., dissenting) * * * .

On balance, we agree with the D.C. Circuit's elaboration of the "similar motive" test and conclude that the government's fundamental objective in questioning Sawyer before the grand jury was to draw out testimony that would support its theory that McFall conspired with Sawyer to commit extortion — the same motive it possessed at trial. That motive may not have been as intense before the grand jury, but Rule 804(b)(1) does not require an identical quantum of motivation.

In sum, the dispute in the courts is over how to interpret "similar motive" with respect to exculpatory grand jury testimony. The Second Circuit view is that "motive" includes a requirement of similar "intensity" of interest in developing the testimony at the grand jury, while the Ninth Circuit rejects that position.

Should an Amendment be Proposed to Rectify the Conflict in the Circuits?

I asked Ken Broun for his opinion on the advisability of an amendment to Rule 804(b)(1) to provide a uniform approach to exculpatory grand jury testimony. This is his response:

I have looked at the *McFall* case. It is hard to imagine a rule amendment that would deal with the issue. The circuit split has to do with how fine-grained the analysis should be of the government's motives to examine before the grand jury as opposed to the current trial. The rule doesn't specify the degree of analysis in any situation (for example, preliminary hearings where different courts take different approaches). I don't see any reason to single out grand jury proceedings for special comment in the rules.

Ken's analysis has a lot of merit. Any amendment would be dealing with a very narrow fact

situation — exculpatory grand jury testimony. Moreover, the only amendment that could be cleanly written is one that would automatically admit exculpatory grand jury testimony against the government. The contrary view — that of the Second Circuit — is not an automatic rule excluding such testimony. Rather it is a case by case approach that is already being conducted under the language of the existing rule — it would be more difficult to codify the Second Circuit view. Something like "but grand jury testimony is admissible under this exception if at the time of the testimony the obtaining of the indictment is in doubt" is unlikely to be very helpful. Nor is "but grand jury testimony is admissible under this exception only if the prosecutor has an interest in developing the grand jury testimony that is of similar intensity as the interest in developing it at trial."

An automatic rule of admissibility could be written more cleanly. For example, something like the following sentence could be added to the end of the rule :

> "Testimony of a witness at a grand jury is admissible against the government under this exception."

But it is likely that a rule amendment mandating admissibility of exculpatory grand jury testimony would be strenuously opposed in several quarters. And on the merits, that amendment could result in a change in grand jury practice in a number of circuits that would require some serious consideration (and perhaps empirical research). Certainly it could be predicted that a rule change from a case by case approach to automatic admissibility would require prosecutors in districts subject to the change to treat every instance of exculpatory grand jury testimony as a trial-like event. A mandated change in practice before a grand jury should not be done lightly by way of an evidence rule.

The other alternative would be to try to add something about "intensity" of motive to the Rule — that is, a general amendment as opposed to one dealing only with exculpatory grand jury testimony. An amendment incorporating the Second Circuit approach might look like this:

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive and intensity of interest to develop it by direct, cross-, or redirect examination.

An amendment incorporating the Ninth Circuit approach might look like this:

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar ~~motive~~ goal to develop it by direct, cross-, or redirect examination.

[The word "goal" is not ideal, but it seems less likely to be read as having an intensity factor. The option of "motive, but not including intensity of interest" seems confusing and balky.]

But to apply new language outside the grand jury context may create unintended

consequences in a wide variety of cases and situations, including depositions and preliminary hearings. And yet to limit the reference to "intensity" to grand jury testimony would probably be confusing and would impose the substantial costs of an amendment for a relatively small return.

One possible solution to resolving the circuit split on this important but relatively narrow application of Rule 804(b)(1) is not rulemaking, but rather Supreme Court adjudication. The Supreme Court has shown an interest in the question of the admissibility of exculpatory grand jury testimony, having decided *United States v. Salerno*, 505 U.S. 317 (1992). [The Second Circuit decision in *DiNapoli* was on remand from the Supreme Court in *Salerno.*] In that case, the Court held that "similar motive" was dependent on the facts, and that a "similar motive" could not be found simply because it would be fair to the parties to do so. The Court left to the lower courts the question whether the government's motive in developing grand jury testimony in any particular case is similar to that at trial. Now that the courts have split on the question of application of the similar motive standard to grand jury testimony, it is at least possible that the Court may be interested in rectifying the conflict. At the very least, given the recency of the 9th Circuit's weighing-in, it would appear to make some sense to hold off on any amendment for the near future — especially because none of the alternatives for amendment seem very fruitful.

Conclusion

The conflict over the admissibility of exculpatory grand jury testimony under Rule 804(b)(1) is based on different views of the term "similar motive." But any amendment to the language to rectify the conflict could raise significant difficulties, while any benefit would likely be limited to a handful of cases. Given the difficulties of an amendment, it may be prudent to await further case development and possible Supreme Court review. But if the Committee wishes to proceed with a proposed amendment, a draft will be prepared for the next meeting.

VII

RULE 6(d): "3 DAYS ARE ADDED"

Some questions turn on high theory. Some do not. Experience is likely to prove the best guide in returning to the familiar questions posed by Civil Rule 6(d).

Rule 6(d) now reads:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Three days are not added if service is made under Rule 5(b)(2)(A) or (B) by handing the paper to the person, or by leaving it at the person's office or "dwelling or usual place of abode." Three days are added if service is made under Rule 5(b)(2)(C), (D), (E), or (F) — mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, or delivering by any other means that the person consented to in writing.

Criminal Rule 45(c) is an almost-verbatim duplicate of Civil Rule 6(d). Appellate Rule 26(c) is similar, but adds a wrinkle. Bankruptcy Rule 9006(f) is a variation. The parallels are no accident — these rules were revised in 2005 to achieve rough uniformity in time calculations. So now, any actual recommendations for change must be coordinated with the other advisory committees, perhaps directly and perhaps through a joint subcommittee or similar device.

The wisdom of the "3-days-are-added" provision has been explored repeatedly. In 1994 it was decided, in response to a question raised at a Standing Committee meeting, that there was no reason to extend the added time to 5 days.

The question next arose in conjunction with the 2001 amendments that added service by electronic means. Discussion focused on the question whether the nearly instantaneous transmission of most e-messages obviates the need for additional time. The decision to treat electronic service the same as postal mail rested in part on doubt whether e-mail is always transmitted immediately. The doubts were most important with respect to attachments — several participants commented that it may take two or three days to establish a mutually compatible system of transmitting attachments. Doubts of this sort are subject to reconsideration as technology marches on. Additional questions were raised about strategic calculations, resting on the perception that some lawyers will select whatever method of service is calculated to minimize the actual time available to respond. Again, questions of this sort are subject to reconsideration in light of changing circumstances, particularly the pressures that may make e-service virtually compulsory in many courts.

The Style Project considered whether this subject should be advanced for more-than-style revision, but nothing has happened yet.

The most recent occasion for discussion arose with the Time Computation Project. One of the potential virtues of the 7, 14, 21, and occasional 28-day periods widely adopted in the Rules is closing the count on the same day of the week as opened the count. Seven days from Monday is Monday, and so on. The added 3 days messes up this calculation, and, when the 3d day lands on a weekend or legal holiday, requires an extension to the end of the weekend-holiday period. Some of the public comments pointed out that Rule 6(d) defeats the desired simplicity.

The questions do not go away.

The case for adding 3 days when service is made by postal mail seems strong, unless we believe that most of the time periods provided by the rules are longer than needed. Mail often is

delivered on the next day, but that ambitious goal is not always met. The problem of delivery time could be addressed by dropping the 3-day extension and also dropping the provision that service by mail is complete on mailing. But there are good reasons to avoid the likely alternative of making service complete on delivery.

Adding 3 days when service is made on the court clerk may be no more than a token gesture — if the person has no known address, an extra 3 days may not mean much in a busy clerk's office. Perhaps the best case for adding this time is the obvious analogy — if extra days are added for mail, surely they should be added here as well.

Service by e-mail continues to be the subject of most discussion. Practical judgment based on experience is called for. Experience, moreover, may indicate the need for considering three separate questions: How often is service still accomplished outside electronic communication? When service is electronic, how often is it accomplished through the court's facilities? How often is it accomplished by counsel to counsel?

Reliance on electronic service is probably pervasive in most courts. Some courts encourage it, and at least a few virtually mandate it. The most notable exceptions are for pro se litigants. The more nearly universal electronic service is, whether as a matter of preference or compulsion, the less reason there is to worry about the influence of denying 3 added days on strategic choices about the mode of service.

Is service through the court's electronic facilities so reliable and instantaneous that there is no plausible argument for adding 3 days to protect against delayed or garbled transmission?

Similarly, is e-mail addressed by counsel to counsel so regularly received soon after transmission, and received in such shape that it can be promptly opened, and tended to with the alacrity likely to be stimulated by personal delivery, that the 3 added days are no more than a windfall extension of time periods that generally do not deserve extension? Will strategic calculation be advanced, impeded, or merely different if 3 days are added for service by mail or leaving with the court clerk, but not otherwise?

One possible outcome of these questions would be to distinguish between e-service through the court's facilities and counsel-to-counsel service. Drafting would likely lead to some change in Rule 5(b)(3), which now describes service through the court's facilities as service "under 5(b)(2)(E)." That will surely provide an occasion for reopening the question whether Rule 5(b)(2)(E) should continue to require the party's consent to e-service, a question that likely will soon be ripe in any event.

Delivery by any other means consented to in writing does not stir obvious passions. A party concerned about adding 3 days under the present rule need not ask others to consent. A party asked to consent under an amended rule that does not add 3 days can refuse consent. But the analogy to mail may offer some support for retaining the 3-day extension, particularly under the Appellate Rule 25(c)(1)(C) provision for service "by third-party commercial carrier for delivery within 3 calendar days." Consent is not required under the Appellate Rule, and the speediest — and most expensive — mode of delivery also is not required.

One final observation. The notes following Rule 6 show that it has been amended in 1948, 1963, 1966, 1968, 1971, 1983, 1985, 1987, 1999, 2001, 2005, and 2007. The Time Computation Project amendments are almost upon us. The steady progression of changes may reflect a need for constant adjustments, large or small, to reflect changed circumstances or better understanding. The persistent fear of missed deadlines may stir lawyers' concerns and rulemaking sensitivity to those concerns. Whenever the Committee acts next, it will be optimistic to hope for long-term repose.

Rule 6(d) Three Days are Added

Judge Kravitz introduced the Rule 6(d) topic. Rule 6(d) adds three days to any time specified to act after service when service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. These other means include mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, and delivery by any other means the person consented to in writing. In the Time Computation Project the Subcommittee and several advisory committees decided to defer the question whether the three added days are appropriate in all the circumstances now provided. It is useful to reconsider the timing question now.

The most questionable instances are those where three days are added after e-service and after service by agreed means. When e-service was first authorized, the three days seemed useful. The CM/ECF system was still in its infancy — it was not clear whether it would work well, nor whether lawyers would seize the opportunity to effect service through the court's system. Lawyers said that it might take as long as three days to accomplish effective receipt of e-messages, particularly with attachments. The attachments to Rule 56 motions may run hundreds of pages, and there were problems with system compatibilities. Service by private carrier is not instantaneous, and only the most expensive means are likely to accomplish next-day delivery.

Despite these questions, lawyers will surely see any reduction of the categories that allow three added days as taking away something they count on. This seems particularly true for e-service, which ordinarily arrives the same day as transmitted. Moreover, the Time Computation Project amendments take effect this December 1. It might we wise to see how they work before undertaking further adjustments. The three-day addition "is a small thing; why not let the bar absorb the new rules" before looking toward further changes?

Laura Briggs has provided great help in explaining how e-service through the court's facilities works. She found that in her court approximately 5,000 notices of electronic filing are received each day. Of them, 20 to 30 are initially undeliverable. The clerks immediately investigate the undeliverable notices and are able to accomplish effective transmission of all but 2 or 3 within the next day. When delivery cannot be accomplished, notice is mailed — triggering the three extra days for mail delivery. In exploring the question with a bar group, however, she found great resistance to deletion of the three added days for e-service.

On an anecdotal level, lawyers still tell stories of as much as three days from docketing in the court to receipt of e-notice, and rather often.

On a more general level, it was observed that this question affects Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c). Criminal Rule 45(c) is virtually identical to Rule 6(d), but the others introduce variations. Any project to revise Rule 6(d) must be coordinated with the other advisory committees, perhaps directly or perhaps through a joint subcommittee.

The three added days for service by mail seems to make sense; if it were treated the same as direct delivery or e-service, lawyers would do everything possible to serve by mail so as to reduce the effective time available to respond. And pro se litigants, particularly prisoners, are likely to use mail service. When service is made on the court clerk because the person to be served has no known address, the three added days may be more symbolic than useful, but do no apparent harm. Service by other means consented to may not be a real problem, since consent might be conditioned on the most expeditious mode of delivery, and can be withheld in any event.

The question of e-service ties to the question of e-filing. Under Rule 5(d)(3), a local rule may require e-filing, although reasonable exceptions must be allowed. Many courts effectively require e-filing by lawyers. Rule 5(b)(2)(E) requires consent of the person served for e-service, and Rule 5(b)(3) allows e-service through the court's facilities if authorized by local rule. It may prove desirable to reconsider this package in tandem with the three-added day provision. Registering for

e-filing is obviously coupled with consent to receive e-notice of filing from the court. So in the Southern District of Indiana, the local rules require all cases to be e-filed, subject to exceptions. Signing in for e-filing includes consent to e-notice. That might be made mandatory for all e-filing cases, carrying forward the requirement that reasonable exceptions be allowed.

The lawyer members were asked whether the Committee should move promptly to reconsider the three-added days. One said: "Enough already. This is all some of us have left. It is too soon after the Time Computation Project to make further changes." Another agreed, and added that e-service "does not always work that smoothly." A third added that some of the "darndest things" wind up in his junk-mail box; there is a real risk that spam filters will divert an e-notice away from the in-box.

Emery Lee added that the recent discovery survey used e-mail transmission, and that a non-negligible number were bounced back and did not work. And sometimes the system has to try several times to get a good address to go through.

Laura Briggs added to the information about the success of her office in ensuring near-perfect e-transmission the results of a quick look at practices in other districts. Even a quick look showed at least two districts that explicitly refuse to monitor bouncebacks. That is cause for worry about eliminating the three added days.

Judges Kravitz and Rosenthal suggested that the other advisory committees are not likely to be disappointed if this Committee decides to postpone any reconsideration of the three added days. The Bankruptcy Rules Committee might have some regret — there is much greater pressure for fast action in many bankruptcy proceedings than in most civil proceedings. The Bankruptcy Rules Committee is working on the Part 8 appeal rules, seeking a model that approaches closer to the Appellate Rules. Their many conferences lead to questions that come back to e-filing: why is it necessary to adopt rules on the color of brief covers, when all is done electronically anyway? There is considerable pressure to make e-filing the norm. This affects service, filing, and more. E-records are upon us.

Two lawyer members observed that in the e-world they still print out copies, but limit the number and share the paper copies as different lawyers need them.

Judge Rosenthal suggested that it may be appropriate to undertake a project akin to the Style Project as a long-term reconsideration of every rule to remove vestiges of the bygone paper world. But the time has not yet come. E-filing must be allowed to become firmly settled first.

It was agreed that the question should remain on the agenda, and when it is taken up should be approached in a way that avoids any unnecessary differences among the different sets of rules.