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ADVISORY COMMITTEE ON EVIDENCE RULES

Washington, D.C.
April 14-15, 1997

ADVISORY COMMITTEE ON EVIDENCE RULES
Agenda for Committee Meeting
Washington, D.C.
April 14-15, 1997

I. Opening Remarks of the Chair.

Including approval of the minutes of the November meeting, and a report on the January meeting of the Standing Committee. The Draft Minutes of the November meeting, and the Standing Committee's report to the Judicial Conference, are included in the agenda book.

II. Committee Business.

A. *Discussion of Omnibus Crime Bill*. The Bill contains a number of provisions bearing on the Federal Rules of Evidence. The report of the Chair and the Reporter on the provisions in the Bill affecting the Evidence Rules, submitted to Judge Stotler, is included in the agenda book. The provisions commented upon are also included in the agenda book.

III. Evidence Rules Under Review.

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

B. *Rules 404(b) and 609* (concerning the structure for decisionmaking under those Rules)--the Reporter's memorandum on these Rules is included in the agenda book. The *Old Chief* case is also included.

C. *Rule 615* (concerning the conflict between the Rule and the Victim's Bill of Rights)--the Reporter's memorandum is included in the agenda book.

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

E. *Rule 706* (concerning deal with funding in civil cases and several other noted problems)--the Reporter's memorandum on this Rule is included in the agenda book. Also included are: (1) a letter from the Federal Judicial Center to the Reporter concerning Rule 706; and (2) the proposed amendment to Civil Rule 53, dealing with special masters.

F. *Rule 803(6)* (concerning proof of foundation requirements without the necessity of a testifying witness)--the Reporter's memorandum on Rules 803(6) and 902 is included in the agenda book. Also included is the Justice Department proposal to provide for self-authenticating foreign business records in all cases.

IV. Long-range Projects.

A. *Effect of Automation*--the report by John Kobayashi is either included in the agenda book or will be distributed separately.

B. *Circuit Splits*--the Reporter's memorandum on recent cases indicating a split on evidence issues is included in the agenda book.

C. *Statutes Affecting Admissibility*--the Reporter's memorandum, collecting all statutes affecting the admissibility of evidence in the federal courts, is included in the agenda book.

D. *Outmoded Advisory Committee Notes*--the Reporter's memorandum, with a proposed letter to publishers of the Federal Rules, is included in the agenda book. The agenda book also includes: (1)a sample Federal Judicial Center Note; (2) sample pages from the Federal Rules of Evidence Manual; and (3) a list of those who publish the Federal Rules.

V. Recent Developments.

A. *Omnibus Crime Bill Provisions on Forfeiture*--the memorandum from John Rabiej to Judges Smith and Jensen, concerning these provisions, is included in the agenda book.

B. *Maryland Rules on computer-generated evidence*--the Rules are included in the agenda book.

C. *Victim Hearsay Exception*--the Reporter's memorandum, on recent developments in the Uniform Rules and in California (the "O.J. exception"), is included in the agenda book.

VI. New Issues for the Committee to Pursue.

VII. Next meeting.

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Item I

ADVISORY COMMITTEE ON EVIDENCE RULES

Draft Minutes of the Meeting of November 12, 1996

San Francisco, California

The Advisory Committee on the Federal Rules of Evidence met on November 12, 1996 in the Park Hyatt Hotel in San Francisco, California.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair

Hon. David C. Norton

Hon. Jerry E. Smith

Hon. James T. Turner

Professor Kenneth S. Broun

Frederic F. Kay, Esq.

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

Roger Pauley, Esq.

Dean James K. Robinson

Professor Daniel J. Capra, Reporter

Hon. Milton I. Shadur, Hon. Ann K. Covington, and Mary F. Harkenrider, Esq., were unable to attend.

Also present were:

Hon. David S. Doty, Liaison to the Civil Rules Committee

Hon. David D. Dowd, Liaison to the Criminal Rules Committee

Hon. Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure

Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure

Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

Professor Rob Aronson, Uniform Rules of Evidence Committee

Joe Cecil, Esq., Federal Judicial Center

John K. Rabiej, Esq., Chief, Rules Committee Support Office

Opening Business

Judge Smith called the meeting to order at 8:30 a.m. She acknowledged with gratitude the services of the previous Chair, Judge Ralph Winter, and the previous Reporter, Professor Margaret Berger. The minutes of the meeting of April 22, 1996 were then approved by the Committee.

Judge Smith brought the Committee up to date on the status of the amendments proposed by the Committee. The Judicial Conference has approved, and passed on to the Supreme Court, the following: the proposed amendments to Rules 407 and 801; new Rule 804(b)(6); and the movement of the residual exceptions to a single Rule 807.

Self-Evaluation Report

The Judicial Conference has directed that each of its committees prepare a self-evaluation report. At the Committee meeting, the Chair described the form provided by the Judicial Conference and proposed answers to the questions on the form. After discussion, the following responses were agreed to by the Committee:

1. The Committee should continue to exist, given the constant state of change in the law of evidence, and the continuing need for a deliberative body of experts to respond to new developments.

2. The Committee has the appropriate amount of work.

3. The size of the Committee is appropriate.

4. The Committee membership is representative.

5. The work of the Committee is consistent with its jurisdictional statement.

6. The Committee's jurisdiction overlaps, to some extent, the jurisdiction of the Civil and Criminal Rules Committees, as well as that of the Committee on Court Administration. However, the Evidence Rules Committee is necessary because the Federal Rules of Evidence are trans-substantive, and there is no other committee with the jurisdiction to consider the impact of proposed amendments to the Evidence Rules on all types of federal litigation. Judge Stotler, elaborating on this point, noted that the Judicial Conference had considered the possibility, before the Evidence Rules Committee was reconstituted, of forming a

committee with members from the Civil Rules Committee and the Criminal Rules Committee. This proposal was rejected in favor of a free-standing Evidence Rules Committee.

7. There are no areas within the jurisdiction of other committees that would be better placed with the Evidence Rules Committee.

8. The Committee meets twice per year, 50% of the time in Washington, D.C.

9. The Committee has no suggested changes for its own structure or for the Judicial Conference committee structure in general.

Rape Counselor Privilege

Congress, in 42 U.S.C.§ 13942(c) (1996), directed that the Judicial Conference report on whether the Federal Rules of Evidence should be amended to include a privilege for confidential communications from sexual assault victims to their counselors. The Evidence Rules Committee directed the Reporter to prepare a proposed statement of the Committee on this issue. After some discussion, the Committee voted unanimously to adopt the statement, which would recommend to the Standing Committee that the Federal Rules of Evidence not be amended to include such a privilege. The Committee concluded that it would be anomalous to have the rape counselor privilege as the only codified privilege in the Federal Rules of Evidence. Nor would such a

codification be necessary, since the Supreme Court, in *Jaffee v. Redmond,* recently established a privilege for statements to psychotherapists and licensed social workers; and it is probable that a rape counselor privilege comes within the *Jaffee* rule. The Chair expressed concern that the *Jaffee* protection might not extend to social workers and other therapists who are unlicensed, but opined that we should wait to see how the *Jaffee* rule develops before proposing any amendments. All Committee members agreed with this assessment. The Committee also agreed that it was unnecessary to address the constitutional issues that might arise in a criminal case when confidential statements of a prosecution witness are shielded by a rape counselor privilege; nothing the Committee could propose would change or resolve this constitutional question.

Uniform Rules of Evidence

Professor Rob Aronson, a member of the Committee on the Uniform Rules of Evidence, brought the Committee up to date on recent proposals for amending the Uniform Rules. The Uniform Rules Committee has reviewed all the articles up to Article 8. Professor Aronson described the following proposals:

1. *Rule 103*--The Rule would provide that a pretrial objection must be renewed, unless the court states on the record that a ruling is final.

2. *Article 3*--The Uniform Rules Committee proposed no

change. The concern was that other uniform laws use the term "presumption" in various substantive ways. Professor Aronson noted that it would be useful to have a single rule governing the use of presumptions, but that much of the law of presumptions is based on policy beyond evidence. The Uniform Rules reporter has been instructed to try to draft an all-encompassing rule, but Professor Aronson is not optimistic about its passage.

3. *Rule 404*--Changes were made in this Rule in response to Federal Rules 413-15. The Reporter to the Uniform Rules Committee has been instructed to draft a "lustful disposition" rule of admissibility, such as exists in many states--permitting evidence of prior unlawful sexual conduct directed toward the same victim. Professor Aronson noted that there is overwhelming support in the Uniform Rules Committee for restricting Rule 404b. The Uniform Rules Committee proposal includes an in camera hearing requirement, as well as a requirement of advance notice (with a good cause exception); it requires clear and convincing proof that the opponent committed the bad act before it can be admitted; and it requires that the probative value of the bad act for its not-for-character purpose must substantially outweigh its prejudicial effect. The Chair asked whether there has been any negative reaction from trial judges as to the proposed in camera requirements. Professor Aronson said that trial judges had been positive about these requirements and that his sense was that trial judges wanted direction in handling evidence of uncharged misconduct.

4. *Rule 407*--The proposed amended Uniform Rule would apply specifically to product liability cases. No change has been made to the "after the event" language of the rule, but a comment will say that the relevant event is the time of sale rather than the time of injury.

5. *Rule 408*--This Rule would be modified to make it clear that it would include statements made during the course of an alternative dispute resolution.

6. *Rule 412*--The proposal adds a legislative purpose section indicating that the purpose of the rule is to protect the privacy of rape victims. Prior sexual conduct of the victim would be admissible only to show source of injury, consent, bias, or the source of sexual knowledge in a case involving a child-victim. The proposed amendment would apply the rule in both civil and criminal cases.

7. *Privileges*--Unlike the Federal Rules, the Uniform Rules contain a detailed set of privileges. Two amendments to these rules are proposed. First, the psychotherapist-patient privilege would be expanded to cover statements made to licensed social workers. A licensing requirement was thought necessary because otherwise there would be no way to meaningfully limit the therapeutic privilege. Second, the procedural rules concerning invocation and waiver of privileges would be revised and expanded, consistently with the case and statutory law that has developed.

8. *Rule 609*--A requirement of pretrial notice, parallel to

that in Rule 404(b), has been added. Also, when the criminal defendant is the witness, impeachment would not be permitted with non-crimen falsi crimes unless the probative value of the conviction substantially outweighs the prejudice to the defendant.

9. *Bias*--Uniform Rule 616 currently permits impeachment for bias, subject to the 403 test. The Uniform Rules Committee is recommending that this rule be deleted, due to concern that the rule, by negative implication, could have a confining influence on other methods of impeachment not mentioned in the Rules.

10. *Writings*--The Uniform Rules Committee would amend every rule in which the term "writing" is used. The term "writing" would be changed to "record", and the term "record" would then be defined as any means of preserving information, much like the definition in the Federal best evidence rule. This change was thought necessary to account for technological developments in preserving writings and records.

Developments in Technology

The proposed change in the term "writings" in the Uniform Rules engendered some discussion about technological advances and their impact on the Federal Rules of Evidence. Judge Stotler pointed out that the problem of electronic data cuts across all the rules, not only the Evidence Rules, as we move toward the "electronic courtroom." The Chair observed that the problems

created by technological change are more problems of validity and reliability than definitional. The Chair announced that in response to the challenges created by new technology, Judge Stotler has formed a subcommittee, consisting of one member from each of the advisory committees, as well as the reporters from each advisory committee. The purpose of this subcommittee is to consider how best to respond to changes in data retrieval and presentation in the federal courts. Judge Turner has been appointed by the Chair and has agreed to serve on the technology subcommittee.

Grants of Certiorari

Roger Pauley suggested that one of the Reporter's duties should be to keep Committee members apprised of cases taken by the Supreme Court involving the interpretation of the Federal Rules of Evidence. A short discussion ensued about the current case in front of the Supreme Court, *United States v. Old Chief*, which presents the question whether the prosecution must accept a stipulation to a felony in a felon firearm possession prosecution; Roger Pauley noted that there is currently no provision in the Federal Rules which specifically discusses stipulations. The Reporter agreed to keep Committee members apprised of cert. grants involving the Federal Rules of Evidence.

Issues for the Committee to Pursue

The Chair then asked each member of the Committee whether there was any issue that he or she thought the Committee should pursue. Many issues were discussed.

The Committee agreed to take up the following issues at the next meeting:

1. *Rule 103(e)*: While the Committee's proposal to amend Rule 103 was withdrawn, the Committee unanimously voted to revisit the question of amending the rule to provide instruction to litigants as to when an in limine motion must be renewed at trial. Judge Turner noted that the conflict in the circuits on this question has not gone away. Judge Turner, Greg Joseph and the Reporter were instructed to work on a draft which would provide a neutral solution for the problem, i.e., a solution which would not opt for excusing a trial objection in all cases or for requiring it in all cases, which would provide concrete guidance to litigants, and which would not unduly burden trial judges. Judge Doty noted that the Civil Rules Committee was opposed to the original proposal of the Evidence Rules Committee, which would have required the renewal of an objection unless the "context" instructed otherwise. The Civil Rules Committee thought that wording too ambiguous. It was further suggested in discussion that the Uniform Rules provision should be considered to see if it would be helpful.

2. *Rules 404(b) and 609*--The Committee generally agreed that it would be useful to provide for a more structured procedure for trial courts to follow in considering the admissibility of evidence of uncharged misconduct and prior convictions. The Reporter was instructed to review how other jurisdictions are dealing with these matters--including the Uniform Rules and the Michigan Rules of Evidence. The Reporter was also instructed to consider whether a common notice provision could be applied to both rules. The Reporter will review the extant alternatives and set forth options for the Committee at the next meeting.

3. *Rule 615*--The Reporter informed the Committee that the "Victim of Crime Bill of Rights," 42 U.S.C. 10606, passed in 1990, places some limits on Rule 615. Subsection (b) of the statute sets forth seven rights of victims of crimes. Although the statute is not a model of clarity, paragraph (4) of subsection (b) sets forth the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." It appears that Congress intended to create a limited exception to Rule 615. This exception, which is narrowly tailored to take account of the interests of crime victims and is more recently enacted than the Rule, would take precedence over Rule 615. The relationship between Rule 615 and the Victim of Crime Bill of Rights is currently being tested in the Oklahoma City bombing

trial. The Reporter stated that he would report more fully on this issue at the next meeting.

4. *Rule 703*--The Reporter was directed to prepare a report on whether Rule 703, which permits an expert to rely on inadmissible evidence, has been used, as a practical matter, as a means of improperly evading the hearsay rule. The Reporter agreed to survey the law and practice under Rule 703 and report back to the Committee at the next meeting.

5. *Rule 706*--Judge Stotler and Joe Cecil informed the Committee that funding had been approved for Judge Pointer's plan to appoint expert witnesses in the breast implant litigation, but that Judge Jones' request for similar funding had been denied. This raised the question of the adequacy of the funding mechanism provided by Rule 706 for court-appointed experts in civil cases. Rule 706 provides that the parties shall pay for court-appointed experts in civil cases, but Judges Pointer and Jones argue that this provision is unfair when the expert's testimony will be used in many subsequent trials. It has been argued that Rule 706 is not even applicable when the court-appointed expert's testimony is used in more than one trial. Another important question is whether Rule 706 has any applicability where the expert is retained by the court for technical assistance, rather than to testify as a witness.

The Committee instructed the Reporter to work with Joe Cecil

to develop a proposal for the Committee to consider whether Rule 706 should be amended to accomodate some of the concerns expressed by the judges involved in the breast implant litigation, especially the question of funding by the government.

6. *Self-authenticating Business Records*--The Committee voted to consider whether Rule 803(6) should be amended to dispense with the requirement of a qualified witness. The Reporter will survey the law of other jurisdictions and prepare a report on the advisability of such an amendment for the next meeting.

7. *Obsolete or Inaccurate Rules and Notes*--Several Committee members observed that the original Advisory Committee notes are incorrect in some respects. For example, the Note to Rule 104 contains a "not", which creates the opposite impression from what the Advisory Committee intended. The Note to Rule 301 has little or nothing to do with the Rule ultimately adopted. John Rabiej agreed to contact West to determine whether editor's notes could be used to alert the reader to some of these obvious errors.

More broadly, several Committee members observed that the Committee could do a service by updating the original Advisory Committee notes to account not only for discrepancies but for subsequent case developments. As Judge Jerry Smith noted, practitioners rely on the Advisory Committee comments more than they rely on treatises, etc. Some doubt was expressed, however, as to whether the Advisory Committee notes could be updated

outside of any process of amending or re-enacting the Rules. Professor Coquillette agreed to pass along the suggestion that the Evidence Rules should be re-enacted so that the Advisory Committee notes could be updated. Another possible solution discussed was to add a new note after the old note, rather than to amend the original note. Questions were raised about whether changes to the notes, independent of any amendment process, would require the three-year process attendant to amending the Rules themselves.

The Reporter was directed to go through the Rules and the Advisory Committee comments to determine where the Rules or the comments are obsolete, contradictory, or clearly wrong. The Reporter will report back on this matter at the next meeting. Special consideration will be given to the Notes prepared by the Federal Judicial Center, which are included in some published versions of the Federal Rules and which point out where the Advisory Committee Notes are inaccurate or outmoded.

Professor Coquillette informed the Committee that the reporters of all of the committees are going to get together in January to look at anachronisms and inconsistencies throughout the rules and committee notes. One topic of discussion will be the proper procedure for amending the committee notes where appropriate. The Reporter will report back on the results of the reporters' meeting at the next Committee meeting.

8. *Circuit Splits*--John Kobayashi suggested that it would be

a useful long-term project for the Committee to investigate evidentiary issues on which the circuit courts are split. The Reporter agreed to prepare a memorandum on circuit splits for the next meeting.

9. *Statutes Bearing on Admissibility of Evidence*--The Committee agreed with Dean Robinson's suggestion that the Committee would perform a valuable service by incorporating by reference, in the Federal Rules, all of the many specific statutory provisions outside the Rules which regulate the admissibility of evidence proffered in federal court. The Reporter agreed to conduct a survey of all provisions outside the Rules which affect admissibility, and to report back to the Committee before the next meeting.

10. *Automation*--John Kobayashi suggested, as a long-term project, that the Committee investigate whether the Evidence Rules should be amended to accomodate changes in automation. The issues are not limited solely to a definition of what constitutes a writing. For example, another issue is: how does one authenticate an electronically produced document? How do the litigants and the court deal with materials presented in interactive form? It was also noted that it would be helpful for trial counsel to have some certainty as to what the judges will do with modern visual evidence--when and whether the judge will reach a determination. Mr. Kobayashi agreed to prepare a

memorandum on these issues for the next meeting.

The following issues were discussed, and the Committee decided not to proceed on them at this time:

1. *Rule 201:* Rule 201(g) makes no reference to whether a criminal defendant should or must be permitted a conclusive fact against the government. Also, the Rule in general makes no attempt to delineate the distinction between legislative and adjudicative fact. The Committee decided, however, that the Rule was not presenting a problem for courts or counsel.

2. *Rule 301*--Professor Broun noted that Rule 301 applies to evidentiary presumptions but doesn't apply to substantive presumptions, and that it could be useful to develop a definitional hierarchy as to what effect a given presumption would have. The Committee was of the opinion that this would be a massive project with uncertain results. It was noted that the Uniform Rules Committee is investigating whether a rule of evidence can be fashioned to provide a definitional context for all presumptions. The Committee decided to review the Uniform Rules proposal on presumptions when it is completed, and to determine at that point whether such a project should be undertaken.

3. *Rule 404b*--Frederic Kay suggested that Rule 404(b) should

be amended along the lines of the Uniform Rules proposal, so that uncharged misconduct could not be admitted unless the probative value substantially outweighs the prejudicial effect. While there was much sympathy for this position, the Committee unanimously agreed that the proposal would be rejected by Congress, and therefore decided not to pursue the suggestion at this time.

4. *Privileges*--The Chair noted that the Committee had never considered in detail whether to codify the federal law of privileges. Greg Joseph remarked that codification would be a problematic effort because, under the Enabling Act, any evidentiary rule on privilege must be affirmatively adopted by Congress. The Chair observed that in light of the Committee's recommendation against an amendment for the rape counselor privilege, it might be anomalous at this point to propose any amendment to the Rules with regard to privileges. Judge Stotler pointed out that questions about the scope of a privilege do create problems for the courts. For example, there is an issue of whether the state or federal law of privilege applies in actions brought under the Federal Tort Claims Act. The Committee decided not to attempt to codify the federal law of privileges at this time.

5. *Rule 611*(b)--Dean Robinson suggested that the Committee might consider whether the Rule should be amended so that the scope of cross-examination would not be limited by the subject

matter of the direct. But the Committee decided not to proceed on this matter at this time.

6. *Admissibility of Videotaped Expert Testimony*--Dean Robinson suggested that the Committee might explore whether the Evidence Rules should be amended to provide for admissibility of videotaped expert testimony. Greg Joseph noted that a rule had been proposed to this effect by the Civil Rules Committee, but that the proposal had been withdrawn. John Kobayashi suggested that experts could be saved the inconvenience of testifying at trial through the method of videoconferencing, but questions were raised as to whether the trial judge would have jurisdiction over the witness in such circumstances. It was pointed out that Judge Pointer's plan in the breast implant litigation is for the videotaped testimony of the experts appointed by the court to be admissible in all breast implant trials. It was ultimately concluded that the Committee would continue to monitor the phenomenon of videotaped expert testimony, but that no action should be taken at this time.

7. *Rule 803(8)(B)*--The Rule does not on its face permit a law enforcement report favorable to the criminal defendant to be admitted against the government. It was pointed out, however, that the courts had construed the rule to permit such reports to be admitted in favor of a criminal defendant, so the rule as applied was not posing any problems.

8. *Rule 806*--No mention is made in the Rule as to whether extrinsic evidence, which would be excluded under Rule 608(b) if offered against a testifying witness, would be admitted to impeach the character for veracity of a hearsay declarant. The Committee agreed, however, that this anomaly was not creating a problem in the courts.

9. *Residual Exception*--At the last meeting, the Reporter was asked to prepare reports on two aspects of the residual exception: 1. Whether there are conflicts in the cases regarding the notice requirement; and 2. Whether the residual exception has been improperly expanded to admit evidence of dubious reliability. The Reporter prepared a report on each of these issues, and sent them in advance of the meeting to the Committee members.

At the meeting, the Reporter summarized the conclusions of these reports. First, as to the notice requirement, there is some disagreement among the courts as to whether the requirement can be excused for good cause. Also, there is some dispute about whether the proponent must provide notice of a specific intent to invoke the residual exception. Finally, the Reporter pointed out that no consistent approach is taken to the notice requirements found scattered throughout the Evidence Rules.

As to the trustworthiness requirement, the Reporter noted that the disputed question of law was whether "near misses" (hearsay which misses one of the admissibility requirements of

one of the categorical exceptions) can qualify as residual hearsay. Most courts have held that the term "not specifically covered" in the residual exception means "not admissible under" one of the other exceptions; thus most courts find near misses to potentially qualify as residual hearsay. As to whether evidence of dubious reliability is being admitted under the residual exception, the Reporter observed that this is largely a subjective question, dependent on one's view of the hearsay rule and its exceptions.

The Committee discussed the issues presented by the Reporter's memoranda. Judge Jerry Smith stated that the current residual exception is a useful tool for trial judges, since the other exceptions are not always well-conceived, and are sometimes underinclusive. John Kobayashi contended that it would be useful to impose a specific number of days before trial as a date for the pre-trial notice requirement. Roger Pauley argued that there was no reason to conform the notice requirements found throughout the Evidence Rules, contending that each Rule has a reason for a different approach as to notice.

Professor Broun stated his impression that the residual exception is being overused, and that it would be useful to give guidance, either by a more specific and stricter definition of trustworthiness, or by a specific exclusion of "near miss" hearsay. But he acknowledged that the question of overuse is to a large extent a normative question on which people can differ. The Chair expressed the opinion that the role of the Committee is not

to reduce the discretion of trial judges, but to determine whether rules are unnecessarily ambiguous, incorrect, or are the subject of conflicting opinions among the circuits. Under this standard, there appeared to be no need at this time to amend the residual exception.

A vote was taken and two Committee members were in favor of proceeding and the rest of the members were opposed to proceeding on any amendment to the residual exception at this time.

10. *Sentencing Proceedings*--Some interest was expressed in extending the Federal Rules of Evidence to sentencing proceedings, given the fact that Guidelines proceedings are so fact-driven. However, there was a general concern that the issue created policy conflicts beyond the scope of the Committee's jurisdiction--given the existence of a statute and a Sentencing Guideline which specifically provide for flexible admissibility, and given the historically broad discretion of the court to consider all information presented at the sentencing hearing. Therefore, the Committee decided not to proceed on this matter at this time.

Criminal Forfeiture

Roger Pauley reported to the Committee, for information purposes only, on a Justice Department proposal to make criminal forfeiture part of the ancillary proceedings to a criminal trial, rather than a question for the jury. At this time, this proposal has no immediate impact on the Evidence Rules. Judge Stotler

expressed the hope that eventually the patchwork of forfeiture provisions will be made into an integrated whole; but she noted that there are no current proposals to change the Federal Rules of Evidence in any way that would bear upon forfeiture proceedings.

Liaison Reports

Judge Doty, the liaison to the Civil Rules Committee, reported on the discussion within that Committee of the proposed and withdrawn amendment to Federal Rule of Evidence 103. That Committee concluded that the Evidence Committee's former proposal would have created more problems than it solves.

Judge Dowd, the liaison to the Criminal Rules Committee, reported that the Committee was working on integrating forfeiture provisions. Also, the Committee is considering how Rule 11 guilty pleas were working in light of the Sentencing Guidelines. The Committee is trying to fashion a fair, streamlined procedure to permit defendants and lawyers to determine exactly how Guidelines will affect a plea. The Committee is also concerned about the growing insistence by the government that a defendant waive the right to appeal and to bring a collateral attack as a condition to entering into a plea; the Committee is considering whether to amend Rule 11 to prevent this kind of waiver. The Committee is also considering how to treat alternate jurors once the jury has retired. Judge Dowd noted that none of the described developments has any immediate impact on matters within the jurisdiction of

the Evidence Rules Committee.

Restylized Appellate Rules

Judge Stotler reported that the Appellate Rules have been restyled, so that they are more concise, consistent and clear. She noted that commentary on the changes has been very positive. Those Committee members familiar with the changes unanimously expressed the opinion that the modifications in style are a great improvement. Judge Stotler noted that there is no immediate plan to restyle the Federal Rules of Evidence.

Evidence Project

The Chair informed the Committee that she had been contacted by Professor Rice of American University Law School, concerning a project that he has sponsored. This project proposes a total overhaul of the Federal Rules of Evidence. After discussion, the Committee determined that while it would monitor the progress of this project, it found no need for a full-scale revision of the Evidence Rules.

Next Meeting

The Chair announced that the next meeting of the Committee would take place on April 14th and 15th in Washington, D.C.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

Agenda F-18 (Summary)
Rules
March 1997

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Civil Rule 73, proposed amendments abrogating Rules 74, 75, and 76, and revision of Forms 33 and 34, and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp.3-4

2. Approve the proposed amendments to Criminal Rule 58 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp.6-7

3. Approve the proposed report, which concludes that it is not advisable to amend the Evidence Rules to include a special privilege for confidential communications between sexual assault victims and their counselors or therapists, for transmission to Congress in accordance with the law..... pp.7-8

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

- Long-Range Plan implementation..... p.9
- Status of rules amendments..... p.9

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Your Committee on Rules of Practice and Procedure met on January 9-10, 1997. All the members attended the meeting.

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

Participating in the meeting were Peter G. McCabe, the committee's Secretary; Professor Daniel R. Coquillette, the committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro, attorney, of the Administrative Office's Rules Committee Support Office; William B. Eldridge of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules is reviewing comments submitted on the comprehensive style revision of the Appellate Rules, which is intended to clarify and simplify the language of the rules. The proposed revision was published in April 1996, and the public comment period expired on December 31, 1996. Although the number of comments was modest, virtually all were favorable. The advisory committee is also reviewing comments on the proposed consolidation of Appellate Rules 5 and 5.1 (to account for chang in 28 U.S.C. §1292 governing interlocutory appeal and to accommodate possible amendments to Civil Rule 23) and revision of Appellate Form 4 (to implement provisions in the Prisoner Litigation Reform Act dealing with *in forma pauperis* petitions), which were separately published in August 1996. These amendments will be considered simultaneously with the comprehensive style revision of the Appellate Rules.

The advisory committee presented no items for your committee's action.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented no items for your committee's action. It is reviewing comments submitted on a preliminary draft of proposed amendments to the Official Bankruptcy Forms, which was published for comment in August 1996.

At its September 1995, March 1996, and September 1996 meetings, the advisory committee considered and approved proposed amendments to 14 Bankruptcy Rules, including Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7062, 9006, and 9014. It is expected that these proposed amendments and possibly a few more — which may be

approved at the advisory committee's spring 1997 meeting — will be presented to the Standing Committee at its June 1997 meeting with a recommendation that they be published for comment in the fall. The advisory committee is working on possible amendments that would substantially revise Rules 9013 and 9014 governing adversary procedures, contested matters, applications, and other litigation proceedings.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Federal Rules of Civil Procedure 73 and proposed amendments abrogating Rules 74, 75, and 76, and revisions of Forms 33 and 34, together with Committee Notes explaining their purpose and intent. These changes are proposed to conform to the provisions in the Federal Courts Improvement Act, Pub. L. No. 104-317 (effective October 19, 1996), which eliminate the alternative appeal to a district judge from a decision entered by a magistrate judge under 28 U.S.C. § 636(c). Consistent with the Act, the proposed amendments would eliminate the alternative appeal route and permit appeals only to the court of appeals.

Since the provisions eliminating the alternative appeal route took effect immediately, the chair of the Committee on Administration of the Magistrate Judges System requested the rules committees to take quick action to reconcile the inconsistency between the rules and the statutory changes.

Under the Judicial Conference's Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure, "the Standing Committee may eliminate the public comment requirement if, in the case of a technical or conforming (statutory)

amendment, it determines that notice and comment are not appropriate or necessary." On the recommendation of the advisory committee, your committee agreed that the proposed amendments were technical or conforming and need not be published for comment. If approved by the Judicial Conference and the Supreme Court by May 1, 1997, the proposed amendments could take effect on December 1, 1997, instead of December 1, 1998, when they would otherwise take effect if they were published for comment.

The proposed amendments to the Federal Rules of Civil Procedure and to the Forms, as recommended by your committee, appear in Appendix A together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve proposed amendments to Civil Rule 73, proposed amendments abrogating Rules 74, 75, and 76, and revision of Forms 33 and 34, and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendments to Rule 23 (Class Action)

The Advisory Committee on Civil Rules has held three public hearings and is reviewing comments submitted on proposed amendments to Civil Rule 23 published for comment in August 1996. Among other things, the proposed amendments provide additional factors for consideration in certifying class actions under Rule 23(b)(3), establish discretionary interlocutory appeal on the certification decision, and expand the permissible time for the court to make a certification decision. The proposal has generated keen interest. Approximately 90 witnesses have testified at the hearings, including class action practitioners, general counsel from large corporations, law school academics, and representatives from public interest groups. One provision in the proposed amendments would expressly permit certifying a class action for

settlement purposes only. That issue is now pending in the Supreme Court in a case granted review after publication of the Rule 23 proposal. The Court scheduled oral argument in *Amchem Prods., Inc. v. Windsor* (No. 96-270) for February 17, 1997. The advisory committee will consider whether to address further problems that have been uncovered from the testimony at the hearings, which indicate a substantial increase in the use of Rule 23.

Scope and Nature of Discovery

At the suggestion of the American College of Trial Lawyers and with the goal of reducing cost and delay in litigation, the advisory committee has also embarked on a major review of the general scope and nature of discovery. A subcommittee was appointed to explore discovery issues. It convened a conference of about 30 prominent attorneys and academics to discuss discovery problems. The advisory committee plans to hold two meetings in the fall to follow up and focus on the results of the subcommittee's conference and begin to select specific issues and possible solutions for further study.

Judicial Conference Report to Congress on the RAND CJRA Study

The advisory committee submitted for your committee's consideration a draft report from the Committee on Court Administration and Case Management (CACM) to Congress evaluating the experiences of the district courts under the respective Civil Justice Reform Act plans. At the request of the CACM committee, your committee met in executive session for the discussion. The draft CACM committee report proposed recommendations for procedural changes, which would initiate the rulemaking process. The CACM committee report itself was based on district courts' reviews of their dockets and procedures, a Federal Judicial Center study of the demonstration courts, and an extensive study conducted by the RAND corporation, which

included several hundred pages of statistical and analytical data. Both your committee and the Civil Rules Advisory Committee are now directing careful attention to the CACM committee draft report and the RAND study. Neither rules committee has taken a collective position on the CACM committee report or on the RAND study. The report to Congress is due by June 30, 1997. Your committee and the advisory committee believe that the report to Congress is an important part of establishing an appropriate working relationship with Congress and are keenly interested in both the report and the RAND study, and their impact on the rulemaking process.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Criminal Rule 58 together with Committee Notes explaining their purpose and intent.

The proposed amendments to Rule 58 conform with the provisions in the Federal Courts Improvement Act, which modify the procedures governing the consent of a defendant to be tried by a magistrate judge. The changes would eliminate the requirement for a defendant to consent to a trial before a magistrate judge in a case when the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction. The proposed amendments would also permit a defendant to consent to a trial by a magistrate judge in all other misdemeanor cases either orally on the record or in writing.

As in the case of the proposed amendments to the Civil Rules, the Chair of the Committee on Administration of the Magistrate Judges System requested the rules committees to expedite the rulemaking process and eliminate the inconsistency between the rule and the

amended statutory provisions. On recommendation of the advisory committee and in accordance with established Judicial Conference procedures, your committee agreed that the proposed amendments to Criminal Rule 58 were technical or conforming and need not be published for public comment.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in Appendix B with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rule 58 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Item

The advisory committee is reviewing suggested amendments to Criminal Rule 11 addressing issues that have resulted in conflicting decisions among the circuits. It also is studying suggested procedures governing forfeiture proceedings.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Report to Congress

Under 42 U.S.C.§ 13942(c), as amended in 1996, the Judicial Conference "shall evaluate and report to Congress its views on whether the Federal Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings."

The Advisory Committee on Evidence Rules examined state laws and cases, federal cases, and a report to Congress prepared by the Department of Justice, dated December 1995,

entitled "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counsellors." The advisory committee concluded that it was not advisable to amend the Evidence Rules to include a special privilege for these confidential communications.

Your committee approved the recommended draft report to Congress proposed by the advisory committee. The report explains why no amendment is necessary to guarantee that the confidentiality of these communications will be fairly and adequately protected in federal court proceedings.

Evidence Rule 501 gives the federal courts the primary responsibility for developing evidentiary privileges under a common law approach. Since the rule was enacted in 1975, several evidentiary privileges have been recognized by the federal courts. Most recently, the Supreme Court recognized the existence of a privilege for confidential statements made to a licensed clinical social worker in a therapy session. *Jaffee v. Redmond*, 116 S.Ct. 812 (1996).

In light of the *Jaffee* decision and the well-entrenched, common-law approach to recognizing privilege in the Evidence Rules, there is every reason to believe that confidential communications from victims of sexual assault to licensed therapists and counselors are and will be adequately protected by the common-law approach mandated by Rule 501. More importantly, it would be inadvisable to single out a particular privilege for codification in the rules. It would be anomalous and might cause unwarranted confusion in the bar and bench, because all other federally-recognized privileges would remain grounded in common law. The report is contained in Appendix C with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed report, which concludes that it is not advisable to amend the Evidence Rules to include a special privilege for confidential communications between sexual assault victims and their counselors or therapists, for transmission to Congress in accordance with the law.

Informational Item

The advisory committee is reviewing the rules to identify obsolete provisions and rules generating inter circuit conflict. It is also reexamining proposed amendments to Rule 103 and is reviewing a few other rules, including Rules 404(b), 615, 703, 706, and 803(6).

LONG-RANGE PLAN IMPLEMENTATION

The Standing Rules Committee completed a self-study, which reviewed the present operation and the future course of the rulemaking process. The self-study was published in the Federal Rules Decisions. 168 F.R.D. 679 (1996). A copy of the self-study is not attached due to its length.

Your Committee and the respective advisory rules committees continue to follow the three implementation strategies in the Long Range Plan to effect the Plan's Recommendation 28 dealing with the rulemaking process.

STATUS OF PROPOSED AMENDMENTS

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

Respectfully submitted,

Alicemarie H. Stotler
Chair

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

APPENDICES

Appendix A — Proposed Amendments to the Federal Rules of Civil Procedure

Appendix B — Proposed Amendments to the Federal Rules of Criminal Procedure

Appendix C — Proposed Report to Congress on Amending Evidence Rules Regarding the Confidentiality of Communications Between Sexual Assault Victims and Their Counsellors

Appendix D —Chart Summarizing Status of Rules Amendments

To: Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: December 6, 1996

Re: Report of the Advisory Committee on Civil Rules

I Introduction

The Advisory Committee on Civil Rules met on October 17 and 18, 1996, at the Administrative Office of the United States Courts in Washington, D.C. A brief summary of the topics considered at the meeting is provided in this Introduction. Part II recommends that this Committee transmit to the Judicial Conference changes to conform the Civil Rules to the repeal of the statutory provision that allowed parties that had agreed to trial before a magistrate judge to agree also that the first appeal would be taken to the district court.

* * * * *

II ACTION ITEMS

Rules Transmitted for Judicial Conference Approval

Rules 73, 74, 75, 76

Section 207 of S. 1887, the Federal Courts Improvement Act of 1996, Act of October 19, 1996, reshapes the 28 U.S.C. § 636 provisions for appeal from a judgment entered by a magistrate judge following consent to trial before the magistrate judge. Section 636(c) formerly provided two alternative appeal paths. Appeal could be taken to the court of appeals, or, alternatively, the parties could agree at the time of consenting to trial before a magistrate judge that any appeal would be taken to the district court. The judgment of the district court on appeal from the

magistrate judge could be reviewed only by petition to the court of appeals for leave to appeal. This second appeal path has been rescinded, leaving only the path of direct appeal to the court of appeals.

Portions of Civil Rule 73 refer to the former provision for appeal to the district court. Civil Rules 74, 75, and 76 establish the procedure for appeal to the district court. Rule 73 must be conformed to the statute as amended, and Rules 74, 75, and 76 must be abrogated. Portions of Forms 33 and 34 also must be changed to conform to the statutory and rules changes. To conform these rules to the statutory changes, the Advisory Committee recommends the changes shown below in the usual form.

The Advisory Committee also recommends that these changes be transmitted to the Judicial Conference without any period of public comment, with the recommendation that they be sent on to the Supreme Court for submission to Congress. Part I(4)(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure authorizes this Committee to "eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception."

Parties no longer can consent to appeal from the judgment of a magistrate judge to the district court. Perpetuation of the Civil Rules describing such appeals serves no purpose and may mislead some parties to consent to trial before a magistrate judge for the purpose of also achieving a hoped-for speedy and inexpensive opportunity to appeal "at home." Even if the comment and hearing requirement is excused, conforming amendments can become effective only on December 1, 1997, more than a full year after the statutory change. With comment and hearing, the date would be pushed back to December 1, 1998. Once Congress has made the decision to abolish this means of appeal, the only question for the Enabling Act Process is the technical one of making the right conforming changes. The Advisory Committee believes that the conforming changes are sufficiently clear to justify prompt action.

It is possible that on December 1, 1997, some cases will remain pending before magistrate judges in which the parties have consented to appeal to the district court. There is no need to

defer conforming changes for fear of the impact on these cases. The retroactive effect of the statutory change is not a matter to be resolved by court rule. The effect of the conforming rules changes will be governed by the Supreme Court order making the amendments; the usual provision in rules orders is that the changes take effect on December 1 and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 28 U.S.C.A. § 2074(a) provides that changes do not apply to pending proceedings "to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies."

* * * * *

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE*

Rule 73. Magistrate Judges; Trial by Consent and Appeal ~~Options~~

(a) Powers; Procedure. * * * * * A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(~~7~~5).

* * * * *

(c) ~~Normal~~ Appeal ~~Route~~. In accordance with Title 28, U.S.C. § 636(c)(3), ~~unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule,~~ appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

~~**(d) Optional Appeal Route.** In accordance with Title 28, U.S.C. § 636(c)(4), at the time of reference to a magistrate~~

* New material is underlined; material to be omitted is struck through.

~~judge, the parties may consent to appeal on the record to a district judge of the court and thereafter, by petition only, to the court of appeals.~~

COMMITTEE NOTE

The Federal Courts Improvement Act of 1996 repealed the former provisions of 28 U.S.C. § 636(c)(4) and (5) that enabled parties that had agreed to trial before a magistrate judge to agree also that appeal should be taken to the district court. Rule 73 is amended to conform to this change. Rules 74, 75, and 76 are abrogated for the same reason. The portions of Form 33 and Form 34 that referred to appeals to the district court also are deleted.

~~**Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)**~~

~~**(a) When Taken.** When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate judge under the consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal may be taken from the decision of a magistrate judge by filing with the clerk of the district court a notice of appeal within 30~~

~~days of the date of entry of the judgment appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by this subdivision, whichever period last expires.~~

~~The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate judge by any party, and the full time for appeal from the judgment entered by the magistrate judge commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a~~

~~motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.~~

~~An interlocutory decision or order by a magistrate judge which, if made by a district judge, could be appealed under any provision of law, may be appealed to a district judge by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a district judge under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate judge unless the magistrate judge or district judge shall so order.~~

~~Upon a showing of excusable neglect, the magistrate judge may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.~~

~~**(b) Notice of Appeal; Service.** The notice of appeal shall~~

~~specify the party or parties taking the appeal, designate the judgment, order or part thereof appealed from, and state that the appeal is to a judge of the district court. The clerk shall mail copies of the notice to all other parties and note the date of mailing in the civil docket.~~

~~**(c) Stay Pending Appeal.** Upon a showing that the magistrate judge has refused or otherwise failed to stay the judgment pending appeal to the district judge under Rule 73(d), the appellant may make application for a stay to the district judge with reasonable notice to all parties. The stay may be conditioned upon the filing in the district court of a bond or other appropriate security.~~

~~**(d) Dismissal.** For failure to comply with these rules or any local rule or order, the district judge may take such action as is deemed appropriate, including dismissal of the appeal. The district judge also may dismiss the appeal upon the filing of~~

~~a stipulation signed by all parties, or upon motion and notice by the appellant.~~

COMMITTEE NOTE

Rule 74 is abrogated for the reasons described in the Note to Rule 73.

~~Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d)~~

~~**(a) Applicability.** In proceedings under Title 28, U.S.C. § 636(c), when the parties have previously elected under Rule 73(d) to appeal to a district judge rather than to the court of appeals, this rule shall govern the proceedings on appeal.~~

~~**(b) Record on Appeal.**~~

~~*(1) Composition.* The original papers and exhibits filed with the clerk of the district court, the transcript of the proceedings, if any, and the docket entries shall constitute the record on appeal. In lieu of this record~~

~~the parties, within 10 days after the filing of the notice of appeal, may file a joint statement of the case showing how the issues presented by the appeal arose and were decided by the magistrate judge, and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.~~

~~*(2) Transcript.* Within 10 days after filing the notice of appeal the appellant shall make arrangements for the production of a transcript of such parts of the proceedings as the appellant deems necessary. Unless the entire transcript is to be included, the appellant, within the time provided above, shall serve on the appellee and file with the court a description of the parts of the transcript which the appellant intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be~~

~~necessary, within 10 days after the service of the statement of the appellant, the appellee shall serve on the appellant and file with the court a designation of additional parts to be included. The appellant shall make arrangements for the inclusion of all such parts unless the magistrate judge, upon motion, exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.~~

~~*(3) Statement in Lieu of Transcript.* If no record of the proceedings is available for transcription, the parties shall, within 10 days after the filing of the notice of appeal, file a statement of the evidence from the best available means to be submitted in lieu of the transcript. If the parties cannot agree they shall submit a statement of their differences to the magistrate judge for settlement.~~

~~**(c) Time for Filing Briefs.** Unless a local rule or court order otherwise provides, the following time limits for filing briefs shall apply:~~

~~(1) The appellant shall serve and file the appellant's brief within 20 days after the filing of the transcript, statement of the case, or statement of the evidence.~~

~~(2) The appellee shall serve and file the appellee's brief within 20 days after service of the brief of the appellant.~~

~~(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee.~~

~~(4) If the appellee has filed a cross-appeal, the appellee may file a reply brief limited to the issues on the cross-appeal within 10 days after service of the reply brief of the appellant.~~

~~**(d) Length and Form of Briefs.** Briefs may be typewritten. The length and form of briefs shall be governed by local rule.~~

~~**(e) Oral Argument.** The opportunity for the parties to be heard on oral argument shall be governed by local rule.~~

COMMITTEE NOTE

Rule 75 is abrogated for the reasons described in the Note to Rule 73.

~~Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs~~

~~**(a) Entry of Judgment.** When the parties have elected under Rule 73(d) to appeal from a judgment of the magistrate judge to a district judge, the clerk shall prepare, sign, and enter judgment in accordance with the order or decision of the district judge following an appeal from a judgment of the magistrate judge, unless the district judge directs otherwise. The clerk shall mail to all parties a copy of the order or decision of the district judge.~~

~~**(b) Stay of Judgments.** The decision of the district judge shall be stayed for 10 days during which time a party may petition the district judge for rehearing, and a timely petition shall stay the decision of the district judge pending disposition of a petition for rehearing. Upon the motion of a party, the decision of the district judge may be stayed in order to allow a party to petition the court of appeals for leave to appeal.~~

~~**(c) Costs.** Except as otherwise provided by law or ordered by the district judge, costs shall be taxed against the losing party; if a judgment of the magistrate judge is affirmed in part or reversed in part, or is vacated, costs shall be allowed only as ordered by the district judge. The cost of the transcript, if necessary for the determination of the appeal, and the premiums paid for bonds to preserve rights pending appeal shall be taxed as costs by the clerk.~~

COMMITTEE NOTE

Rule 76 is abrogated for the reasons described in the Note to Rule 73.

Form 33. Notice of Availability of Magistrate Judge to Exercise Jurisdiction ~~and Appeal Option~~

* * * * *

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. ~~Alternatively, upon consent by all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal.~~

Copies of the Form for the "Consent to Jurisdiction by a United States Magistrate Judge" ~~and "Election of Appeal to a District Judge"~~ are available from the clerk of the court.

Form 34. Consent to Exercise of Jurisdiction by a United States Magistrate Judge~~, Election of Appeal to District Judge~~

* * * * *

~~ELECTION OF APPEAL TO DISTRICT JUDGE~~

~~[Do not execute this portion of the Consent Form if you desire that the appeal lie directly to the court of appeals.]~~

~~In accordance with the provisions of Title 28, U.S.C. § 636(c)(4), the undersigned party or parties elect to take any appeal in this case to a district judge of this court.~~

_____ _____

~~Date~~ ~~Signature~~

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report of Advisory Committee on Rules of Criminal Procedure**

DATE: **December 4, 1996**

I. INTRODUCTION.

At its meeting on October 7th and 8th, 1996, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting and proposed amendments to Rule 58 are attached.

II. ACTION ITEMS

A. Action on Proposed Changes to Rule 58

After the Committee met in October, the President signed the Federal Courts Improvement Act of 1996 (S. 1887). Section 202 amended 18 U.S.C. § 3401(b) and (g) and 28 U.S.C. § 636(a); those amendments eliminated the requirement that a defendant consent to a trial before a magistrate judge in those cases where the defendant is charged with a petty offense which is either a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. That same section also amended §3401(b) by allowing the defendant to consent to a trial by a magistrate judge in all other misdemeanor cases either orally on the record or in writing. Those statutory changes will require conforming amendments to Rule 58, Procedure for Misdemeanors and Other Petty Offenses.

On the recommendation of Hon. Phillip M. Pro (Chair of the Committee on the Administration of the Magistrate Judges System) and with the assistance of Mr. Rabiej

(who drafted suggested conforming language) the Criminal Rules Committee was polled and agreed that the changes should be forwarded to the Standing Committee for action at its January 1997 meeting. The Style Committee has reviewed the draft and has made its suggested changes.

Under the rule-making procedures, "The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Committee views the proposed amendments as "conforming" changes resulting from the changes in the underlying statutory provisions and believes that public comment is not necessary. If the changes are forwarded without public comment, and assuming they are approved by the Supreme Court, they would go into effect on December 1, 1997. If the normal procedure of publication and comment is followed, they would not go into effect until December 1, 1998.

A draft of the proposed changes to Rule 58, the Committee Note, and a copy of Section 202 of the Federal Courts Improvement Act of 1996, are attached.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 58, without publication, and forward them to the Judicial Conference for approval.

* * * * *

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 58. Procedure for Misdemeanors and Other Petty Offenses

(a) SCOPE.

(1) *In General.* This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to district judges ~~of the district courts~~ in such cases tried by United States magistrate judges.

* * * * *

(b) PRETRIAL PROCEDURES.

* * * * *

(2) *Initial Appearance.* At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

* * * * *

---

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

(C) ~~unless the charge is a petty offense for which appointment of counsel is not required,~~ the right to request the ~~assignment~~ appointment of counsel if the defendant is unable to obtain counsel, unless the charge is a petty offense for which an appointment of counsel is not required;

* * * * *

(E) the right to trial, judgment, and sentencing before a district judge ~~of the district court~~ , unless:

(i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or

(ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) ~~unless the charge is a petty offense,~~ the right to trial by jury before either a United States magistrate

judge or a district judge ~~of the district court~~, unless the charge is a petty offense; and

(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense;~~ the right to a preliminary examination in accordance with 18 U.S.C. § 3060, and the general circumstances under which the defendant may secure pretrial release, if the defendant is held in custody and charged with a misdemeanor other than a petty offense.

(3) *Consent and Arraignment.*

(A) TRIAL BEFORE A UNITED STATES MAGISTRATE JUDGE. ~~If the defendant signs a written consent to be tried before the magistrate judge which specifically waives trial before a judge of the district court, the magistrate judge shall take the defendant's plea.~~ A magistrate judge shall take the defendant's plea in a Class B misdemeanor charging a motor vehicle-

offense, a Class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or orally on the record to be tried before the magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere.

(B) FAILURE TO CONSENT. ~~If the defendant does not consent to trial before the magistrate judge,~~ In a misdemeanor case — other than a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction,— the ~~defendant shall be ordered~~ magistrate judge shall order the defendant to appear before a district judge ~~of the district court~~ for further proceedings on notice, unless the defendant consents to trial before the

magistrate judge.

* * * * *

(g) APPEAL.

(1) *Decision, Order, Judgment or Sentence by a District Judge.* An appeal from a decision, order, judgment or conviction or sentence by a district judge ~~of the district court~~ shall be taken in accordance with the Federal Rules of Appellate Procedure.

(2) *Decision, Order, Judgment or Sentence by a United States Magistrate Judge.*

(A) INTERLOCUTORY APPEAL. A decision or order by a magistrate judge which, if made by a district judge ~~of the district court~~, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a district judge ~~of the district court~~ provided such appeal is taken within 10 days of the entry of the decision or order. An appeal

shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge.

(B) APPEAL FROM CONVICTION OR SENTENCE. An appeal from a judgment of conviction or sentence by a magistrate judge to a district judge ~~of the district court~~ shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.

* * * * *

(D) SCOPE OF APPEAL. The defendant shall not be entitled to a trial de novo by a district judge ~~of the district court~~. The scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.

* * * * *

COMMITTEE NOTE

The Federal Courts Improvement Act of 1996, Sec. 202, amended 18 U.S.C. § 3401(b) and 28 U.S.C. § 636(a) to remove the requirement that a defendant must consent to a trial before a magistrate judge in a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. Section 202 also changed 18 U.S.C. § 3401(b) to provide that in all other misdemeanor cases, the defendant may consent to trial either orally on the record or in writing. The amendments to Rule 58(b)(2) and (3) conform the rule to the new statutory language and include minor stylistic changes.

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT VICTIMS AND THEIR COUNSELORS (March 11, 1997)

Introduction

Section 40153 of the Violent Crime Control and Law Enforcement Act of 1994 directed that:

> The Judicial Conference of the United States shall evaluate and report to Congress its views on whether the Federal Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings. 42 U.S.C. § 13942(c) (1996).

The Advisory Committee on Evidence Rules examined the advisability of amending the Federal Rules of Evidence to include a specific privilege protecting confidential communications from victims of sexual assault to their therapists and counselors. The advisory committee examined state laws and cases, federal cases, and a Report to Congress prepared by the Department of Justice, dated December, 1995, entitled "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors." After this extensive review by the advisory committee, the committee concluded that it is not advisable to amend the Federal Rules of Evidence to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. The Committee on Rules of Practice and Procedure agreed with the conclusion of the advisory committee at its January 9-10, 1997 meeting.

Discussion

Based on the analysis and conclusions of the Advisory Committee on Evidence Rules and the Committee on Rules of Practice and Procedure, the Judicial Conference recommends to Congress that the Federal Rules of Evidence not be amended to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. An amendment is not necessary to guarantee that the confidentiality of

these communications will be fairly and adequately protected in federal court proceedings.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Recently the Supreme Court, operating under the common law approach mandated by Rule 501, recognized the existence of a privilege under federal law for confidential statements made in psychological therapy sessions. The Court specifically held that this privilege protected confidential statements made to a licensed clinical social worker in a therapy session. *Jaffee v. Redmond,* 116 S.Ct. 812 (1996). In *Jaffee* the Court further held that the privilege was absolute rather than qualified.

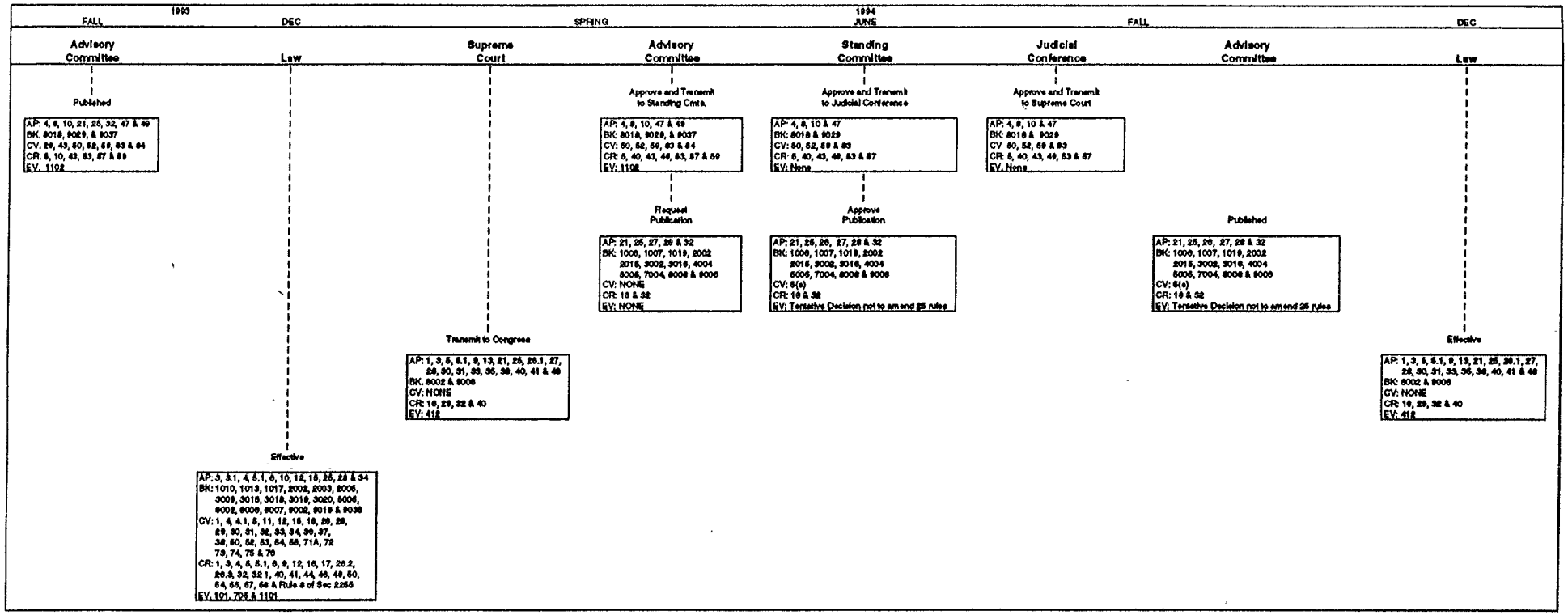
While the exact contours of the privilege recognized in *Jaffee* remain to be developed, the Court's generous view of the therapeutic privilege can be adequately applied to protect confidential communications from sexual assault victims to licensed therapists or counselors. In light of the recency of *Jaffee* and the well-entrenched common law approach to privileges set forth in the Federal Rules, the Judicial Conference concludes that legislative intervention at this time is neither necessary nor advisable. There is every reason to believe that confidential communications from victims of sexual assault to licensed therapists and counselors are and will be adequately protected by the common law approach mandated by Rule 501. At the very least, the federal courts should be given the chance to apply and develop the *Jaffee* principle before legislative intervention is considered.

Most importantly, it is not advisable to single out a sexual assault counselor privilege for legislative enactment. Amending the Federal Rules to include a sexual assault counselor privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. The Judicial Conference believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving sexual assault in the federal courts. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar.

Conclusion

For these reasons, the Judicial Conference recommends that the Federal Rules of Evidence not be amended to include a specific privilege for confidential communications from sexual assault victims to their therapists or counselors.

PROMULGATION OF RULES AMENDMENTS



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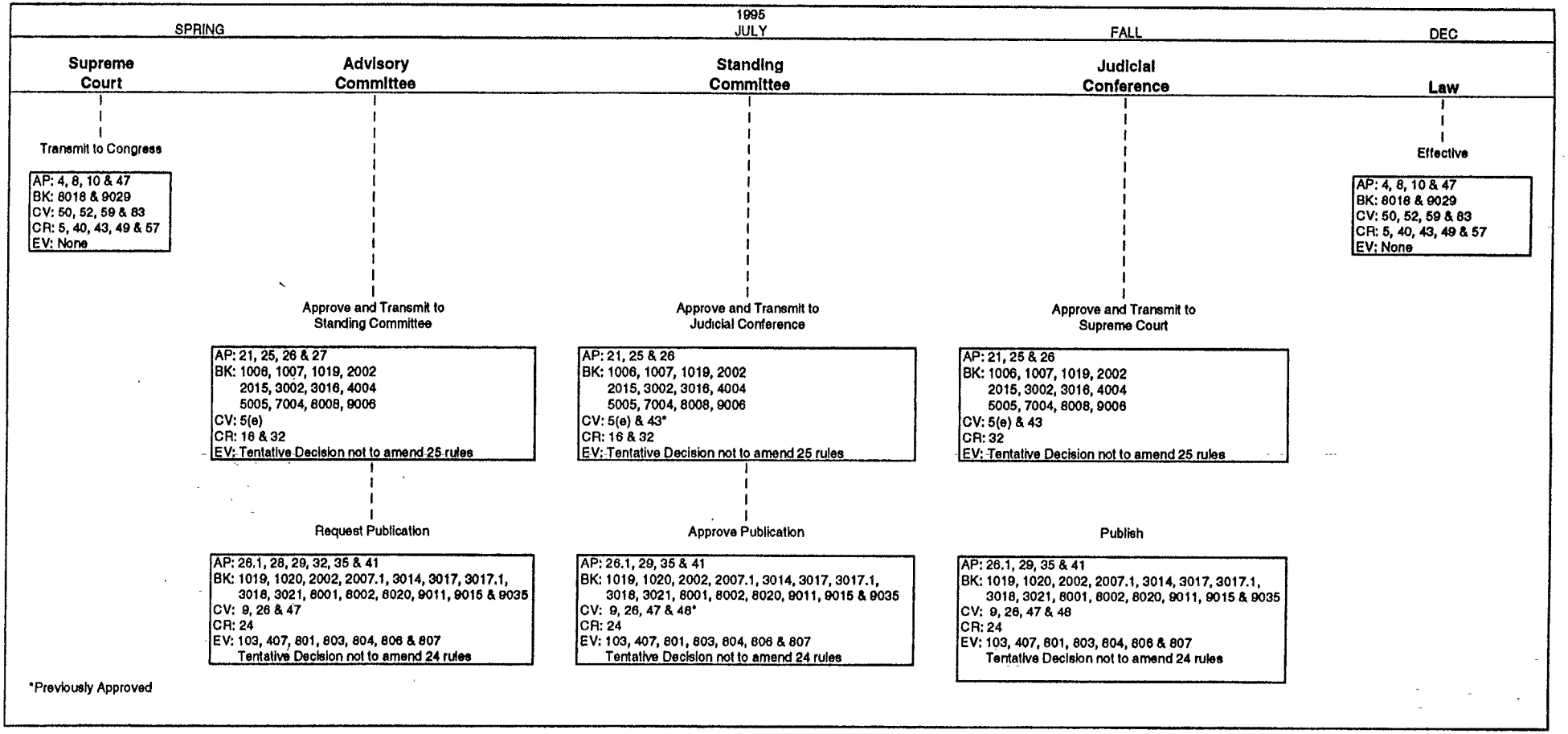

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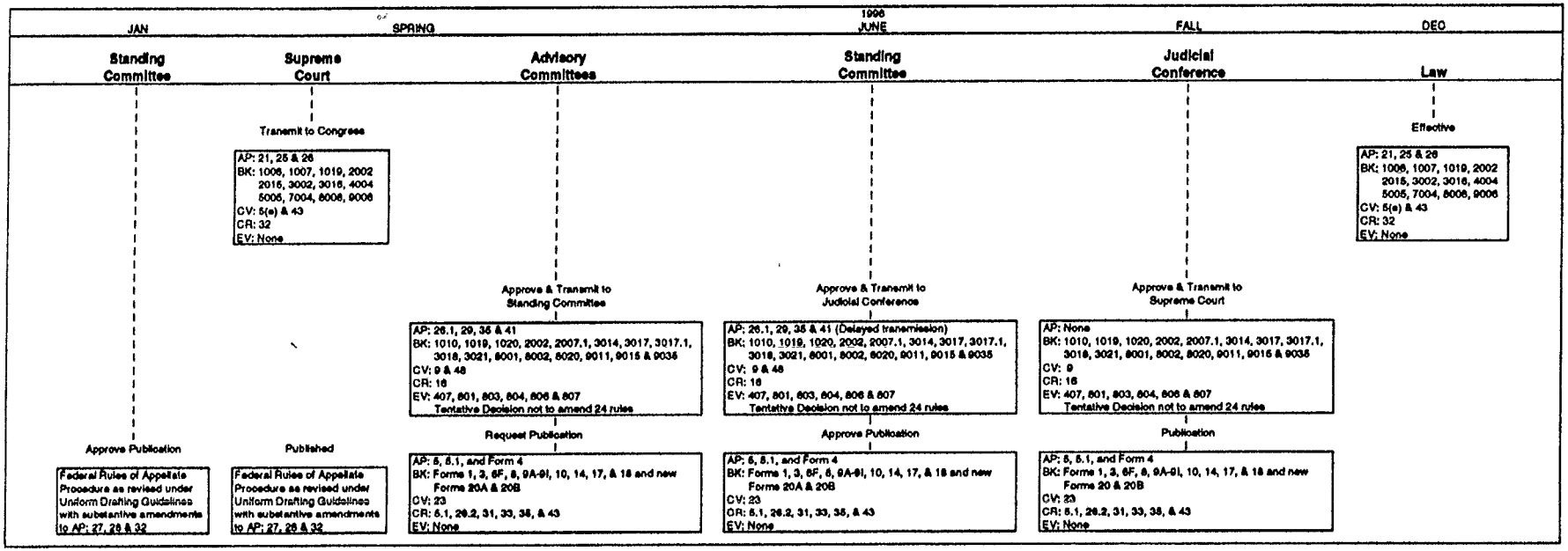

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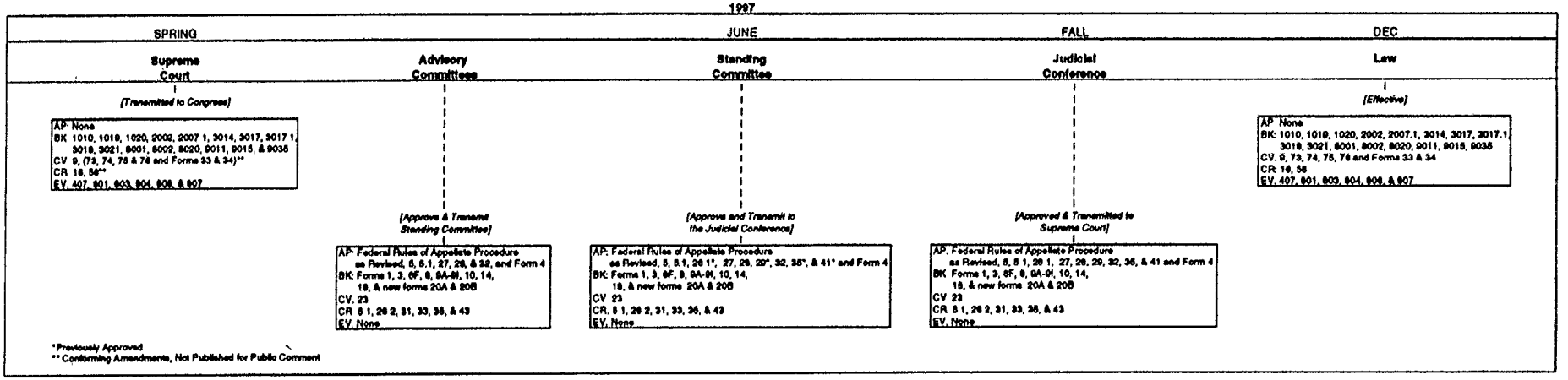
1997



*Previously Approved
**Conforming Amendments, Not Published for Public Comment

FORDHAM
University

Agenda Item II
School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

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Hon. Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, California 92701

February 17, 1997

Re: Omnibus Crime Control Act of 1997

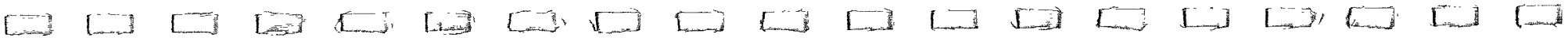
Dear Judge Stotler,

Enclosed is a memorandum prepared by Judge Smith and myself, on behalf of the Evidence Rules Committee, concerning proposed amendments to the Federal Rules of Evidence that are contained in the Omnibus Crime Control Act of 1997. At the suggestion of John Rabiej, we include a proposed text to be included in your letter to Congress commenting upon the Act. I also enclose a disk with a file containing the attached memorandum. The disk is in Wordperfect 5.2+. Please do not hesitate to contact me if I can be of any further assistance on this matter.

Very truly yours,

Daniel J. Capra
Reed Professor of Law

cc: Hon. Fern M. Smith



FORDHAM
UNIVERSITY

Memorandum To: Hon. Alicemarie H. Stotler
From: Hon. Fern M. Smith and Professor Daniel J. Capra
Re: Evidence Provisions in the Omnibus Crime Control Act
Date: February 16, 1997

Introduction

We have been informed of two provisions in the Omnibus Crime Control Act of 1997 (S.3) which would amend the Federal Rules of Evidence. We understand that you plan to send a letter to Congress indicating that rulemaking procedures should be followed. John Rabiej suggested that we prepare a statement concerning any substantive problems we have with the legislation, so that these comments might be added to your letter. What follows is suggested language about the substance of the legislation insofar as it affects the evidence rules. We note that our preliminary view of the first proposal is not negative as a substantive matter. We feel it appropriate to comment favorably on the substance of this provision so as to indicate our willingness to analyze congressional proposals without bias or prejudgment.

Proposed Text of Letter to Congress as it Pertains to Evidence Rules

Section 503 of the Omnibus Crime Control Act of 1997 (the Act) would amend Rule 404(a) of the Federal Rules of Evidence to provide that "if an accused offers evidence of a pertinent trait of character of the victim of the crime, evidence of a pertinent character trait of the accused" may be offered by the prosecution. Under current law, the defendant does not open the door to his own character by proffering evidence about the character of a victim. We believe that as a substantive matter, this provision is fair, balanced, and well-drafted. The reason character evidence is generally excluded at trial is that it has dubious probative value, and could lead to a trial of personality, rather than a trial on the merits. If, however, the defendant decides to introduce character evidence, he

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presumably has made the decision that this kind of evidence is relevant, and that it is fair to inquire into personality as it bears on the merits. Once that decision has been made, it is appropriate to allow the prosecution to respond on those very premises. Moreover, the proposed amendment would allow proper prosecutorial response when the defendant attempts a "blame the victim" defense.

We have serious concerns, however, with section 713 of the Act, which would amend Rule 404(b) of the Rules of Evidence to include "disposition toward a particular individual" among the valid purposes for admitting evidence of a person's (usually a criminal defendant's) uncharged misconduct. Rule 404(b) codifies the time-honored principle that specific bad acts are never admissible to prove that a person had a character or propensity to act in a certain way. The Rule states, however, that specific bad acts can be offered to prove something other than a person's propensity to act--some not-for-character purpose. The Rule then gives several illustrations of permissible purposes, such as intent and identity. It is important to remember that the list of not-for-character purposes in the Rule is *illustrative only*. See *United States v. Simon*, 767 F.2d 524 (8th Cir. 1985) ("Rule 404(b) is a rule of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to *any* issue in the trial, unless it tends to prove only criminal disposition.") (emphasis added).

Section 713 would add "disposition toward a particular individual" to this illustrative list. We believe this amendment is problematic for at least three reasons:

1. Assuming that "disposition toward a particular individual" is not itself a character trait, evidence of such disposition is fully admisssible now, without having to amend the rule. This follows from the premise that the list of permissible purposes in the Rule is by way of illustration only; adding another illustration does not affect the admissibility of evidence of uncharged misconduct in any sense.

2. Adding another illustration to the Rule could give courts the misimpression that an explicit mention of a permissible purpose under the Rule is actually *necessary* for admissibility. This could cause the Rule to be applied in an unnecessarily restrictive manner--to exclude evidence legitimately offered for a not-for-character purpose, simply because that purpose was not one specifically listed in the Rule. The amendment could in fact serve to harm legitimate prosecutorial

interests.

3. There is a strong argument that "disposition toward an individual" is really just another way of saying "character" or "propensity". The courts often use the term "criminal *disposition*" as a synonym for the character purpose that is prohibited by the Rule. If "disposition" does mean "character" or "propensity", as most courts have held, then including "disposition toward an individual" as a permissible purpose for bad acts evidence renders the Rule internally inconsistent. The Rule would essentially read: "Evidence of uncharged misconduct cannot be used to prove a person's propensity to act in a certain way, but it can be used for other purposes, such as to prove a person's propensity to act in one specific way." If disposition is not really an "other purpose" then the Rule would be self-contradictory as amended. Moreover, the amendment would create the anomaly that this one character trait would be proveable while all others would not. This could create confusion as to why this particular character trait is given special treatment over all others.

For all these reasons, we respectfully request that Rule 404(b) not be amended in the manner set forth in section 713 of the Omnibus Crime Control Act of 1997.

Exclusionary Rule

The Omnibus Crime Control Act contains a provision that would limit the exclusionary rule. We have chosen not to comment on this proposal. Although the exclusionary rule is a rule of evidence in a broad sense, it is a court-made rule that is not in the Federal Rules of Evidence. Whether the exclusionary rule should apply in a federal court is a policy matter that implicates fundamental questions of remedial enforcement of constitutional rights. We believe that these issues are beyond the scope of the Evidence Rules Committee's jurisdiction.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

February 4, 1997
Via Facsimile

MEMORANDUM TO JUDGE FERN M. SMITH AND PROFESSOR DANIEL J. CAPRA

SUBJECT: *Proposed Amendment to Evidence Rule 404 in Pending Legislation*

For your information, I am attaching section 503 from the Omnibus Crime Control Act of 1997 (S.3), which was introduced by Senator Hatch on January 21, 1997. The provision would amend Evidence Rule 404 to allow the prosecution to offer evidence of the negative character trait of the defendant to rebut negative character evidence offered against a victim by the defendant.

The Omnibus Crime bill contains several other provisions that affect the rulemaking process. In the past Congressional sessions, comprehensive crime bills have been introduced early in the session. Many hearings are held throughout the session on these bills. Inevitably, the bills are later substantially amended and divided into many separate bills. Only a few of the separate bills ordinarily get passed and then only at the end of the session.

We usually prepare a response to the Hill from Judge Stotler early in this process to get the judiciary's position on the record on all the rules-related provisions in a bill. In these cases, we advise Congress that the Rules Enabling Act and its rulemaking procedures should be followed. We also identify any substantive problems with the drafting of the legislation. After conferring with our Legislative Affairs Office, I will contact you to discuss our response.

In the meantime, I will keep you posted on developments involving this legislation.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

JUVENILE JUSTICE REFORM

The youth violence bill will ensure that violent and repeat juvenile offenders are treated as adults by authorizing US Attorneys to prosecute 14-year-olds for any federal felony that is a crime of violence or a serious drug trafficking offense. This legislation also confines juveniles prosecuted in the federal system for the length of their sentence. New federal penalties for offenses committed by criminal street gangs will create a sustained effort to target violent youth gang activity. Federal prosecutors will be able to charge gang leaders or members under this bill if they engage in two or more criminal gang offenses. It will also be a crime to recruit someone into a gang, or solicit their participation in a gang crime.

This legislation also will reform federal aid to State youth crime programs by eliminating needless federal mandates on state criminal justice systems that have stifled innovative state efforts to address violent youth crime. This bill also requires that states not exclude religious organizations from participating in juvenile rehabilitative programs. In an effort to encourage the states to undertake progressive responses to violent youth crime, this bill authorizes funding for a variety of programs, such as fingerprinting, DNA testing, and improved record keeping practices for juvenile offenders. The Juvenile Justice bill also fosters youth crime prevention that works by ensuring that there are 3,000 Boys & Girls Clubs by the year 2000, and by permitting some federal grant funds to be used to establish a role model speakers program.

PERSONAL SECURITY

Recent studies show that the adoption by more than 30 states of laws allowing citizens to carry firearms has had, and will have, a material and positive effect in preventing violent crime. S. 3 will empower current and retired law enforcement officers to carry firearms in other states, and will authorize states to enter into interstate compacts recognizing each other's citizen carry laws. It will also create an exception to federal firearm purchase waiting periods for persons protected under a protective order. Thus, for instance, no longer will a threatened and abused woman be forced to wait in fear for the right to protect herself.

SENSIBLE PRISON REFORM

American taxpayers should not be saddled with the burden of paying for the cost of incarcerating aliens convicted of crimes in this country. In an effort to lessen this burden, this legislation requires the Department of State to negotiate treaties with all foreign governments that receive U.S. aid. Under these treaties, receipt of American aid will be contingent upon foreign governments receiving and incarcerating their citizens and nationals who are convicted of crimes in the United States for a majority of their sentences.

This legislation also continues the authorization for the pilot project on privatization of federal prisons. It will also build on the Prison Litigation Reform Act enacted last Congress by amending and clarifying features of the PLRA. Provisions of this bill will also make it more difficult for prisoners to pursue their criminal careers while in prison by making it more difficult to conduct criminal activity by phone.

Importantly, this bill also eliminates inappropriate and counter-productive "incentives" of early release for federal inmates to get drug treatment. Further, our bill will require all federal prisoners to work, and impose no-frills prisons in the federal system.

CHILD PORNOGRAPHY

This legislation also builds on the advances made in the 104th Congress by requiring the Secretary of State to renegotiate extradition treaties with foreign governments to ensure that child pornography offenses under federal law are extraditable offenses. It also modifies current federal law so that the statute of limitations is tolled when the federal child pornography laws are violated, in whole or in part, by persons beyond the jurisdiction of the United States.

CRIMINAL JUSTICE REFORM

S. 3 will improve public confidence in the criminal justice system by enhancing the accuracy of the trial process. The current exclusionary rule often unjustifiably bars use of probative evidence at trial. This law will amend the exclusionary rule to allow evidence to be admitted if law enforcement officers had an objectively reasonable belief that their conduct was lawful. Further, 18 U.S.C. §3501 provides that judges must admit a confession as long as it is voluntary. This bill will direct the Justice Department to ensure this provision is enforced. This bill also proposes various reforms to ensure fairness for both the defendant and the victim in criminal trials. These reforms to the criminal justice process that are critical if we are to prevent our cherished liberties from further devolving into merely a cynical shield for the guilty to avoid just punishment.

Mr. President, these bills alone will not solve our crime problem. That must be done community by community. Crime cannot thrive in a society that will not tolerate it. But by enacting these common sense reforms, we can signal our determination to build such a society. I urge my colleagues to support these bills.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 3

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Omnibus Crime Control Act of 1997".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Severability.

TITLE I—TRANSFER OF ALIEN PRISONERS

Sec. 101. Short title.
Sec. 102. Transfers of alien prisoners.
Sec. 103. Consent unnecessary.
Sec. 104. Certification transfer requirement.
Sec. 105. International prisoner transfer report.
Sec. 106. Annual reports on foreign assistance.
Sec. 107. Annual certification procedures.
Sec. 108. Prisoner transfers treaties.
Sec. 109. Judgments unaffected.
Sec. 110. Definition.
Sec. 111. Repeals.

TITLE II—EXCLUSIONARY RULE REFORM

Subtitle A—Exclusionary Rule Reform

Sec. 201. Short title.
Sec. 202. Admissibility of certain evidence.

Subtitle B—Confession Reform

Sec. 211. Enforcement of confession reform statute.

TITLE III—VIOLENT CRIME, DRUGS, AND TERRORISM

Sec. 301. Short title.

Subtitle A—Criminal Penalties and Procedures

Sec. 311. Protection of the Olympics.
Sec. 312. Federal responsibility for security at international athletic competitions.
Sec. 313. Technical revision to penalties for crimes committed by explosives.
Sec. 314. Chemical weapons restrictions.

Subtitle B—International Terrorism

Sec. 321. Multilateral sanctions.
Sec. 322. Information on cooperation with United States antiterrorism efforts in annual country reports on terrorism.
Sec. 323. Report on international terrorism.
Sec. 324. Revision of Department of State rewards program.

Subtitle C—Commissions and Studies

Sec. 331. National commission on terrorism.

TITLE IV—COMMUNITY PROTECTION

Sec. 401. Short title.

Subtitle A—Law Enforcement Assistance

Sec. 411. Exemption of qualified current and former law enforcement officers from State laws prohibiting the carrying of concealed firearms.

Subtitle B—Citizens' Assistance

Sec. 421. Short title.
Sec. 422. Authorization to enter into interstate compacts.
Sec. 423. Authorized uses of Federal grant funds.
Sec. 424. Self defense for victims of abuse.

TITLE V—CRIMINAL PROCEDURE IMPROVEMENTS

Subtitle A—Equal Protection for Victims

Sec. 501. The right of the victim to an impartial jury.
Sec. 502. Jury trial improvements.
Sec. 503. Rebuttal of attacks on the character of the victim.
Sec. 504. Use of notice concerning release of offender.
Sec. 505. Balance in the composition of rules committees.

Subtitle B—Firearms

Sec. 521. Mandatory minimum sentences for criminals possessing firearms.
Sec. 522. Firearms possession by violent felons and serious drug offenders.
Sec. 523. Use of firearms in connection with counterfeiting or forgery.
Sec. 524. Possession of an explosive during the commission of a felony.
Sec. 525. Second offense of using an explosive to commit a felony.
Sec. 526. Increased penalties for international drug trafficking.

Subtitle C—Federal Death Penalty

Sec. 541. Strengthening of Federal death penalty standards and procedures.
Sec. 542. Murder of witness as aggravating factor.
Sec. 543. Death penalty for murders committed in the district of columbia.

TITLE VI—INCREASED PENALTIES FOR TRAFFICKING AND MANUFACTURE OF METHAMPHETAMINE AND PRECURSORS

Sec. 601. Trafficking in methamphetamine penalty increases.
Sec. 602. Reduction of sentence for providing useful investigative information.
Sec. 603. Implementation of a sentence of death.
Sec. 604. Limitation on drug enforcement administrator tenure.
Sec. 605. Serious juvenile drug offenses as armed career criminal act predicates.

"(I) was issued to the individual by the public agency with which the individual serves or served as a qualified law enforcement officer; and

"(II) identifies the holder of the document as a current or former officer, agent, or employee of the agency.

"(B) QUALIFIED LAW ENFORCEMENT OFFICER.—The term 'qualified law enforcement officer' means an individual who—

"(i) is presently authorized by law to engage in or supervise the prevention, detection, or investigation of any violation of criminal law;

"(ii) is authorized by the agency to carry a firearm in the course of duty;

"(iii) meets any requirements established by the agency with respect to firearms; and

"(iv) is not the subject of a disciplinary action by the agency that prevents the carrying of a firearm.

"(C) QUALIFIED FORMER LAW ENFORCEMENT OFFICER.—The term 'qualified former law enforcement officer' means, an individual who is—

"(i) retired from service with a public agency, other than for reasons of mental disability;

"(ii) immediately before such retirement, was a qualified law enforcement officer with that public agency;

"(iii) has a nonforfeitable right to benefits under the retirement plan of the agency;

"(iv) was not separated from service with a public agency due to a disciplinary action by the agency that prevented the carrying of a firearm;

"(v) meets the requirements established by the State in which the individual resides with respect to—

"(I) training in the use of firearms; and

"(II) carrying a concealed weapon; and

"(vi) is not prohibited by Federal law from receiving a firearm.

"(D) FIREARM.—The term 'firearm' means any firearm that has, or of which any component has, traveled in interstate or foreign commerce.".

(b) CLERICAL AMENDMENT.—The chapter analysis for chapter 44 of title 18, United States Code, is amended by inserting after the item relating to section 926A the following:

"926B. Carrying of concealed firearms by qualified current and former law enforcement officers."

Subtitle B—Citizens' Assistance

SEC. 421. SHORT TITLE.

This subtitle may be cited as the "Citizens' Assistance Act of 1997".

SEC. 422. AUTHORIZATION TO ENTER INTO INTERSTATE COMPACTS.

(a) IN GENERAL.—The consent of Congress is hereby given to any 2 or more States—

(1) to enter into compacts or agreements for cooperative effort in enabling individuals to carry concealed weapons as dictated by laws of the State within which the owner of the weapon resides and is authorized to carry a concealed weapon; and

(2) to establish agencies or guidelines as they may determine to be appropriate for making effective such agreements and compacts.

(b) RESERVATION OF RIGHTS.—The right to alter, amend, or repeal this section is hereby expressly reserved by Congress.

SEC. 423. AUTHORIZED USES OF FEDERAL GRANT FUNDS.

(a) IN GENERAL.—Section 501(b) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3751(b)) is amended—

(1) in paragraph (25), by striking "and" at the end;

(2) in paragraph (26), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(27) at the discretion of State or local law enforcement authorities, to train members of the public in the safe possession, ownership, handling, carry, and use of firearms, including handguns.".

(b) EVALUATING DATA BAN.—Section 501(c) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3751(c)) is amended—

(1) by striking "Each" and inserting the following:

"(1) IN GENERAL.—Each";

(2) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and indenting appropriately;

(3) adding at the end the following:

"(2) COLLECTION AND USE OF DATA.—

"(A) IN GENERAL.—As a part of any evaluation required by paragraph (1) or otherwise, the Attorney General may not require the collection, and a grant recipient may not undertake any collection, of any data about any person who participates in any program funded under this section for the purpose of training members of the public in the safe possession, ownership, handling, carry, and use of firearms, including handguns, other than data necessary to determine whether such a member lawfully may possess a firearm.

"(B) DESTRUCTION OF DATA.—Any data described in subparagraph (A) shall be destroyed by any party in possession of that data not later than 7 days after the date on which it is collected or once a member of the public receives the training offered, whichever comes first.".

SEC. 424. SELF DEFENSE FOR VICTIMS OF ABUSE.

Section 922(s)(1)(B) of title 18, United States Code, is amended—

(1) by striking "the transferee has" and inserting "the transferee—

"(i) has"; and

(2) by adding at the end the following: "or

"(ii) is named as a person protected under a court order described in subsection (g)(8).".

TITLE V—CRIMINAL PROCEDURE IMPROVEMENTS

Subtitle A—Equal Protection for Victims

SEC. 501. THE RIGHT OF THE VICTIM TO AN IMPARTIAL JURY.

Rule 24(b) of the Federal Rules of Criminal Procedure is amended by striking "the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges" and inserting "each side is entitled to 10 peremptory challenges".

SEC. 502. JURY TRIAL IMPROVEMENTS.

(a) JURIES OF 6.—

(1) IN GENERAL.—Rule 23(b) of the Federal Rules of Criminal Procedure is amended—

(A) by striking "JURY OF LESS THAN TWELVE JURORS" and inserting the following:

"(b) NUMBER OF JURORS.—

"(1) IN GENERAL.—Except as provided in subsection (2), juries"; and

(B) by adding at the end the following:

"(2) JURIES OF 6.—Juries may be of 6 upon request in writing by the defendant with the approval of the court and the consent of the government.".

(2) ALTERNATE JURORS.—Rule 24(c) of the Federal Rules of Criminal Procedure is amended by inserting after the first sentance the following: "In the case of a jury of 6, the court shall direct that not more than 3 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors.".

(b) CAPITAL CASES.—Section 3593(b) of title 18, United States Code, is amended by striking the last sentence and inserting the following: "A jury impanelled pursuant to paragraph (2) may be made of 6 upon request in writing by the defendant with the approval of the court and the consent of the government. Otherwise, such jury shall be made of 12, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.".

SEC. 503. REBUTTAL OF ATTACKS ON THE CHARACTER OF THE VICTIM.

Rule 404(a)(1) of the Federal Rules of Evidence is amended by inserting before the semicolon the following: ", or, if an accused offers evidence of a pertinent trait of character of the victim of the crime, evidence of a pertinent trait of character of the accused offered by the prosecution".

SEC. 504. USE OF NOTICE CONCERNING RELEASE OF OFFENDER.

Section 4042(b) of title 18, United States Code, is amended by striking paragraph (4).

SEC. 505. BALANCE IN THE COMPOSITION OF RULES COMMITTEES.

Section 2073 of title 28, United States Code, is amended—

(1) in subsection (a)(2), by adding at the end the following: "On each such committee that makes recommendations concerning rules that affect criminal cases, including the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal Rules of Appellate Procedure, the Rules Governing Section 2254 Cases, and the Rules Governing Section 2255 Cases, the number of members who represent or supervise the representation of defendants in the trial, direct review, or collateral review of criminal cases shall not exceed the number of members who represent or supervise the representation of the Government or a State in the trial, direct review, or collateral review of criminal cases."; and

(2) in subsection (b), by adding at the end the following: "The number of members of the standing committee who represent or supervise the representation of defendants in the trial, direct review, or collateral review of criminal cases shall not exceed the number of members who represent or supervise the representation of the Government or a State in the trial, direct review, or collateral review of criminal cases.".

Subtitle B—Firearms

SEC. 511. MANDATORY MINIMUM SENTENCES FOR CRIMINALS POSSESSING FIREARMS.

Section 924(c) of title 18, United States Code, is amended—

(1) by striking "(c)" and all that follows through "(3)" and inserting the following:

"(c) POSSESSION OF FIREARM DURING COMMISSION OF CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME.—

"(1) TERM OF IMPRISONMENT.—

"(A) IN GENERAL.—Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which a person may be prosecuted in a court of the United States, uses, carries, or possesses a firearm shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

"(i) be sentenced to a term of imprisonment of not less than 5 years;

"(ii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years; and

"(iii) if the death of any person results, be sentenced to a term of imprisonment for life or sentenced to death.

"(B) EXCEPTION FOR CERTAIN OFFENSES.—If the firearm possessed by a person convicted of a violation of this subsection—

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

February 4, 1997
Via Facsimile

MEMORANDUM TO JUDGE FERN M. SMITH AND PROFESSOR DANIEL J. CAPRA

SUBJECT: *Additional Evidence Provisions in the Omnibus Crime Control Act*

We have located two other provisions in the Omnibus Crime Control Act of 1997 (S. 3) that affect the Evidence Rules. First, section 713 would amend Evidence Rule 404(b) to include "disposition toward a particular individual" among the valid purposes for admitting evidence of the defendant's other crimes, wrongs, or bad acts. The caption to § 713 refers to the "disposition of (the) defendant toward (a) victim in domestic violence cases and other cases."

Second, the Crime bill also includes a provision governing admissibility of evidence obtained by objectively reasonable search and seizure methods otherwise forbidden by the exclusionary rule. The amendment was introduced in last year's crime bill. The Committee on Federal and State Jurisdiction is responsible for it. The provision has been under study for many years in the judiciary. The rules committees have not weighed in on this controversial issue.

I am attaching copies of both sections.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

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105TH CONGRESS
1ST SESSION

S. 3

IN THE SENATE OF THE UNITED STATES

Mr. HATCH (for himself _____
_____
_____) introduced the following bill; which was read twice and referred to the Committee on _____

Mr. LOTT
Mr. ABRAHAM
Mr. ALLARD
Mr. ASHCROFT
Mr. CRAIG
Mr. D'AMATO
Mr. DeWINE
Mr. DOMENICI
Mr. ENZI
Mr. FAIRCLOTH
Mr. GORTON
Mr. GRAMS
Mr. GRASSLEY
Mr. HAGEL
Mr. HELMS
Mr. HUTCHINSON
Mr. KYL
Mr. MURKOWSKI
Mr. NICKLES
Mr. ROBERTS
Mr. SMITH
Mr. THOMAS
Mr. THURMOND
Mr. WARNER
Mr. COVERDELL

A BILL

To provide for fair and accurate criminal trials, reduce violent juvenile crime, promote accountability by juvenile criminals, punish and deter violent gang crime, reduce the fiscal burden imposed by criminal alien prisoners, promote safe citizen self-defense, combat the importation, production, sale, and use of illegal drugs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Omnibus Crime Control Act of 1997".

ity Act of 1996 is amended by inserting "during fiscal years 1997 and 1998," after "compensation,".

(6) Section 330(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is amended by striking ", except as required by treaty,".

(7) Section 332 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is repealed.

TITLE II—EXCLUSIONARY RULE REFORM

Subtitle A—Exclusionary Rule Reform

SEC. 201. SHORT TITLE.

This subtitle may be cited as the "Exclusionary Rule Reform Act of 1997".

SEC. 202. ADMISSIBILITY OF CERTAIN EVIDENCE.

(a) IN GENERAL.—Chapter 223 of title 18, United States Code, is amended by adding at the end the following:

"§ 3510. Admissibility of evidence obtained by search or seizure

"(a) EVIDENCE OBTAINED BY OBJECTIVELY REASONABLE SEARCH OR SEIZURE.—

"(1) IN GENERAL.—Evidence that is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that the search or seizure was in conformity with the fourth amendment.

"(2) PRIMA FACIE EVIDENCE.—The fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment.

"(b) EVIDENCE NOT EXCLUDABLE BY STATUTE OR RULE.—

"(1) IN GENERAL.—Evidence shall not be excluded in a proceeding in a court of the United States on the ground that it was obtained in violation of a statute, an administrative rule or regulation, or a rule of procedure unless the exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to statutory authority.

"(2) SPECIAL RULE RELATING TO OBJECTIVELY REASONABLE SEARCHES AN SEIZURES.—Evidence that is otherwise excludable under paragraph (1) shall not be excluded if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that the search or seizure was in conformity with the statute, administrative rule or regulation, or rule of procedure, the violation of which occasioned its being excludable.".

(b) RULES OF CONSTRUCTION.—This section and the amendments made by this section shall not be construed to require or authorize the exclusion of evidence in any proceeding. Nothing in this section or the amendments made by this section shall be construed so as to violate the fourth amendment to the Constitution of the United States.

(c) CLERICAL AMENDMENT.—The chapter analysis for chapter 223 of title 18, United States Code, is amended by adding at the end the following:

"3510. Admissibility of evidence obtained by search or seizure.".

Subtitle B—Confession Reform

SEC. 211. ENFORCEMENT OF CONFESSION REFORM STATUTE.

(a) IN GENERAL.—Section 3501 of title 18, United States Code, is amended by adding at the end the following:

SEC. 713. EVIDENCE OF DISPOSITION OF DEFENDANT TOWARD VICTIM IN DOMESTIC VIOLENCE CASES AND OTHER CASES.

Rule 404(b) of the Federal Rules of Evidence is amended by striking "or absence of mistake or accident" and inserting "absence of mistake or accident, or a disposition toward a particular individual,".

SEC. 714. HIV TESTING OF DEFENDANTS IN SEXUAL ASSAULT CASES.

(a) IN GENERAL.—Chapter 109A of title 18, United States Code, is amended by adding at the end the following:

"§ 2249. Testing for human immunodeficiency virus; disclosure of test results to victim; effect on penalty

"(a) TESTING AT TIME OF PRETRIAL RELEASE DETERMINATION.—

"(1) IN GENERAL.—In a case in which a person is charged with an offense under this chapter, upon request of the victim, a judicial officer issuing an order pursuant to section 3142(a) shall include in the order a requirement that a test for the human immunodeficiency virus be performed upon the person, and that followup tests for the virus be performed 6 months and 12 months following the date of the initial test, unless the judicial officer deter-

FORDHAM Agenda Item III A
University School of Law

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Rule 103(e)
Date: February 17, 1997

Introduction

A subcommittee consisting of Judge Turner, Greg Joseph, and myself was constituted to come up with a proposed amendment to Rule 103 that could perhaps would be more bright-line and more neutral than the proposal that has been withdrawn. After conferring, we decided to use Kentucky Rule of Evidence 103(d) as a model. This is the only evidence rule in the country, so far as I know, that specifically discusses motions in limine.

We felt it necessary, however, to modify the rule slightly to account for the result in *Luce v. United States* and its progeny. *Luce* states, broadly, that to preserve an objection to impeachment evidence, the criminal defendant must take the stand. *Luce* has been extended to several situations, including: 1)Impeachment of defense witnesses; 2)Failure to pursue a defense at trial due to alleged fear of evidence ruled admissible in limine; and 3) Testifying as to one subject matter but not another, again in fear that evidence held admissible would be used. In all these circumstances, the courts have held that the failure to call the witness or pursue the defense or testify in a certain way results in a failure to preserve any error for appellate review. All members of the Subcommittee agree that the *Luce* rule is fundamentally sound, and we felt it appropriate to attempt to codify *Luce* and the cases following it.

What follows is our proposed language for Rule 103(e); a proposed Advisory Committee Note; a short description of some of the major cases from each circuit on these issues; and alternative proposals from Professor Rice's Evidence Project and from the Uniform Rules. I have included fairly extensive parentheses after the cases in the proposed Advisory Committee Note, mainly for the convenience of the Committee. Certainly these can be cut out or cut down if the Committee finds them to be superfluous.

Proposed Amendment to Rule 103:

Rule 103. Rulings on Evidence

(e) *Motions in limine. -- A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on the party's motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion made in advance of trial on the admission or exclusion of evidence, when definitively resolved by order of record, is sufficient to preserve error for appellate review. However, in a criminal case, where the court's resolution is conditioned upon the testimony of a witness or the pursuit of a defense, error is not preserved unless that testimony is given or defense pursued. Nothing in this rule precludes the court from reconsidering at trial any ruling on a motion made in advance of trial.*

Proposed Advisory Committee Note:

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

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

Subdivision (e) provides that a motion *in limine* definitively resolved by order of record is sufficient to preserve appellate review. Where the ruling is definitive, a renewed objection or offer of proof is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same). On the other hand, where the trial court reserves its ruling or makes the ruling provisional, it makes sense to require the party to bring the issue to the court's attention again at trial. See *United States v. Holmquist*, 36 F.3d 154 (1st Cir. 1995) (where order excluding evidence is provisional, "the exclusion of evidence pursuant to that order may be challenged on appeal only if the party unsuccessfully attempts to offer such evidence in accordance with the terms specified in the order"); *Doty v. Sewall*, 908 F.2d 1053, 1056 (1st Cir. 1990) ("a pre-trial motion *in limine* is not sufficient to preserve an issue for appeal where the district court declines to rule on the admissibility of the evidence until the evidence is actually offered.").

Even where the court's ruling is definitive, nothing in the rule prohibits the court from revisiting its decision at trial. If the court changes its ruling at trial, or if the opposing party violates the pretrial ruling, objection must of course be made at trial to preserve error. The error if any in such a situation occurs only at trial. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk*, 810 F.2d 809 (8th Cir. 1987) (waiver found where defendant failed to object at trial to secure the benefit of a favorable ruling he had received before trial).

The fourth sentence in Subdivision (e) is intended to codify the principles of *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. In *Luce*, the Supreme Court held that a criminal defendant must testify at trial to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the defendant's prior convictions for impeachment. The *Luce* principle has been extended by the lower courts to other comparable situations. See *United States v. Weichert*, 783 F.2d 23 (2d Cir. 1986) (applying *Luce* where defendant would be impeached with evidence offered under Rule 608); *United States v. DiPaolo*, 804 F.2d 225 (2d Cir. 1986) (impeachment of defendant's witness); *United States v. Ortiz*, 857 F.2d 900 (2d Cir.), *cert. denied*, 489 U.S. 1070 (1989) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial to preserve error).

The Rule does not purport to answer whether a party objecting to impeachment evidence *in limine* waives the objection by offering the evidence on direct to "remove the sting" of anticipated impeachment. See *Gill v. Thomas*, 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal.").

Summary of Cases on the Renewal Question:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Cases on the *Luce* Question:

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

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

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

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

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

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

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

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

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

United States v. Smiley, 997 F.2d 475 (8th Cir. 1993): Defendant waived objection on appeal by introducing evidence of his conviction on direct examination.

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

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

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

Rule 103 Provision Proposed by Professor Rice's Evidence Project

Rulings *in limine* and contemporaneous objections. When an objection to the admissibility of evidence is ruled upon *in limine* and the judicial officer who will make the ultimate determination of admissibility at trial makes an unequivocal ruling on that objection, the objecting party is not required to renew the objection at trial. An *in limine* ruling shall be considered equivocal unless the court states on the record that its ruling is unequivocal. A court should consider whether the evidence or circumstances developed at trial might affect an *in limine* ruling before characterizing such ruling as unequivocal.

Comment on this proposal by the Advisory Committee Reporter--The rule is different from our subcommittee's proposal in several respects. First, it does not cover the situation where a motion to exclude evidence is granted *in limine*, and the party who loses on the motion wants to know whether to proffer the evidence at trial. Second, it defines in much more detail the kind of *in limine* ruling which need not be revisited at trial. Third, it applies only if the judge making the *in limine* ruling is also the judge presiding over the trial. Fourth, it says nothing about the *Luce* problem.

Uniform Rules Proposal

Effect of Pretrial Ruling. A pretrial objection to, or proffer of, evidence must be timely renewed at trial unless, at the request of counsel, or sua sponte, the court states that the ruling on the objection, or proffer, is final.

Short comment by Advisory Committee Reporter--The proposal governs only the renewal question. It does not touch on the *Luce* problem nor on any of the broader aspects of in limine practice. Our subcommittee was of the view that if we are to amend the Federal Rules to deal with the renewal question, we should provide broader guidance as to in limine practice generally. Also, the proposal uses the term "final" instead of our term "definitively resolved".

FORDHAM
University

Agenda Item III B

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Adding Procedural Provisions to Rules 404(b) and 609.
Date: February 18, 1997

At the November, 1996 meeting, I was instructed to review the possibility of adding procedural requirements to Rules 404(b) and 609, in order to provide more structure for courts in determining the admissibility of evidence under those Rules. My mission was to investigate the approaches of other jurisdictions, with a special focus on the Uniform Rules and the Michigan Rule. This I have done, and this memorandum provides a proposal for amending Rules 404(b) and 609 to include procedural limitations, should the Committee decide that amending these rules is advisable. No assertion is made one way or another as to whether the Rule should in fact be amended.

This memorandum is in six parts. The first part sets forth the current Uniform Rules proposal on Rule 404(b), and provides a short comment. The second part sets forth the procedural provisions in Michigan Rule 404(b), and provides a short comment. The third part sets forth and discusses a proposal by the ABA Criminal Justice Section to include procedural requirements in Rule 609, with a short comment. Part Four sets forth the procedural aspects of Michigan Rule 609, and provides a short comment. (The Uniform Rules Committee proposes no procedural additions to Rule 609). The fifth part sets forth proposed amendments to Rules 404(b) and 609 for this Committee to consider, based on the above proposals. The sixth part is an attachment of the Supreme Court's decision in *Old Chief*, which must inform any attempt to amend Rule 404(b).

Procedural Provisions in Proposed Uniform Rule 404(b)

Tentative Draft #2 of the Uniform Rules of Evidence would add the following provisions at the end of Rule 404(b):

Evidence is not admissible under this rule unless:

(A) the proponent gives to the adverse party reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence the proponent intends to use at trial; and the court

(B) conducts a hearing to determine the admissibility of the evidence;

(C) finds by clear and convincing proof that the other crime, wrong or act was committed;

(D) finds that the probative value of admitting the evidence outweighs the danger of unfair prejudice; and,

(E) upon request, gives an instruction on the limited admissibility of the evidence, as provided in Rule 105.

The first tentative draft of Rule 404(b) contained other procedural requirements that were dropped, without explanation, from the second tentative draft but that might (or might not) interest this Committee. Those extra procedural requirements are:

1. *the court finds that the evidence is relevant to a fact of consequence other than conduct conforming with a character trait; and*

2. *the court states on the record the fact of consequence, the ruling and the reasons for admitting the evidence.*

Comment on Uniform Rules Proposal

The first part of the proposal deals with notice. Unlike the Federal Rule, the current Uniform Rule has no notice provision. The proposed notice provision differs from the Federal Rule in several respects: 1) It applies to all cases, not just criminal cases; 2) It applies to any party seeking to offer evidence under the Rule; and 3) It eliminates the necessity of a request by the party against whom the evidence will be offered.

At the last meeting of this Committee, I took it, perhaps wrongly, that the Committee was generally satisfied with the text of the notice provisions strewn throughout the Federal Rules. Therefore, the amalgamated provision proposed for Committee consideration later in this memorandum does not contain a change to the current notice provision in Rule 404(b). Certainly, though, changes could be implemented along the lines of the Uniform Rules proposal should the Committee so decide.

The procedural requirements set forth after the notice requirement in the Uniform Rule appear straightforward, but adjustments would have to be made to two of them to accord with current Federal law: 1) The provision requiring clear and convincing evidence of the uncharged misconduct is inconsistent with *Huddleston v. United States*, which requires only evidence sufficient to support a finding by a preponderance; 2) The balancing test proposed is more exclusionary than the Rule 403 test currently used by the Federal courts. The proposal for Committee consideration set forth later in this memo attempts to modify the Uniform Rules proposal to account for these differences.

Michigan Rule 404(b)--Procedural Aspects

As to procedures, Michigan Rule 404(b) has a subdivision (2) which provides as follows:

> *(2) 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 and the rationale, whether or not mentioned in [the illustrative list of permissible purposes], for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.*

Comment on Michigan Rule

A large part of the rule concerns notice, and as discussed above, I assume that the Committee is not interested in revising the notice provision of Rule 404(b). The major difference in the notice provision of the Michigan Rule is that it applies even in the absence of a request by the defendant.

One provision that is in the notice clause is actually separable from a notice requirement and might well be considered by the Committee. The Michigan Rule requires the prosecution to articulate the rationale for admitting the evidence of uncharged misconduct. The argument for such a provision is that it will help to focus the court, and might serve to prevent the kind of blunderbuss arguments that have been reported in some of the cases. See, e.g., *United States v. Rivera*, 837 F.2d 906 (10th Cir. 1988) (prosecutor argues that bad act evidence was admissible for "four or five things, one of which is absence of mistake, motive, intent, identity, I forget what all, there are four or five").

The Michigan rule further requires that the defendant articulate the theory of the defense if the court finds that necessary to determine admissibility. The premise of this provision is that the probative value of the evidence for a not-for-character purpose is often dependent on the defense pursued. For example, if the defendant claims accident, a prior similar act might be more probative than if the defendant claims misidentity. If a provision requiring declaration of defenses is included in any amendment, however, it must be made clear that there is no attempt to regulate the prosecutor's decision on whether or not to accept a defendant's stipulation. Such a proviso is made necessary by the *Old Chief* case, which is attached to this memorandum.

ABA Proposed Procedural Additions to Rule 609

The ABA Criminal Justice section has proposed two new subdivisions to Rule 609 which would set forth procedures under that Rule. Current subdivisions (c), (d) and (e) would be moved down in the Rule to (e), (f) and (g). The procedural provisions are as follows:

(c) Procedure.

(1) The party who intends to introduce any impeachment pursuant to this rule shall give notice to the party against whom such impeachment will be offered prior to impaneling the jury in the action.

(2) The court shall articulate on the record the factors considered in making its determination. The court may consider such factors, among others, as the impeachment value of the prior crime, the point in time of the conviction and the witness' subsequent history, the similarity between the other crime and the charged crime if the witness is a defendant in a criminal case, the importance of the witness' testimony, the importance of credibility to the outcome of the action, and whether the witness testified in the case in which he or she was convicted.

(3) Provided the witness is at some point afforded a fair opportunity to reply, the conviction can be elicited from the witness during examination or cross-examination, established by public record, or presented during the trial by other extrinsic evidence if the public record is not available and good cause is shown.

(d) Details of conviction.

Unless the right is waived by a party whose witness is being impeached, the only details of the crime which may be admitted for impeachment are the fact of the conviction, the name of the crime (but this may not be given if the witness is a defendant who is being tried for a similar offense), the time, place and number of times convicted, and whether the crime is a felony or a misdemeanor. If any statement is made in mitigation, relevant rebutting details may be allowed to be inquired into.

The comment by the ABA committee asserts that procedural rules are required because currently circuits take a variety of approaches, and generally the practice under Rule 609 is "quite loose."

Comment on ABA Proposal

The notice provision in the ABA proposal is in one sense broader than the provision currently in the Federal Rule. The Federal Rule's notice requirement only applies to Rule 609(b) evidence. The Committee might consider whether that notice provision should be applied to all convictions offered under Rule 609. If that is done, however, the notice provision should track that in Rule 404(b) *exactly*, because the same conviction is often offered under both Rules. An anomaly arises under current practice when a party fails to give notice of a conviction, and then can offer the conviction under Rule 609(a), but not under Rule 404(b); this anomaly could be cleared up by adding a notice provision that would govern Rule 609(a) as well as 609(b). I make this point even recognizing that at the November meeting the Committee appeared to express some satisfaction with the notice provisions currently in the Federal Rules.

The notice provision in the ABA proposal is problematic in at least two respects when it states that notice must be given before the jury is impaneled. First, its applicability to bench trials is unclear; there is no reason why notice should not be given in a bench trial if it is to be given in a jury trial. Second, there is no provision for good cause excusal.

Another problem with the ABA proposal is that it seems to require a balancing of the listed factors in every case. This ignores the fact that convictions falling within Rule 609(a)(2) are automatically admissible--no balancing is permitted. So the proposal needs to be amended to clarify its applicability.

The subdivision limiting the use of details of the conviction is generally in accord with case law, but it ignores the fact that these details might be admissible for other purposes under other Rules. For example, a fact underlying a conviction might be admissible under Rule 608, or to show bias. The provision seems to indicate that the details are never admissible except in rebuttal. The scope of the proposal must therefore be clarified.

Finally, if new provisions are to be added to Rule 609, they should be added to the end of the Rule. Moving provisions around upsets settled expectations, impedes electronic searches, imposes inconvenience on treatise writers and buyers, etc. That should not be done unless there is a compelling reason to do so.

Michigan Rule 609--Procedural Aspects

Michigan Rule 609 contains a procedural provision governing a trial court's balancing of probative value and prejudicial effect. It provides:

(b) Determining Probative Value and Prejudicial Effect. For purposes of the probative value determination required by [the provision of Rule 609(a) dealing with non-crimen-falsi crimes], the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each such factor.

Comment on Michigan Rule

Like the ABA proposal, the Michigan Rule seeks to articulate factors for the court to apply in assessing the probative value and prejudicial effect of a proffered conviction. It seeks to narrow the balancing process more closely than the wide-ranging and flexible factors offered by the ABA. One problem arises with the "effect on the decisional process factor." The trial court is to consider what will happen if the *defendant* elects not to testify. The provision does not refer to a criminal defendant, only to a defendant. This leaves the same anomaly as was left by the "to the defendant" language of Federal Rule 609(a) as it was initially enacted. The rule had to be amended because of its anomalous application to civil cases. If a "decisional process" factor is to be added to a procedural provision, it should probably require the court to consider the loss of testimony of any witness who would be subject to impeachment.

It should be noted that the Michigan Rule is much more restrictive than the Federal Rule as to the types of convictions that can be admitted. Under the Michigan Rule, if the crime does not involve dishonesty or false statement, it must contain an element of theft, and then a balancing process is conducted. There is no reason, however, why a procedural provision like Michigan Rule 609(b) could not apply to any balancing conducted under the Federal Rule.

Proposed Amendment to Rule 404(b) for the Advisory Committee to Consider

(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 use at trial.

Evidence is not admissible under this subdivision unless the court: (i) conducts a hearing to determine the admissibility of the evidence; (ii) finds evidence sufficient to support a finding by the factfinder that the other crime, wrong or act was committed; (iii) finds that the evidence is relevant to a fact of consequence other than action in conformity with character; (iv) finds that the prejudicial effect of the evidence does not substantially outweigh the probative value of admitting the evidence for a permissible purpose; (v) *states on the record the fact of consequence, the ruling and the reasons for admitting the evidence; and (vi) upon request, instructs the jury on the specific purpose for which the evidence can be used, and expressly advises the jury that the evidence cannot be used as proof of action in conformity with character.*

Reporter's Comment:

I did not include the procedural details from the Michigan provision, in part because I find the requirements imposed on the parties by that rule implicit in the requirements proposed on the trial court by the Uniform Rule, which I used as a model. The Committee is, of course, free to consider whether the Michigan requirements should be included in any amendment--assuming without deciding that an amendment should be proposed in the first place.

I changed the Uniform Rule language concerning "criminal disposition" to "action in conformity with character" in order to make it more parallel with the language currently employed in Federal Rule 404(b).

Proposed Advisory Committee Note to Rule 404(b)

Appellate courts have often strongly suggested if not required that trial courts conduct on-the-record hearings to assess the admissibility of evidence of uncharged misconduct offered under Rule 404(b). See *United States v. Robinson,* 700 F.2d 205 (5th Cir. 1983), *cert. denied,* 465 U.S. 1008 (1984); *United States v. Roberts,* 88 F.3d 872 (10th Cir. 1996) (remanding for an explicit on-the-record determination); *United States v. Najib,* 56 F.3d 798 (7th Cir. 1995) (same). Appellate courts have also stressed that trial courts must carefully consider the identified purpose for admitting evidence of uncharged misconduct, and determine whether the evidence is probative for that purpose. See *United States v. Merriweather,* 78 F.3d 1070 (6th Cir. 1996) (emphasizing the need for a "close and careful" analysis of evidence of uncharged misconduct). Finally, appellate courts have stressed that a limiting instruction specifying the permissible use of uncharged misconduct evidence is critical to controlling its prejudicial effect. See *United States v. Hardwell,* 80 F.3d 1471 (10th Cir. 1996) (finding a limiting instruction insufficient where it gave the "laundry list" of permissible purposes under the Rule rather than being tailored to the permissible purpose for which the evidence was offered, and where it failed to expressly advise the jury that the evidence could not be considered as proof of criminal disposition).

In accordance with these concerns expressed by appellate courts, the amendment provides a structure for trial courts to employ in determining the admissibility of evidence of uncharged misconduct. Subdivision (ii) codifies the standard set forth in *Huddleston v. United States,* 485 U.S. 681 (1988).

Proposed Amendment to Rule 609 for the Advisory Committee to Consider

Rule 609 Impeachment by Evidence of Conviction of Crime

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

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

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

(b) Time limit. — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of

justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. ~~However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.~~

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

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

admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

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

(f) Procedure.

(1) Upon request of the party against whom a conviction will be offered, the party who intends to introduce any conviction pursuant to this Rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(2) The court shall articulate on the record the factors considered in making its determination of admissibility of evidence offered under either subdivision (a)(1) or subdivision (b) of this rule. The court may consider such factors, among others, as (i) the degree to which a conviction of the crime is indicative of veracity; (ii) the point in time of the conviction and the witness' subsequent history; (iii) the similarity between the conviction offered for impeachment and the charged crime if the witness is either a defendant in a criminal case or a witness who would be associated with the defendant; (iv) the importance

of the witness' testimony; (v) the importance of credibility to the outcome of the action; (vi) other evidence offered or to be offered by the party to impeach the witness; and (vi) whether the witness testified in the case in which he or she was convicted. If a conviction is admitted at trial under this Rule, the court must, upon request, instruct the jury on the specific purpose for which the evidence can be used, and expressly advise the jury that the evidence cannot be used as proof of criminal disposition.

(3) Provided the witness is at some point afforded a fair opportunity to reply, the conviction may be elicited from the witness during examination or cross-examination, established by public record, or presented during the trial by other extrinsic evidence if the public record is not available and good cause is shown.

(g) Details of conviction.

Unless the right is waived by a party whose witness is being impeached, the only details of the crime that may be admitted for impeachment under this rule are the fact of the conviction, the name of the crime, the time, place and number of times convicted, and whether the crime is a felony or a misdemeanor. If any statement is made in mitigation, inquiry into rebutting details may be permitted.

Reporter's Comment:

This proposal basically combines what I believe to be the best-drafted parts of the ABA and Michigan versions, and adapts them to the Federal Rule. No opinion is expressed as to the merits of these provisions. I can say that the procedural provisions track the appellate cases on this subject, including one I added--that the court should assess whether the witness has already been impeached with other material. I cut the parenthesis in the ABA proposal which would have prohibited the name of the conviction from being brought out when the conviction is similar to that with which a criminal defendant is charged. In my judgment, the possibility of prejudicial effect from such a practice will already have been factored in under the procedures provided in proposed subdivision (f). I opted for the more flexible balancing approach provided by the ABA proposal, as opposed to the more structured Michigan rule, mainly because the flexible approach seems more in accordance with the federal case law.

The notice provision of Rule 609(b) is deleted to provide for a notice provision generally applicable to all convictions offered under the Rule. Obviously, this is a matter of judgment for the Committee. The notice requirement is written to parallel that of Rule 404(b), including the provision that the requirement is not triggered unless the opposing party requests notice. As I stated above, it is important to have substantively identical notice requirements for both Rule 404(b) and Rule 609, since at least in criminal cases, the same conviction is often offered under both Rules. Admittedly, the notice requirements are different in that Rule 404(b)'s notice requirement applies only in criminal cases where the evidence is offered against the accused. While the proposed Rule 609 notice requirement is broader, it is usually only criminal cases in which a conviction would be proffered under both Rules. The Committee may wish to consider, however, either limiting the notice provision of Rule 609 to criminal cases, or expanding the notice provision of Rule 404(b) to apply to civil cases.

I thought it appropriate to include a provision mandating a specific limiting instruction upon request. This parallels the provision in the Rule 404(b) proposal.

Proposed Advisory Committee Note to Rule 609

Subdivision (f) spells out the procedure that the parties and the court must follow in determining the admissibility of convictions offered under the Rule. This subdivision requires a party to give notice of intent to offer any conviction under the Rule. The notice requirement applies to both civil and criminal cases.

Most appellate courts have urged trial judges to make Rule 609 rulings after a hearing, and to make findings on the record. See *United States v. Preston*, 608 F.2d 626 (5th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. Hood*, 748 F.2d 439 (8th Cir. 1984). Requiring a hearing with on-the-record findings is most desireable because it assures careful consideration by the trial court and expedites appellate review. The factors set forth in the Rule to be considered by the court in determining the admissibility of a proffered conviction are the factors that are often discussed by the courts. See generally *United States v. Lipscomb*, 702 F.2d 1049 (D.C.Cir. 1983), and *United States v. Givens*, 767 F.2d 574 (9th Cir.), *cert. denied*, 474 U.S. 953 (1985), for an excellent discussion of these factors. See also *United States v. Toney*, 27 F.3d 1245 (7th Cir. 1994) (considering the similarity between the prior conviction and the crime charged). The factors set forth in subdivision (f) are not intended to be exclusive. It is intended that the court, in making an on-the-record determination, will make some statement concerning the factors it used in the balancing process.

Subdivision (g) provides that the details of the conviction used for impeachment are not generally admissible under Rule 609. This provision is in accordance with the case law. See *United States v. Albers*, 93 F.3d 1469 (10th Cir. 1996) (noting that "only the prior conviction, its general nature, and punishment of felony range were fair game" under Rule 609); *United States v. Robinson*, 8 F.3d 398 (7th Cir. 1993). The details of the conviction may be admissible for some other purpose, however, such as to impeach the witness under Rule 608, or to prove bias.

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January 7, 1997 THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. • Volume 65, No. 25

OPINION ANNOUNCED JANUARY 7, 1997

The Supreme Court decided:

CRIMINAL LAW AND PROCEDURE—Firearms

In prosecution under 18 USC 922(g)(1) for possession of firearm by felon, trial court abuses its discretion under Fed.R.Ev. 403 to exclude relevant evidence that is unfairly prejudicial when it admits into evidence name and nature of defendant's prior conviction over defendant's offer of admission to felon-status element, and prior conviction is for offense that is likely to lead jury to convict on some improper ground. (*Old Chief v. U.S.*, US SupCt, No. 95-6556, 1/7/97) .. Page 4049

Full Text of Opinion

No. 95–6556

JOHNNY LYNN OLD CHIEF, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Syllabus

No. 95–6556. Argued October 16, 1996—Decided January 7, 1997

After a fracas involving at least one gunshot, petitioner, Old Chief, was charged with, *inter alia*, violating 18 U. S. C. §922(g)(1), which prohibits possession of a firearm by anyone with a prior felony conviction. He offered to stipulate to §922(g)(1)'s prior-conviction element, arguing that his offer rendered evidence of the name and nature of his prior offense—assault causing serious bodily injury—inadmissible because its "probative value [was] substantially outweighed by the danger of unfair prejudice . . . ," Fed. Rule Evid. 403. The Government refused to join the stipulation, however, insisting on its right to present its own evidence of the prior conviction, and the District Court agreed. At trial, the Government introduced the judgment record for the prior conviction, and a jury convicted Old Chief. In affirming the conviction, the Court of Appeals found that the Government was entitled to introduce probative evidence to prove the prior offense regardless of the stipulation offer.

Held: A district court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.

(a) Contrary to Old Chief's position, the name of his prior offense as contained in the official record is relevant to the prior-conviction element. That record made his §922(g)(1) status "more probable . . . than it [would have been] without the evidence," Fed. Rule Evid. 401; and the availability of alternative proofs, such as his admission, did not affect its evidentiary relevance, see Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 859.

(b) As to a criminal defendant, Rule 403's term "unfair prejudice" speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on an improper basis rather than on proof specific to the offense charged. Such improper grounds certainly include generalizing from a past bad act that a defendant is by propensity the probable perpetrator of the current crime. Thus, Rule 403 requires that the relative probative value of prior-conviction evidence be balanced against its prejudicial risk of misuse. A judge should balance these factors not only for the item in question but also for any actually available substitutes. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

(c) In dealing with the specific problem raised by §922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice whenever the official record would be arresting enough to lure a juror into a sequence of bad-character reasoning. Old Chief sensibly worried about the prejudicial effect of his prior offense. His proffered admission also presented the District Court with alternative, relevant, admissible, and seemingly conclusive, evidence of the prior conviction. Thus, while the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission.

(d) Old Chief's offer supplied evidentiary value at least equivalent to what the Government's own evidence carried. The accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away has virtually no application when the point at issue is a defendant's legal status. Here, the most the jury needed to know was that the conviction admitted fell within the class of crimes that Congress thought should bar a convict from possessing a gun. More obviously, the proof of status went to an element entirely outside the natural sequence of what Old Chief was charged with thinking and doing to commit the current offense. Since there was no cognizable difference between the evidentiary significance of the admission and the official record's legitimately probative component, and since the functions of the competing evidence were distinguishable only by the risk inherent in the one and wholly absent from the other, the only reasonable conclusion was that the risk of unfair prejudice substantially outweighed the conviction record's discounted probative value. Thus, it was an abuse of discretion to admit the conviction record when the defendant's admission was available.

56 F. 3d 75, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

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JUSTICE SOUTER delivered the opinion of the Court.

Subject to certain limitations, 18 U. S. C. §922(g)(1) prohibits possession of a firearm by anyone with a prior felony conviction, which the government can prove by introducing a record of judgment or similar evidence identifying the previous offense. Fearing prejudice if the jury learns the nature of the earlier crime, defendants sometimes seek to avoid such an informative disclosure by offering to concede the fact of the prior conviction. The issue here is whether a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.[1] We hold that it does.

I

In 1993, petitioner, Old Chief, was arrested after a fracas involving at least one gunshot. The ensuing federal charges included not only assault with a dangerous weapon and using a firearm in relation to a crime of violence but violation of 18 U. S. C. §922(g)(1). This statute makes it unlawful for anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm . . . ." "[A] crime punishable by imprisonment for a term exceeding one year" is defined to exclude "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" and "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U. S. C. §921(a)(20).

The earlier crime charged in the indictment against Old Chief was assault causing serious bodily injury. Before trial, he moved for an order requiring the government "to refrain from mentioning—by reading the Indictment, during jury selection, in opening statement, or closing argument—and to refrain from offering into evidence or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, *except* to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year." App. 6. He said that revealing the name and nature of his prior assault conviction would unfairly tax the jury's capacity to hold the Government to its burden of proof beyond a reasonable doubt on current charges of assault, possession, and violence with a firearm, and he offered to "solve the problem here by stipulating, agreeing and requesting the Court to instruct the jury that he has been convicted of a crime punishable by imprisonment exceeding one (1) year[]." App. 7. He argued that the offer to stipulate to the fact of the prior conviction rendered evidence of the name and nature of the offense inadmissible under Rule 403 of the Federal Rules of Evidence, the danger being that unfair prejudice from that evidence would substantially outweigh its probative value. He also proposed this jury instruction:

> "The phrase 'crime punishable by imprisonment for a term exceeding one year' generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable by a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.
>
> "[I] hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year." App. 11.[2]

The Assistant United States Attorney refused to join in a stipulation, insisting on his right to prove his case his own way, and the District Court agreed, ruling orally that, "If he doesn't want to stipulate, he doesn't have to." App. 15–16. At trial, over renewed objection, the Government introduced the order of judgment and commitment for Old Chief's prior conviction. This document disclosed that on December 18, 1988, he "did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury," for which Old Chief was sentenced to five years' imprisonment. App. 18–19. The jury found Old Chief guilty on all counts, and he appealed.

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[1]The standard of review applicable to the evidentiary rulings of the district court is abuse of discretion. *United States* v. *Abel*, 469 U. S. 45, 54–55 (1984).

[2]Proposals for instructing the jury in this case proved to be perilous. We will not discuss Old Chief's proposed instruction beyond saying that, even on his own legal theory, revision would have been required to dispel ambiguity. The jury could not have said whether the instruction that Old Chief had been convicted of a crime punishable by imprisonment for more than one year meant that, as a matter of law, his conviction fell within the definition of "crime punishable by imprisonment for a term exceeding one year," or was instead merely a statement of fact, in which case the jurors could not have determined whether the predicate offense was within one of the statute's categorical exceptions, a "state . . . misdemeanor . . . punishable by a term . . . of two years or less" or a "business" crime. The District Court did not, however, deny Old Chief's motion because of the artless instruction he proposed, but because of the general rule, to be discussed below, that permits the Government to choose its own evidence.

While Old Chief's proposed instruction was defective even under the law as he viewed it, the instruction actually given was erroneous even on the Government's view of the law. The District Court charged, "You have also heard evidence that the defendant has previously been convicted of a felony. You may consider that evidence only as it may affect the defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." App. 31. This instruction invited confusion. First, of course, if the jury had applied it literally there would have been an acquittal for the wrong reason: Old Chief was on trial for, among other offenses, being a felon in possession, and if the jury had not considered the evidence of prior conviction it could not have found that he was a felon. Second, the remainder of the instruction referred to an issue that was not in the case. While it is true that prior-offense evidence may in a proper case be admissible for impeachment, even if for no other purpose, Fed. Rule Evid. 609, petitioner did not testify at trial; there was no justification for admitting the evidence for impeachment purposes and consequently no basis for the District Court's suggestion that the jurors could consider the prior conviction as impeachment evidence. The fault for this error lies at least as much with Old Chief as with the District Court, since Old Chief apparently sought some such instruction and withdrew the request only after the court had charged the jury.

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The Ninth Circuit addressed the point with brevity:

> "Regardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence. *See United States v. Breitkreutz,* 8 F. 3d 688, 690 (9th Cir. 1993) (citing *United States v. Gilman,* 684 F. 2d 616, 622 (9th Cir. 1982)). Under Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the FRE 403 balancing process. *Breitkreutz,* 8 F. 3d at 691–92.
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> "Thus, we hold that the district court did not abuse its discretion by allowing the prosecution to introduce evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge." No. 94–30277, 1995 WL 325745, *1 (CA9, May 31, 1995) (unpublished), App. 50–51.

We granted Old Chief's petition for writ of certiorari because the Courts of Appeals have divided sharply in their treatment of defendants' efforts to exclude evidence of the names and natures of prior offenses in cases like this. Compare, *e.g., United States* v. *Burkhart,* 545 F. 2d 14, 15 (CA6 1976); *United States* v. *Smith,* 520 F. 2d 544, 548 (CA8 1975), cert. denied, 429 U. S. 925 (1976); and *United States* v. *Breitkreutz,* 8 F. 3d 688, 690–692 (CA9 1993) (each recognizing a right on the part of the Government to refuse an offered stipulation and proceed with its own evidence of the prior offense) with *United States* v. *Tavares,* 21 F. 3d 1, 3–5 (CA1 1994) (en banc); *United States* v. *Poore,* 594 F. 2d 39, 40–43 (CA4 1979); *United States* v. *Wacker,* 72 F. 3d 1453, 1472–1473 (CA10 1995); and *United States* v. *Jones,* 67 F. 3d 320, 322–325 (CADC 1995) (each holding that the defendant's offer to stipulate to or to admit to the prior conviction triggers an obligation of the district court to eliminate the name and nature of the underlying offense from the case by one means or another). We now reverse the judgment of the Ninth Circuit.

II

A

As a threshold matter, there is Old Chief's erroneous argument that the name of his prior offense as contained in the record of conviction is irrelevant to the prior-conviction element, and for that reason inadmissible under Rule 402 of the Federal Rules of Evidence.[3] Rule 401 defines relevant evidence as 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." Fed. Rule Evid. 401. To be sure, the fact that Old Chief's prior conviction was for assault resulting in serious bodily injury rather than, say, for theft was not itself an ultimate fact, as if the statute had specifically required proof of injurious assault. But its demonstration was a step on one evidentiary route to the ultimate fact, since it served to place Old Chief within a particular sub-class of offenders for whom firearms possession is outlawed by §922(g)(1). A documentary record of the conviction for that named offense was thus relevant evidence in making Old Chief's §922(g)(1) status more probable than it would have been without the evidence.

Nor was its evidentiary relevance under Rule 401 affected by the availability of alternative proofs of the element to which it went, such as an admission by Old Chief that he had been convicted of a crime "punishable by imprisonment for a term exceeding one year" within the meaning of the statute. The 1972 Advisory Committee Notes to Rule 401 make this point directly:

> "The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute." Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 859.

If, then, relevant evidence is inadmissible in the presence of other evidence related to it, its exclusion must rest not on the ground that the other evidence has rendered it "irrelevant," but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding.[4]

B

The principal issue is the scope of a trial judge's discretion under Rule 403, which authorizes exclusion of relevant evidence when 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." Fed. Rule Evid. 403. Old Chief relies on the danger of unfair prejudice.[5]

1

The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence, ¶403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U. S. C. App., p. 860.

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[3] "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." Fed. Rule Evid. 402.

[4] Viewing evidence of the name of the prior offense as relevant, there is no reason to dwell on the Government's argument that relevance is to be determined with respect to the entire item offered in evidence (here, the entire record of conviction) and not with reference to distinguishable sub-units of that object (here, the name of the offense and the sentence received). We see no impediment in general to a district court's determination, after objection, that some sections of a document are relevant within the meaning of Rule 401, and others irrelevant and inadmissible under Rule 402.

[5] Petitioner also suggests that we might find a prosecutor's refusal to accept an adequate stipulation and jury instruction in the narrow context presented by this case to be prosecutorial misconduct. The argument is that, since a prosecutor is charged with the pursuit of just convictions, not victory by fair means or foul, any ethical prosecutor must agree to stipulate in the situation here. But any ethical obligation will depend on the construction of Rule 403, and we have no reason to anticipate related ethical lapses once the meaning of the rule is settled.

Such improper grounds certainly include the one that Old Chief points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, "Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *United States* v. *Moccia*, 681 F. 2d 61, 63 (CA1 1982). Justice Jackson described how the law has handled this risk:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer* v. *United States*, 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson* v. *United States*, 335 U. S. 469, 475–476 (1948) (footnotes omitted).

Rule of Evidence 404(b) reflects this common law tradition by addressing propensity reasoning directly: "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." Fed. Rule Evid. 404(b). There is, accordingly, no question that propensity would be an "improper basis" for conviction and that evidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence. Cf. 1 J. Strong, McCormick on Evidence 780 (4th ed. 1992) (hereinafter McCormick) (Rule 403 prejudice may occur, for example, when "evidence of convictions for prior, unrelated crimes may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case").

As for the analytical method to be used in Rule 403 balancing, two basic possibilities present themselves. An item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded. Or the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made.[6] This second approach would start out like the first but be ready to go further. On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. As we will explain later on, the judge would have to make these calculations with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case, and the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in. It would only mean that a judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point. Even under this second approach, as we explain below, a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense. See *infra*, at —.[7]

The first understanding of the rule is open to a very telling objection. That reading would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. The worst he would have to fear would be a ruling sustaining a Rule 403 objection, and if that occurred, he could simply fall back to offering substitute evidence. This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.

Rather, a reading of the companions to Rule 403, and of the commentaries that went with them to Congress, makes it clear that what counts as the Rule 403 "probative value" of an item of evidence, as distinct from its Rule 401 "relevance," may be calculated by comparing evidentiary alternatives. The Committee Notes to Rule 401 explicitly say that a party's concession is pertinent to the court's discretion to exclude evidence on the point

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[6] It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight. See, for example, *United States* v. *O'Shea*, 724 F. 2d 1514, 1517 (CA11 1984), where the appellate court approved the trial court's pretrial refusal to impose a stipulation on the Government and exclude the Government's corresponding evidence of past convictions because the trial court had found at that stage that the evidence would quite likely come in anyway on other grounds.

[7] While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status. On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon.

conceded. Such a concession, according to the Notes, will sometimes "call for the exclusion of evidence offered to prove [the] point conceded by the opponent . . . ." Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 859. As already mentioned, the Notes make it clear that such rulings should be made not on the basis of Rule 401 relevance but on "such considerations as waste of time and undue prejudice (see Rule 403) . . . ." *Ibid.* The Notes to Rule 403 then take up the point by stating that when a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may . . . be an appropriate factor." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U. S. C. App., p. 860. The point gets a reprise in the Notes to Rule 404(b), dealing with admissibility when a given evidentiary item has the dual nature of legitimate evidence of an element and illegitimate evidence of character: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under 403." Advisory Committee's Notes on Fed. Rule Evid. 404, 28 U. S. C. App., p. 861. Thus the notes leave no question that when Rule 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives. See 1 McCormick 782, and n. 41 (suggesting that Rule 403's "probative value" signifies the "marginal probative value" of the evidence relative to the other evidence in the case); 22 C. Wright & K. Graham, Federal Practice and Procedure §5250, pp. 546–547 (1978) ("The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point").

2

In dealing with the specific problem raised by §922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious, and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him.[8]

[8]It is true that a prior offense may be so far removed in time or nature from the current gun charge and any others brought with it that its potential to prejudice the defendant unfairly will be minimal. Some prior offenses, in fact, may even have some potential to prejudice the Government's case unfairly. Thus an extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession. Since the Government could not, of course, compel the defendant to admit formally the existence of the prior conviction, the Government would have to bear the risk of jury nullification, a fact that might properly drive the Government's charging decision.

The District Court was also presented with alternative, relevant, admissible evidence of the prior conviction by Old Chief's offer to stipulate, evidence necessarily subject to the District Court's consideration on the motion to exclude the record offered by the Government. Although Old Chief's formal offer to stipulate was, strictly, to enter a formal agreement with the Government to be given to the jury, even without the Government's acceptance his proposal amounted to an offer to admit that the prior-conviction element was satisfied, and a defendant's admission is, of course, good evidence. See Fed. Rule Evid. 801(d)(2)(A).

Old Chief's proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element. The statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies, and Old Chief clearly meant to admit that his felony did qualify, by stipulating "that the Government has proven one of the essential elements of the offense." App. 7. As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission. Logic, then, seems to side with Old Chief.

3

There is, however, one more question to be considered before deciding whether Old Chief's offer was to supply evidentiary value at least equivalent to what the Government's own evidence carried. In arguing that the stipulation or admission would not have carried equivalent value, the Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. The authority usually cited for this rule is *Parr* v. *United States*, 255 F. 2d 86 (CA5), cert. denied, 358 U. S. 824 (1958), in which the Fifth Circuit explained that the "reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.'" 255 F. 2d, at 88 (quoting *Dunning* v. *Maine Central R. Co.*, 91 Me. 87, 39 A. 352, 356 (1897)).

This is unquestionably true as a general matter. The "fair and legitimate weight" of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the

concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault. Cf. *United States* v. *Gilliam*, 994 F. 2d 97, 100–102 (CA2), cert. denied, 510 U. S. 927 (1993).

But there is something even more to the prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. "If [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." Saltzburg, A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence, 66 Calif. L. Rev. 1011, 1019 (1978) (footnotes omitted).[9] Expectations may also arise in jurors' minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.

In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

4

This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him. As in this case, the choice of evidence for such an element is usually not between eventful narrative and abstract proposition, but between propositions of slightly varying abstraction, either a record saying that conviction for some crime occurred at a certain time or a statement admitting the same thing without naming the particular offense. The issue of substituting one statement for the other normally arises only when the record of conviction would not be admissible for any purpose beyond proving status, so that excluding it would not deprive the prosecution of evidence with multiple utility; if, indeed, there were a justification for receiving evidence of the nature of prior acts on some issue other than status (*i.e.*, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," Fed. Rule Evid. 404(b)), Rule 404(b) guarantees the opportunity to seek its admission. Nor can it be argued that the events behind the prior conviction are proper nourishment for the jurors' sense of obligation to vindicate the public interest. The issue is not whether concrete details of the prior crime should come to the jurors' attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute. "A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, *see* 16 U. S. C. §3372, to the most aggravated murder." *Tavares*, 21 F. 3d, at 4. The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions. Finally, the most obvious reason that the general presumption that the prosecution may choose its evidence is so remote from application here is that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit

[9] Cf. Green, "The Whole Truth?": How Rules of Evidence Make Lawyers Deceitful, 25 Loyola (LA) L. Rev. 699, 703 (1992) ("[E]videntiary rules . . . predicated in large measure on the law's distrust of juries [can] have the unintended, and perhaps ironic, result of encouraging the jury's distrust of lawyers. The rules do so by fostering the perception that lawyers are deliberately withholding evidence" (footnote omitted)). The fact that juries have expectations as to what evidence ought to be presented by a party, and may well hold the absence of that evidence against the party, is also recognized in the case law of the Fifth Amendment, which explicitly supposes that, despite the venerable history of the privilege against self-incrimination, jurors may not recall that someone accused of crime need not explain the evidence or avow innocence beyond making his plea. See, *e.g.*, *Lakeside* v. *Oregon*, 435 U. S. 333, 340, and n. 10 (1978). The assumption that jurors may have contrary expectations and be moved to draw adverse inferences against the party who disappoints them undergirds the rule that a defendant can demand an instruction forbidding the jury from drawing such an inference.

the current offense. Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.

Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.[10] What we have said shows why this will be the general rule when proof of convict status is at issue, just as the prosecutor's choice will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.

The judgment is reversed, and the case is remanded to the Ninth Circuit for further proceedings consistent with this opinion.[11]

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The Court today announces a rule that misapplies Federal Rule of Evidence 403 and upsets, without explanation, longstanding precedent regarding criminal prosecutions. I do not agree that the Government's introduction of evidence that reveals the name and basic nature of a defendant's prior felony conviction in a prosecution brought under 18 U. S. C. §922(g)(1) "unfairly" prejudices the defendant within the meaning of Rule 403. Nor do I agree with the Court's newly minted rule that a defendant charged with violating §922(g)(1) can force the Government to accept his concession to the prior conviction element of that offense, thereby precluding the Government from offering evidence on this point. I therefore dissent.

I

Rule 403 provides that a district court may exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Certainly, Rule 403 does not permit the court to exclude the Government's evidence simply because it may hurt the defendant. As a threshold matter, evidence is excludable only if it is "unfairly" prejudicial, in that it has "an undue tendency to suggest decision on an improper basis." Advisory Committee's Note on Fed. Rule Evid. 403, 28 U. S. C. App., p. 860; see, *e.g.*, *United States* v. *Munoz*, 36 F. 3d 1229, 1233 (CA1 1994) ("The damage done to the defense is not a basis for exclusion; the question under Rule 403 is 'one of "unfair" prejudice—not of prejudice alone'") (citations omitted), cert. denied *sub nom. Martinez* v. *United States*, 513 U. S. ___ (1995); *Dollar* v. *Long Mfg., N. C., Inc.*, 561 F. 2d 613, 618 (CA5 1977) ("'[U]nfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair'"), cert. denied, 435 U. S. 996 (1978). The evidence tendered by the Government in this case—the order reflecting petitioner's prior conviction and sentence for assault resulting in serious bodily injury, in violation of 18 U. S. C. §1153 and 18 U. S. C. §113(f) (1988 ed.)—directly proved a necessary element of the §922(g)(1) offense, that is, that petitioner had committed a crime covered by §921(a)(20). Perhaps petitioner's case was damaged when the jury discovered that he previously had committed a felony and heard the name of his crime. But I cannot agree with the Court that it was *unfairly* prejudicial for the Government to establish an essential element of its case against petitioner with direct proof of his prior conviction.

The structure of §922(g)(1) itself shows that Congress envisioned jurors' learning the name and basic nature of the defendant's prior offense. Congress enacted §922(g)(1) to prohibit the possession of a firearm by any person convicted of "a crime punishable by imprisonment for a term exceeding one year." Section 922(g)(1) does not merely prohibit the possession of firearms by "felons," nor does it apply to all prior felony convictions. Rather, the statute excludes from §922(g)(1)'s coverage certain business crimes and state misdemeanors punishable by imprisonment of two years or less. §921(a)(20). Within the meaning of §922(g)(1), then, "a crime" is not an abstract or metaphysical concept. Rather, the Government must prove that the defendant committed a *particular* crime. In short, under §922(g)(1), a defendant's prior felony conviction connotes not only that he is a prior felon, but also that he has engaged in specific past criminal conduct.

Even more fundamentally, in our system of justice, a person is not simply convicted of "a crime" or "a felony." Rather, he is found guilty of a specified offense, almost always because he violated a specific statutory prohibition. For example, in the words of the order that the Government offered to prove petitioner's prior conviction in this case, petitioner "did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in

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[10] There may be yet other means of proof besides a formal admission on the record that, with a proper objection, will obligate a district court to exclude evidence of the name of the offense. A redacted record of conviction is the one most frequently mentioned. Any alternative will, of course, require some jury instruction to explain it (just as it will require some discretion when the indictment is read). A redacted judgment in this case, for example, would presumably have revealed to the jury that Old Chief was previously convicted in federal court and sentenced to more than a year's imprisonment, but it would not have shown whether his previous conviction was for one of the business offenses that do not count, under §921(a)(20). Hence, an instruction, with the defendant's consent, would be necessary to make clear that the redacted judgment was enough to satisfy the status element remaining in the case. The Government might, indeed, propose such a redacted judgment for the trial court to weigh against a defendant's offer to admit, as indeed the government might do even if the defendant's admission had been received into evidence.

[11] In remanding, we imply no opinion on the possibility of harmless error, an issue not passed upon below.

serious bodily injury, in violation of Title 18 U. S. C. §§1153 and 113(f)." App. 18. That a variety of crimes would have satisfied the prior conviction element of the §922(g)(1) offense does not detract from the fact that petitioner committed a specific offense. The name and basic nature of petitioner's crime are inseparable from the fact of his earlier conviction and were therefore admissible to prove petitioner's guilt.

The principle is illustrated by the evidence that was admitted at petitioner's trial to prove the other element of the §922(g)(1) offense—possession of a "firearm." The Government submitted evidence showing that petitioner possessed a 9mm semiautomatic pistol. Although petitioner's possession of any number of weapons would have satisfied the requirements of §922(g)(1), obviously the Government was entitled to prove with specific evidence that petitioner possessed the weapon he did. In the same vein, consider a murder case. Surely the Government can submit proof establishing the victim's identity, even though, strictly speaking, the jury has no "need" to know the victim's name, and even though the victim might be a particularly well loved public figure. The same logic should govern proof of the prior conviction element of the §922(g)(1) offense. That is, the Government ought to be able to prove, with specific evidence, that petitioner committed a crime that came within §922(g)(1)'s coverage.

The Court never explains precisely why it constitutes "unfair" prejudice for the Government to directly prove an essential element of the §922(g)(1) offense with evidence that reveals the name or basic nature of the defendant's prior conviction. It simply notes that such evidence may lead a jury to conclude that the defendant has a propensity to commit crime, thereby raising the odds that the jury would find that he committed the crime with which he is currently charged. With a nod to the part of Rule 404(b) that says "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," the Court writes:

> "There is, accordingly, no question that propensity is an improper basis for conviction and that evidence of a prior conviction is subject to analysis for probative value and for prejudicial risk of misuse as propensity evidence." *Ante*, at 9.

A few pages later, it leaps to the conclusion that there can be "no question that evidence of the name or nature of the prior offense carries a risk of unfair prejudice to the defendant." *Ante*, at 13.

Yes, to be sure, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But Rule 404(b) does not end there. It expressly contemplates the admission of evidence of prior crimes for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The list is plainly not exhaustive, and where, as here, a prior conviction is an element of the charged offense, neither Rule 404(b) nor Rule 403 can bar its admission. The reason is simple: In a prosecution brought under §922(g)(1), the Government does not submit evidence of a past crime to prove the defendant's bad character or to "show action in conformity therewith." It tenders the evidence as direct proof of a necessary element of the offense with which it has charged the defendant. To say, as the Court does, that it "unfairly" prejudices the defendant for the Government to establish its §922(g)(1) case with evidence showing that, in fact, the defendant did commit a prior offense misreads the Rules of Evidence and defies common sense.

Any incremental harm resulting from proving the name or basic nature of the prior felony can be properly mitigated by limiting jury instructions. Federal Rule of Evidence 105 provides that when evidence is admissible for one purpose, but not another, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Indeed, on petitioner's own motion in this case, the District Court instructed the jury that it was not to "'consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.'" Brief for United States 32. The jury is presumed to have followed this cautionary instruction, see *Shannon* v. *United States*, 512 U. S. 573, ___ (1994), and the instruction offset whatever prejudice might have arisen from the introduction of petitioner's prior conviction.

II

The Court also holds that, if a defendant charged with violating §922(g)(1) concedes his prior felony conviction, a district court abuses its discretion if it admits evidence of the defendant's prior crime that raises the risk of a verdict "tainted by improper considerations." See *ante*, at 1. Left unexplained is what, exactly, it was about the order introduced by the Government at trial that might cause a jury to decide the case improperly. The order offered into evidence (which the Court nowhere in its opinion sets out) stated, in relevant part:

> "And the defendant having been convicted on his plea of guilty of the offense charged in Count II of the indictment in the above-entitled cause, to-wit: That on or about the 18th day of December 1988, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian country, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury, in violation of Title 18 U. S. C. §§1153 and 113(f)." App. 18.

The order went on to say that petitioner was sentenced for a term of 60 months' imprisonment, to be followed by two years of supervised release.

Why, precisely, does the Court think that this item of evidence raises the risk of a verdict "tainted by improper considerations"? Is it because the jury might learn that petitioner assaulted someone and caused serious bodily injury? If this is what the Court means, would evidence that petitioner had committed some other felony be admissible, and if so, what sort of crime might that be? Or does the Court object to the order because it gave a few specifics about the assault, such as the date, the location, and the victim's name? Or perhaps the Court finds that introducing the order risks a verdict "tainted by improper considerations" simply because the §922(g)(1) charge was joined with counts charging petitioner with using a firearm in relation to a crime of violence, in violation of 18 U. S. C. §924(c), and with committing an assault with a dangerous weapon, in violation of 18 U. S. C. §1153 and 18 U. S. C. §113(c) (1988 ed.)? Under the Court's nebulous standard for admission of prior felony evidence in a §922(g)(1) prosecution, these are open questions.

More troubling still is the Court's retreat from the fundamental principle that in a criminal prosecution the Government may prove its case as it sees fit. The Court reasons that, in general, a defendant may not stipulate away an element of a charged offense because, in the usual case, "the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story." *Ante,* at 18. The rule has, however, "virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *Ibid.* Thus, concludes the Court, there is no real difference between the "evidentiary significance" of a defendant's concession and that of the Government's proof of the prior felony with the order of conviction. *Ante,* at 19. Since the Government's method of proof was more prejudicial than petitioner's admission, it follows that the District Court should not have admitted the order reflecting his conviction when petitioner had conceded that element of the offense. *Ibid.*

On its own terms, the argument does not hold together. A jury is as likely to be puzzled by the "missing chapter" resulting from a defendant's stipulation to his prior felony conviction as it would be by the defendant's conceding any other element of the crime. The jury may wonder why it has not been told the name of the crime, or it may question why the defendant's firearm possession was illegal, given the tradition of lawful gun ownership in this country, see *Staples* v. *United States,* 511 U. S. 600, 610–612 (1994). "'Doubt as to the criminality of [the defendant's] conduct may influence the jury when it considers the possession element.'" *United States* v. *Barker,* 1 F. 3d 957, 960 (1993) (quoting *United States* v. *Collamore,* 868 F. 2d 24, 28 (CA1 1989)), modified, 20 F. 3d 365 (CA9 1994).

Second, the Court misapprehends why "it has never been seriously suggested that [a defendant] can . . . compel the Government to try the case by stipulation." *Singer* v. *United States,* 380 U. S. 24, 35 (1965). It may well be that the prosecution needs "evidentiary depth to tell a continuous story" in order to prove its case in a way a jury will accept. *Ante,* at 18. But that is by no means the only or the most important reason that a defendant may not oblige the Government to accept his concession to an element of the charged offense. The Constitution requires a criminal conviction to rest upon a jury determination that the defendant is guilty of every element of the crime of which he is charged beyond a reasonable doubt. *United States* v. *Gaudin,* 515 U. S. ___, ___ (1995) (citing *Sullivan* v. *Louisiana,* 508 U. S. 275, 277 (1993)); see also *County Court of Ulster Cty.* v. *Allen,* 442 U. S. 140, 156 (1979) ("[I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt"). "A simple plea of not guilty, Fed. Rule Crim. Proc. 11, puts the prosecution to its proof as to all elements of the crime charged . . . ." *Mathews* v. *United States,* 485 U. S. 58, 64–65 (1988). Further, a defendant's tactical decision not to contest an essential element of the crime does not remove the prosecution's burden to prove that element. *Estelle* v. *McGuire,* 502 U. S. 62, 69 (1991). At trial, a defendant may thus choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on *each* element.

It follows from these principles that a defendant's stipulation to an element of an offense does not remove that element from the jury's consideration. The usual instruction regarding stipulations in a criminal case reflects as much: "When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts." 1 E. Devitt, C. Blackmar, M. Wolff, & K. O'Malley, Federal Jury Practice and Instructions §12.03, p. 333 (4th ed. 1992). Obviously, we are not dealing with a stipulation here. A stipulation is an agreement, and no agreement was reached between petitioner and the Government in this case. Does the Court think a different rule applies when the defendant attempts to stipulate, over the Government's objection, to an element of the charged offense? If so, that runs counter to the Constitution: The Government must prove every element of the offense charged beyond a reasonable doubt, *In re Winship,* 397 U. S. 358, 361 (1970), and the defendant's strategic decision to "agree" that the Government need not prove an element cannot relieve the Government of its burden, see *Estelle, supra,* at 69–70. Because the Government bears the burden of proof on every element of a charged offense, it must be accorded substantial leeway to submit evidence of its choosing to prove its case.

Also overlooked by the Court is the fact that, in "conceding" that he has a prior felony conviction, a defendant may be trying to take the issue from the jury altogether by effectively entering a partial plea of guilty, something we have never before endorsed. Federal Rule of Criminal Procedure 23(a) does not permit a defendant to waive a jury trial unless the Government consents, and we have upheld the provision as constitutional. *Singer, supra,* at 37. "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." 380 U. S., at 36. A defendant who concedes the prior conviction element of the §922(g)(1) offense may be effectively trying to waive his right to a jury trial on that element. Unless the Government agrees to this waiver, it runs afoul of Rule 23(a) and *Singer.*

III

The Court manufactures a new rule that, in a §922(g)(1) case, a defendant can force the Government to accept his admission to the prior felony conviction element of the offense, thereby precluding the Government from offering evidence to directly prove a necessary element of its case. I cannot agree that it "unfairly" prejudices a defendant for the Government to prove his prior conviction with evidence that reveals the name or basic nature of his past crime. Like it or not, Congress chose to make a defendant's prior criminal conviction one of the two elements of the §922(g)(1) offense. Moreover, crimes have names; a defendant is not convicted of some indeterminate, unspecified "crime."

Nor do I think that Federal Rule of Evidence 403 can be read to obviate the well accepted principle, grounded in both the Constitution and in our precedent, that the Government may not be forced to accept a defendant's concession to an element of a charged offense as proof of that element. I respectfully dissent.

DANIEL DONOVAN, Montana Assistant Federal Defender (ANTHONY R. GALLAGHER, Fed. Def., on the briefs) for petitioner; MIGUEL A. ESTRADA, Assistant to Solicitor General (DREW S. DAYS III, Sol. Gen., JOHN C. KEENEY, Acting Asst. Atty. Gen., MICHAEL R. DREEBEN, Dpty. Sol. Gen., ALAN JENKINS, Asst. to Sol. Gen., and THOMAS E. BOOTH, Dept. of Justice atty., on the briefs) for respondent.

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Agenda Item III C

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Review of FRE 615
Date: February 20, 1997

At the November, 1996 meeting, I was directed to investigate whether there is a tension between Rule 615 of the Federal Rules of Evidence, providing for sequestration of witnesses, and a certain provision in the Victim of Crime Bill of Rights, 42 U.S.C. § 10606. The relationship between the statute and the Rule was recently considered by Judge Matsch in *United States v. McVeigh*, 944 F.Supp. 1478 (D.Colo. 1996). Judge Matsch concluded, without analysis in the written opinion, that Rule 615 mandated exclusion from trial of victims who might give victim impact statements at the penalty phase. The Tenth Circuit denied mandamus relief, holding that the government was not entitled to appeal the order and that the witnesses had no standing under the Victim of Crime Bill of Rights. *Kight v. Matsch,* 1997 U.S. App. Lexis 1845.

This memorandum is in two parts. Part One sets forth the Victim of Crime Bill of Rights, and an excerpt from the Supplement to the Federal Rules of Evidence Manual, concerning the relationship between Rule 615 and the statute. Part two is a proposed amendment to Rule 615 for the Committee to consider. The goal of the amendment is to incorporate the terms of the statute into the Rule. No attempt is made to address other possible problems in the Rule that might be worthy of amendment. No view is expressed as to whether the Rule should in fact be amended.

The Statute and Its Relationship to Rule 615

42 U.S.C. § 10606 provides several protections for victims of crime. The statute is set forth below; the part of the statute bearing on sequestration is italicized.

10606. Victims' rights

(a) Best efforts to accord rights. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b).

(b) Rights of crime victims. A crime victim has the following rights:

(1) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(2) The right to be reasonably protected from the accused offender.

(3) The right to be notified of court proceedings.

(4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

(5) The right to confer with an attorney for the Government in the case.

(6) The right to restitution.

(7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.

(c) No cause of action or defense. This section does not create a cause of action or defense in favor of any person arising out of the failure to accordto a victim the rights enumerated in subsection (b).

What follows is an excerpt from the Supplement to the Federal Rules of Evidence Manual concerning the relationship between Rule 615 and the Victims' Bill of Rights.

SUPPLEMENTARY EDITORIAL COMMENT TO RULE 615

We believe that the 1990 statute known as the "Victim of Crime Bill of Rights," 42 U.S.C.§ 10606, places some limits on Rule 615. Although the statute is not a model of clarity, paragraph (4) of subsection (b) sets forth the following right: : "The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." It appears that Congress intended to create an exception to Rule 615. This exception, which is narrowly tailored to take account of the interests of crime victims and is more recently enacted than the Rule, takes precedence over Rule 615.

As we read 42 U.S.C. § 10606 (b)(4), a Trial Judge has no right to automatically exclude every victim-witness, as would be the case under Rule 615. Instead, the Judge must determine whether the testimony of the victim will be not only affected but "materially affected" by hearing other testimony. The use of the word "materially" imposes a difficult task on a Trial Judge, especially in light of the ordinary discovery that is mandated in criminal cases. Fed. R. Crim. P. 16 does not require the government to reveal names of witnesses or to disclose the expected nature of their testimony. Nor does it require the government to produce statements of witnesses provided to the government. The Jencks Act, 18 U.S.C. 3500, does not require the government to turn over statements of testifying witnesses until they have given direct examination. Recent attempts to expand discovery through the rulemaking process were unsuccessful. Thus, a trial judge called upon to determine the effect of other testimony on a victim often will be largely in the dark unless the Judge believes it is fair to consider an ex parte, in camera submission by the government, or the government is prepared to reveal names and expected testimony of witnesses prior to trial. Many judges will be uncomfortable with an ex parte, in camera submission, and many prosecutors will be reluctant to provide the defense with expanded discovery simply to enable a ruling on a sequestration matter. Since the victim of crime is an important witness in most cases, and since exploring inconsistencies between a victim's testimony and that of other witnesses is a crucial part of the defense in many cases, a Trial Judge might conclude that if the victim

hears trial testimony, the victim's testimony would be materially affected. This is especially likely if the Judge concludes that elimination of inconsistencies in the testimony of various witnesses would be a material change in the prosecution's case. Thus, even under the statute, victims of crime will often be sequestered--just not as often as would be the case under Rule 615.

Even if sequestration is ordered under the statute, this does not mean that crime victims should be sequestered for any substantial part of a criminal trial. Any conscientious prosecutor dealing with a victim who wishes to be present at public court proceedings related to that victim's harm should, under subdivision (a) of the statute, make his or her best effort to call the victim first and then argue that the victim has a right to remain in the courtroom during the rest of the trial. The argument is that, once the victim's testimony is completed, there no longer is a good reason to exclude the victim. In some rare cases, the Trial Judge may conclude that there may be a need for the defendant to recall the victim, and that the defendant should not be compelled to decide whether to elicit additional testimony at the outset of the government's case. In such cases, the prosecutor who called the victim as the first witness would have satisfied the statutory requirement of best efforts, even though the victim might be excluded from the courtroom even after testifying. In most cases, the victim should be able to remain in the courtroom after testifying.

Should a prosecutor fail to seek to have the victim testify first, the Judge might exercise the power conferred by Fed. R. Evid. 611 (a) to control the order of proof and require the victim to be the first witness if the victim has expressed a desire to attend the trial. The Judge could even call the victim as the first witness by using the power conferred by Fed. R. Evid. 614, although it is difficult to believe that this ought to be a preferred procedure.

Whether the prosecutor requests or the Judge orders that the victim testify first, the result is that in all but the most unusual cases the victim should be able to be present during virtually the entire trial. This result is consistent with Congress's goals in enacting the Victims' Bill of Rights.

Paragraph (4) of the statute indicates that the victim has a right to be present at all public court proceedings unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony "at trial." The words "at trial" describe the testimony which might materially affect the victim's

testimony. The statute does not say that a victim may be excluded "at trial" only. Rather, the statute states that the right to be present at all public court proceedings related to the offense may be limited if the victim's testimony might be materially affected by hearing other testimony "at trial."

[Reporter's note: The witnesses in the Oklahoma City trial disagree with this construction. They argue that the statute does not cover anything other than trial testimony, because it refers to "other" testimony at the trial. Reading the statute to permit sequestration of impact witnesses at sentencing would render the word "other" superfluous, according to the witnesses.]

One issue that has arisen in what is known as the Oklahoma City bombing case, or United States v. McVeigh and Nichols, is whether a crime victim may be precluded from being present at trial if the victim's testimony would be offered at a subsequent sentencing proceeding, and the victim's testimony might be "materially affected" by hearing the trial testimony. It appears that the statute permits a Trial Judge to conclude that a victim can be precluded from attending a trial if the victim's testimony at some other stage of the case, including sentencing, would be materially affected by hearing trial testimony. This language may be the result of poor drafting, but it is clear that Congress did not limit the power of Trial Judges to exclude even crime victims from any proceeding when the victim's testimony might be materially affected by hearing other trial testimony.

It might appear at first blush that the statute reaches a perverse result, but careful analysis reveals that this is not so. Fed. R. Evid. 1101(d) establishes that the rules of evidence do not apply in sentencing. Thus, were it not for the statute, it might appear that Rule 1101 would prevent a Judge from excluding a crime victim from a trial simply because the victim will be a witness in any subsequent sentencing proceeding that might occur. This appearance is deceptive, however. Although there are cases holding that Rule 615 does not apply of its own force in those proceedings which Rule 1101 says are not governed by the rules of evidence, there is no case that holds that a Trial Judge cannot adopt procedures during sentencing proceedings that promote a just resolution of disputed issues. A Trial Judge may exclude evidence at sentencing under Rule 403. A Trial Judge may use the same powers recognized by Rule 611 (a) in a sentencing proceeding. There is nothing in any rule that suggests that a Trial Judge may not require direct examiners to use nonleading questions as a general matter during sentencing. Similarly, a Trial Judge may decide, when disputed issues of fact are important in sentencing, to

invoke a sequestration rule. We have no doubt that the Trial Judge may adopt some of the rules of evidence that are appropriate for any proceeding not technically governed the Federal Rules of Evidence. In doing so, the Judge may tailor the evidence rules to fit a particular proceeding.

Prior to the enactment of the Victims' Bill of Rights, a Judge could have invoked a sequestration rule in a sentencing proceeding. As a practical matter, however, Judges rarely were asked to rule on the question of whether a victim who would not testify at trial could be present at trial, if the victim would testify in any subsequent sentencing proceeding. In most cases, the victim is a necessary trial witness. Moreover, in most cases tried before the enactment of the Victims' Bill of Rights, victims would not have been able to cite authority for their claim of a right to be present.

The Victims' Bill of Rights changes the rules and provides a basis for a victim to claim a right to be present at all proceedings, unless the Trial Judge makes the requisite finding that would justify exclusion. In our judgment, prior to the enactment of the Victims' Bill of Rights, most Judges would not have excluded a victim from a trial simply because the victim would be a witness at any subsequent sentencing proceeding. The issues that arise at trial are so different from those that arise in sentencing that sequestration would not have been necessary to deal with the kinds of problems that the sequestration rule was meant to address.

It would be an unfortunate irony in our view if the Crime Victims' Bill of Rights were to result in exclusion of crime victims from trials which they would have been permitted to attend before the statute was enacted. It is hard to believe that Congress intended to expand rather than contract the sequestration power in enacting 42 U.S.C. 10606.

We suggest a two-step analysis that should give the Crime Victims' Bill of Rights appropriate deference. First, the Trial Judge must consider, as the statute requires, whether hearing trial testimony will materially affect any subsequent sentencing testimony in the manner that sequestration was meant to prevent. Crime victims can read about trials, they can watch and listen to media reports about trials. The fact that they have views about punishment does not mean that their exposure to trial testimony will materially affect them in the sense of having them fashion their testimony to coincide with some other witness's testimony. It is highly implausible that in most cases exposure to trial testimony will affect sentencing

testimony in any impermissible way.

Second, even in that rare case in which the Trial Judge concludes that trial testimony may materially affect a victim's later testimony in another proceeding, the Trial Judge can accomodate the interests of crime victims in being present at trial while assuring that later testimony is not compromised, by ruling that any crime victim who asserts the right to attend trial will not be permitted to testify during sentencing about any disputed facts that were the subject of trial testimony. If this restriction is placed upon the testimony of crime victims, no good reason appears why a Trial Judge should exclude them from the trial. It is difficult to see how a crime victim's testimony will be "materially affected" in the sense that sequestration rules seek to prevent by hearing testimony on issues about which the victim will not testify.

Proposed Amendment to Rule 615 for Advisory Committee Consideration

Rule 615. Exclusion of Witnesses

At the request of a party *or on its own motion* 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.~~ *provided, however, that in a criminal case a victim of the crime shall not be excluded unless the court determines that testimony by the victim [at the trial] would be materially affected if the victim heard other testimony at trial.* 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.

Comment by the Reporter:

All this does is place the operative provision of the Victim of Crime Bill of Rights into what I hope is the proper place. I switched the provision on the court ruling on its own motion, both to put it where it probably should have been in the first place, and to provide better integration of the new language.

The Committee may wish to clarify whether sequestration of victims is permissible at trial when they would only testify at a sentencing hearing. If the Committee believes that sequestration of sentencing witnesses should not be permitted, then the bracketed language in the proposal should be included in any amendment of the Rule.

Proposed Advisory Committee Note to Rule 615

The amendment incorporates a provision from the Victim of Crime Bill of Rights, 42 U.S.C. § 10606, which limits sequestration of victims of crime. The intent ot the amendment is to make the Rule consistent with the statute. [The Rule specifically provides that a victim who would testify only at the sentencing proceeding cannot be excluded from the trial.]

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 6, 1997
Via Facsimile

MEMORANDUM TO JUDGES STOTLER, JENSEN, AND SMITH

SUBJECT: *Victim Allocution Clarification Act of 1997*

For your information, I am attaching a copy of the *Victim Allocution Clarification Act of 1997* (H.R. 924), which was introduced this morning and reported out of the House Judiciary Subcommittee. The full House Judiciary Committee is expected to act on the bill within the week.

We understand that Senator Hatch is considering introducing a comparable, but different bill, that would require early in the trial a judicial finding that the presence of a victim during trial would not compromise the victim's testimony at a later sentencing hearing.

Some type of legislation will be passed by the Congress in the next few weeks. It is very likely that Congress will not request the judiciary's views. And unless one of you objects, we will not submit any recommendation or comment on the bill. In the unlikely event that we are asked for a judiciary position, we should probably recommend deferring legislation and let the rulemaking process proceed.

If a technical problem is identified with the proposed legislation, I could informally transmit a suggestion to Congressional staff.

John K. Rabiej

Attachment

cc: Professors Capra, Schlueter, and Coquillette
Peter G. McCabe

105TH CONGRESS
1ST SESSION

H. R. 924

IN THE HOUSE OF REPRESENTATIVES

Mr. MCCOLLUM (for himself, Mr. SCHUMER, and Mr. LUCAS of Oklahoma) introduced the following bill; which was referred to the Committee on

A BILL

To amend title 18, United States Code, to give further assurance to the right of victims of crime at attend and observe the trials of those accused of the crime.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Victim Allocution Clarification Act of 1997".

SEC. 2. RIGHTS OF VICTIMS TO ATTEND AND OBSERVE TRIAL.

(a) IN GENERAL.—Chapter 223 of title 18, United States Code, is amended by adding at the end the following:

"§ 3510. Rights of victims to attend and observe trial

"A United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may or will —

"(1) exercise the right to make a statement or present any information in relation to the sentence at the imposition of sentence; or

"(2) testify as to the effect of the offense on the victim and the victim's family.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 223 of title 18, United States Code, is amended by adding at the end the following new item:

"3510. Rights of victims to attend and observe trial.".

(c) EFFECT ON PENDING CASES.—The amendments made by this section shall apply in cases pending on the date of the enactment of this Act.

FORDHAM
University

Agenda Item III D

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Use of Rule 703 as a Hearsay Exception
Date: February 25, 1997

At the November, 1996 meeting, I was instructed to investigate whether Rule 703 has been used as a "back door" hearsay exception, and to draft a proposed amendment to prevent any perceived abuse. This memorandum is in response to that direction. Part One of this memorandum provides a short overview of the case law and commentary on the hearsay exception potential of Rule 703. Part two sets forth the extant rules and proposals for amending the Rule to control the use of inadmissible evidence relied upon by the expert; a short commentary is provided on each proposal or rule. Part three of the memorandum sets forth a proposed amendment to Rule 703 for this Committee to consider, *assuming without deciding that the Rule should be amended*.

I draw no conclusions and give no suggestions on whether the Rule should actually be amended.

Use of Rule 703 as a "Back Door" Hearsay Exception

It is very difficult to assess, from a reading of the reported cases, whether Rule 703 is being routinely used as a de facto hearsay exception. Certainly, no court to my knowledge has explicitly stated that Rule 703 establishes an exception to the hearsay rule for information reasonably relied upon by an expert. See Epps, *Clarifying the Meaning of Federal Rule of Evidence 703,* 36 B.C.L.Rev. 53 (1994) (noting that while one commentator argues that Rule 703 should be read to establish a hearsay exception, "no located case makes this ruling explicitly").

Still, there seems to be a good deal of concern that courts are allowing juries to consider the basis of an expert's opinion as substantive evidence, even when that basis is not independently admissible. Much of this is from the commentators. See Epps, *supra;* Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986). The commentary points out that Rule 703 is not explicit as to how the basis of an expert's testimony can be used when that basis is not independently admissible. Many commentators are concerned that Rule 703 can be read to constitute an end-run around the entire remainder of the Federal Rules of Evidence, by the simple expedient of having an expert rely on information that would not otherwise be admissible. These commentators (most notably Professor Carlson) contend that experts should not be permitted to control the exclusionary rules of evidence in this manner.

Other commentators, most notably Professor Rice, contend that Rule 703 *should* be used as a hearsay exception. See Rice, *The Allure of Illogic: A Coherent Solution for Rule 703 Requires More than Redefining "Facts or Data",* 47 Mercer L.Rev. 495 (1996). Professor Rice argues that if information is good enough to meet the reasonable reliance requirement of Rule 703, it is good enough to qualify for a hearsay exception. He also argues, citing the Advisory Committee Comment to Rule 803(4), that there is no meaningful distinction between evidence used for its truth and evidence used as the basis of a truthful expert's opinion.

There are some cases which, while not explicit on the point, appear to bear out the premise that Rule 703 can be (ab)used as a hearsay exception. That is, cases can be found which appear to admit an expert's underlying information as full substantive evidence. See, e.g., *United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant); *Stevens v. Cessna Aircraft,* 634 F.Supp. 137 (E.D. Pa. 1986) (holding, as properly admitted under Rule 703, an expert's testimony describing hearsay statements of friends and associates of a deceased pilot, in support of an opinion that the pilot was under a great deal of stress); *Durflinger v. Artiles,*

563 F.Supp. 322 (D.Kan. 1981) (admitting, as "validated by Rule 703 of the Federal Rules of Evidence," the deposition testimony of a psychiatrist containing an expert opinion and the basis of that opinion).

Other cases can be found which admit only the expert's opinion itself as substantive evidence, but admit the underlying facts for the limited purpose of explaining or supporting the expert's opinion. See, e.g., *Marsee v. United States Tobacco,* 866 F.2d 319 (10th Cir. 1989) (noting that inadmissible basis could be considered by the jury, but only for the purpose of evaluating the expert's testimony); *Bryan v. John Bean Div. of FMC Corp.,* 566 F.2d 541 (5th Cir. 1978) (citing Rules 703 and 705 as permitting disclosure of otherwise inadmissible hearsay evidence but only for the purpose of illustrating the basis of expert witness opinion).

Finally, there are reported appellate cases indicating that trial courts have sometimes permitted experts to bring inadmissible information before the jury without limitation. See, e.g., *Hutchinson v. Groskin,* 927 F.2d 722 (2d Cir. 1991) (medical expert allowed to refer to letters from three prominent physicians, and to testify that his conclusion was consistent with those doctors; this was reversible error, since the tactic revealed hearsay to the jury and impermissibly bolstered the expert's testimony); *Boone v. Moore,* 980 F.2d 539 (8th Cir. 1992) (harmless error where trial court allowed a report relied on by a medical expert to be admitted into evidence).

Whether or not there is a prevalent use of Rule 703 as a backdoor hearsay exception, it is clear that there is substantial thought being given to the risk of abuse left by the Rule as written. This is indicated by the extensive commentary on the Rule, the several proposals that have been made to amend the Rule, and the fact that three states have rules which specifically deal with the use of inadmissible information relied upon by the expert. The next section of this memorandum describes these proposals and rules.

State Provisions--Minnesota

Minnesota Rule 703 is in two parts. Subdivision (a) is basically the same as Federal Rule 703. Subdivision (b) deals specifically with the treatment of inadmissible evidence reasonably relied upon by the expert. Subdivision (b) reads as follows:

> *(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.*

The Rules Committee commentary to this subdivision is as follows:

> Although an expert may rely on inadmissible facts or data in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis for an expert opinion. In civil cases, upon a showing of good cause, the inadmissible foundation, if trustworthy, can be admitted on direct examination for the limited purpose of establishing the basis for the opinion. See generally Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986); Federal Rules of Evidence: A Fresh Review and Evaluation, ABA Criminal Justice Section, Rule 703 and accompanying comment, 120 F.R.D. 299, at 369 (1987). In criminal cases, the inadmissible foundation should not be admitted. Admitting such evidence might violate the accused's right to confrontation. See State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982).

Reporter's Comment on the Minnesota Rule

This Rule says that inadmissible underlying information cannot be admitted on direct examination, even with a limiting instruction, unless, in a civil case, the data is particularly trustworthy, at which point it could then be admitted for the limited purpose of evaluating the expert opinion. There are several possible objections to the Rule. First, it would mean that in many cases an expert's conclusion could not receive full consideration by the jury; the jury would not know all of the information that the expert relied upon. See Allen and Miller, *The Common Law Theory of Experts: Deference or Education*, 87 Nw.U.L.Rev. 1131 (1993) (arguing that the Minnesota provision requires jurors to defer to an expert's conclusion more than is appropriate). Second, the trustworthiness exception is odd because if the information is trustworthy, it should be admissible anyway under the residual hearsay exception--there would then be no need to admit it for only the limited purpose of illustrating the expert's testimony. If the Rule is attempting to describe information that is trustworthy enough to be mentioned to the jury as the basis of an expert's opinion, but not trustworthy enough to be admissible as residual hearsay, it is misguided. Any attempt to draft or maintain such a delineation is obviously fraught with practical difficulty.

Perhaps the reference to trustworthiness in the Minnesota rule refers to evidence that would be excluded not because it is hearsay, but because of some other exclusionary principle, such as Rule 407. If that is the case, there seems no reason to treat evidence excluded on one ground from evidence excluded on another, assuming that all such evidence can be reasonably relied upon by the expert.

State Provisions--Kentucky

Kentucky Rule 703 provides as follows:

Rule 703 Bases of opinion testimony by experts.

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

Reporter's Comment on Kentucky Provision

The Kentucky provision is like the Minnesota provision in establishing a category of evidence relied on by an expert which is trustworthy enough to be put before the jury for the limited purpose of evaluating the expert's opinion, yet not trustworthy enough to be admissible as residual hearsay. It thus creates the same practical problems discussed above in the comment on the Minnesota provision--a two-tiered standard that seems too difficult to apply.

The Kentucky provision has two possible advantages, however: it mentions that privilege rules remain applicable, and it usefully emphasizes that a limiting instruction must be given upon request.

State Provisions--Texas

Texas Rule of Criminal Evidence 705 specifically addresses the use at trial of inadmissible information reasonably relied upon by an expert. The Texas Rule provides as follows:

Texas Rule of Criminal Evidence 705(d)

(d) *Balancing Test; Limiting Instructions. When the underlying facts or data would be inadmissible in evidence for any other purpose than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.*

Reporter's Comment on the Texas provision:

This Rule takes a different approach from that of Kentucky and Minnesota. Instead of trying to classify information based on various levels of trustworthiness, courts are instructed generally to consider the risk of use for an improper purpose against the importance of explaining the basis of an expert's opinion. Thus, a Rule 403-type balancing process is established--though it is not exactly a Rule 403 balance, because under this provision the danger of an improper purpose need only outweigh, not substantially outweigh, the probative value for the information to be excluded. A flexible balancing process is a far better solution, it would seem, than the complicated trustworthiness-based provisions found in Minnesota and Kentucky--again assuming that an amendment is a worthwhile effort in the first place.

It is unclear why the Texas provision applies only to criminal cases. There is no parallel provision in the Texas Civil Rules. Certainly the concerns of misuse of inadmissible information relied upon by an expert arise in civil as well as criminal cases.

Proposed Revision of Rule 703--Wisconsin

The Judicial Council of Wisconsin proposed an amendment to Wisconsin Rule 703 to prescribe how and whether inadmissible information relied upon by an expert can be used before the jury. The proposal was in response to a conflict in the Wisconsin cases. Some cases allowed unrestricted use of the inadmissible information, some allowed limited use with a limiting instruction, and some allowed no use at all. The proposal was withdrawn because the Wisconsin Supreme Court decided a case and in that case set forth standards which were essentially drawn from the proposed rule. See Buratti, *What is the Status of "Inadmissible" Bases of Expert Testimony?*, 77 Marquette L.Rev. 531 (1994).

The proposed Wisconsin Rule would have added a subdivision (2) to Rule 703, providing as follows:

> *Where the facts or data underlying the expert opinion of inference are otherwise inadmissible in evidence but are of a type reasonably relied upon by such experts as provided in subdivision (1), the judge, after an analysis of the considerations set forth in Rule 403, may permit some or all of this information to be disclosed to the jury under this subsection or under Rule 705, for the limited purpose of establishing the basis for the expert's opinion or inference.*

The Judicial Council Note to the Proposal stated as follows:

> A trial judge may address the underlying bases of expert testimony in several different ways. First, the judge may permit the expert to disclose the details of the inadmissible bases to the jury. If this option is chosen, a limiting instruction must be given to inform the jury that the underlying data may not be used for substantive purposes. Second, the judge may limit disclosure to a general reference to the source or nature of the basis. This option presents a compromise between the proponent's interest in educating the jury about the expert's opinion and the opponent's concern that the evidence will be misused. Finally, the trial court may preclude any mention at all of the inadmissible bases, allowing only the expert opinion testimony that is predicated upon it.

Reporter's Comment on Wisconsin Proposal:

Assuming without deciding that Rule 703 should be amended, the Wisconsin proposal has much to commend it. It gives the trial judge the necessary flexibility to treat the inadmissible information in a variety of ways, depending on the balance of probative value and prejudicial effect in the specific circumstances. The Council Note is especially helpful in instructing judges as to the appropriate options. The reference in the Rule to the factors discussed in Rule 403 is somewhat vague, however, and could be clarified by specifying the relevant factors, as the Texas Rule has done.

Proposed Revision of Rule 703--ABA Committee

In 1987, the ABA Committee on Rules of Criminal Procedure and Evidence proposed the following amendment to Federal Rule 703:

(a) Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence, *in order for the opinion or inference to be admissible.*

(b) Admissibility of underlying facts or data.

Except as provided hereinafter in this Rule, the facts and data underlying an expert's opinion or inference must be independently admissible in order to be received in evidence on behalf of the party offering the expert, and the expert's reliance on facts or data that are not independently admissible does not render those facts or data admissible in that party's behalf.

(1) Exception. Facts or data underlying an expert's opinion or inference that are not independently admissible may be admitted in the discretion of the court on behalf of the party offering the expert, if they are trustworthy, necessary to illuminate the testimony, and not privileged. In such instances, upon request, their use ordinarily shall be confined to showing the expert's basis.

(2) Discretion whether or not independently admissible. Whether underlying facts and data are independently admissible or not, the mere fact that the expert witness has relied upon them does not alone require the court to receive them in evidence on request of the party offering the expert.

(3) Opposing party unrestricted. Nothing in this Rule restricts admissibility of an expert's basis when offered by a party opposing the expert.

The ABA Commentary to the proposed amendment states, in pertinent part:

> While some of [the] underlying records will have been offered and received by the time the expert testifies, others will not. In selected cases, counsel may have formally introduced none of the supporting data, especially where it comes from offices in distant parts of the country. In these circumstances, is the lawyer who calls an expert entitled to read the underlying records into evidence?
>
> Applying strict principles of expert, hearsay and confrontation law, the answer would appear in many cases to be "no." While the underlying records might frequently qualify as business records, and business records are admissible under an exception to the hearsay rule, virtually every formulation ordinarily requires an authenticating witness from the office which generated the record. Such a person knows the regularity of the entries contained in the offered record, their timeliness, and the sort of knowledge possessed by individuals participating in the recordkeeping process. For this reason, business record acts and evidence codes in the usual case require the custodian of the records to testify, or another qualified witness from the office which prepared the record.
>
> Nothing said here is intended to deprive an expert of the use of unadmitted hearsay to form and propound an expert opinion. Rather, the analysis speaks to the impropriety of receiving in wholesale fashion the unauthenticated background data as a substantive exhibit or substantive evidence, received for the truth of the matter, on behalf of the party that offered the expert's courtroom opinion. Once the expert, during direct examination, identifies the sources for his conclusions, the reference to outside material ordinarily should be complete. Especially in criminal cases, to permit the expert to go further and recite extensively from another person's report may do significant damage to the confrontation clause values of the Constitution. The back door introduction of the contents of a nontestifying expert's report, without producing the author of the material, can in many cases, impinge on the defendant's Sixth Amendment rights.
>
> To help protect against litigation unjustifiably based upon unsworn allegations contained in the report or materials of a person not subject to cross-examination, it is timely to consider careful revision of Federal Evidence Rule 703. Such revision would lend a degree of relative consensus to expert witness practice, and help settle the question on whether Rule 703 creates a giant automatic exception to the hearsay rule for otherwise inadmissible hearsay reports and opinions.

Reporter's Comment on ABA Proposal:

The clause added to the end of the current Federal Rule is helpful in distinguishing the opinion--which can be admissible even though the expert relies on inadmissible evidence--from the underlying information itself. The first clause of the new subdivision is odd, however, since it says the same thing twice; one clause or the other would appear to do. The exception to the general rule of exclusion has the same flaw as found in the Minnesota and Kentucky provisions--it establishes a category of evidence trustworthy enough to be admitted to illustrate the opinion, but not trustworthy enough to be admitted for its truth.

Subdivision (b)(2) is anomalous because it provides that a judge can exclude the underlying information even if it is independently admissible. This is to say the least confusing, and to the extent it is intended to give the judge discretion to exclude evidence which might be admissible but cumulative, the judge has that power independent of this Rule.

Proposed Revision of Rule 703--Professor Carlson

In a series of articles, Professor Carlson has suggested amending Rule 703 to provide that the current rule would be set forth as subdivision (a), and a new subdivision (b) added, to read as follows:

> *(b) Nothing in this rule shall require the court to permit the introduction of facts or data into evidence on grounds that the expert relied on them. However, they may be received into evidence when they meet the requirements necessary for admissibility prescribed in other parts of these rules.*

See Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony,* 76 Minn.L.Rev. 859 (1992).

Reporter's Comment on Carlson Proposal:

This proposal does not really say what Professor Carlson wants it to say. He wants it to say that inadmissible information relied on by an expert cannot be admitted into evidence. But the proposal says that nothing requires its admission; the Rule provides no ground for exclusion. On the other hand, if the proposal were to say that inadmissible information could not be introduced into evidence, it would have the drawback of depriving the jury of information that it needs to properly assess the weight of the expert's opinion.

Proposed Revision of Rule 703--Professor Rice

Professor Rice's Evidence Project would amend the Federal Rules to provide a new hearsay exception for information reasonably relied upon by an expert in forming her opinion. This would actually be accomplished by two separate amendments. Rule 703 would be amended to add the following provision at the end of the current Rule:

> *The facts or data need not have been proven beforehand, however, in the absence of admissible proof, a specific demonstration of reliability must be made of otherwise inadmissible hearsay statements pursuant to Rule [new hearsay exception]. Evidence that is inadmissible on grounds other than reliability, may not be relied upon by an expert witness if disclosure of that evidence would be inconsistent with the purposes of the rule excluding it.*

The new hearsay exception would be added to Rule 803 and would provide that the following type of hearsay would not be excluded by the hearsay rule:

> *Statement Employed in Expert Testimony. A statement employed by an expert in arriving at a conclusion offered by that expert at trial, to the extent that (a) the statement is of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, and (b) the expert has demonstrated to the presiding judge a basis for concluding that the statement possesses substantial guarantees of trustworthiness.*

Reporter's Comment on Evidence Project Proposal:

Obviously this is the most radical of all the proposals. It is up to the Committee to determine whether providing a hearsay exception for information reasonably relied on by an expert is good policy or not. The proposal has some virtues, however. First, it eliminates the insubstantial distinction, already recognized in the Advisory Committee Comment to Rule 803(4), between evidence admissible for its truth and evidence admissible only to illustrate the basis of an expert's opinion. Second, it avoids the complications of a two-tiered trustworthiness standard, such as that found in the Kentucky and Minnesota versions of Rule 703.

Proposal for Consideration by the Advisory Committee

The proposed amendment to Rule 703 submitted for consideration by the Committee is based on two premises: 1) That the possibility of using the current Rule as a back door hearsay exception is real enough to warrant an amendment to prevent that possibility; and 2) That the Committee does not wish to add a new hearsay exception for information reasonably relied upon by an expert. If the latter premise is incorrect, an amendment could be drafted along the lines of the proposal by the Evidence Project.

The proposed amendment begins from the Texas version of the rule, which in my judgment was the most instructive and the most flexible.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence, *in order for the opinion or inference to be admissible. When the underlying facts or data would be inadmissible in evidence for any other purpose than to explain or support the expert's opinion or inference, the court may exclude, or limit, the use of the underlying facts or data if the danger that they will be used for an improper purpose substantially outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury solely to explain or support the expert's opinion or inference, a limiting instruction by the court must be given upon request. Nothing in this rule restricts admissibility of underlying expert data when offered by an adverse party.*

Proposed Advisory Committee Comment

The amendment provides a structure for the court to employ when information not otherwise admissible is relied upon by an expert in forming his or her opinion. Courts have reached different results on how to treat this information. Compare *United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant), with *Marsee v. United States Tobacco,* 866 F.2d 319 (10th Cir. 1989) (noting that inadmissible basis could be considered by the jury, but only for the purpose of evaluating the expert's testimony). Commentators have also taken different views. See, e.g., Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986) (advocating limits on the consideration by the jury of inadmissible evidence used as the basis for an expert opinion); Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson,* 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is not independently admissible, a trial judge applying this Rule may treat the underlying bases of expert testimony in several different ways, depending on the balance of probative value and prejudicial effect in a particular case. First, the judge may permit the expert to disclose the details of the inadmissible bases to the jury. If this option is chosen, a

limiting instruction must be given upon request, to inform the jury that the underlying data may not be used for substantive purposes. Second, the judge may limit disclosure to a general reference to the source or nature of the inadmissible information. This option presents a compromise between the proponent's interest in educating the jury about the expert's opinion, and the opponent's concern that the evidence will be used improperly as substantive evidence. Finally, the trial court may preclude any mention at all of the inadmissible bases, allowing only the expert opinion testimony that is predicated upon it. In considering the appropriate course, the court must consider the effectiveness of a limiting instruction under the particular circumstances.

The amendment governs the use before the jury of inadmissible information reasonably relied on by an expert. It is not intended to affect the admissibility of an expert's opinion, or to deprive an expert of the use of unadmitted hearsay to form and propound an expert opinion.

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Agenda Item III-E

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Review of Rule 706
Date: February 27, 1997

At the November, 1996 meeting, the Committee asked me to prepare a report on problems in applying Rule 706 which might warrant a proposed amendment. The problem which sparked the Committee's concern was that of funding of court-appointed experts in complex civil cases. Specifically, in the breast implant litigation, Judge Jones sought funding for court-appointed experts, asserting that it would be unfair to saddle the parties before him with the costs, where the court-appointed expert's testimony could be used in subsequent cases. This funding was denied.

With the help of Joe Cecil and Tom Willging of the Federal Judicial Center, whose letter to me is attached to this memorandum, I have focussed on several problems that could be tackled in an amendment to Rule 706. These problems are: 1. The relationship between technical advisers (appointed pursuant to the inherent authority of the court), special masters (appointed pursuant to FRCP 53), and court-appointed expert witnesses (appointed pursuant to Evidence Rule 706); 2. The issues surrounding funding in civil cases; 3. The problems arising from ex parte communications between the judge and the expert and between the parties and the expert; 4. Whether deposition and cross-examination of the expert can be limited; 5. Whether the jury should be informed of the expert's court-appointed status and/or whether the jury should be cautioned against excessive reliance on the expert; 6. Whether limitations should be imposed on the selection process.

This memo briefly discusses each of these problems, and analyzes whether an amendment to the Rule seems required to address the particular problem. If the Committee decides that the Rule should be amended, this memo provides several textual suggestions.

1. Technical Advisers, Special Masters, Expert Witnesses

There is obviously some overlap between the roles of technical adviser, special master, and court-appointed expert witness. Rule 706 governs only the use of an expert as a witness. While there is overlap in the roles, there does not appear to be a substantial amount of confusion in the courts as to where to find an appropriate source of authority for an appointment. For example, in the Oregon Breast Implant Case, the court had no trouble appointing impartial experts under its inherent authority to decide a preliminary issue of admissibility. See also *Reilly v. United States,* 863 F.2d 149 (1st Cir. 1988) (Rule 706 "was not intended to subsume the judiciary's power to appoint technical advisers").

It is, of course, possible to amend Rule 706 to provide that "nothing in this Rule limits the court's inherent authority to appoint a technical adviser, or the authority provided by Federal Rule of Civil Procedure 53 to appoint a special master." Given the basic lack of confusion over the three separate sources of authority, however, it does not seem necessary to amend the Rule on this count.

While courts have had no trouble finding *authority* to make an appointment, the actual *delineation* of the appointee's role might be problematic, given the acknowledged overlap among the roles of technical adviser, special master, and expert witness. A Rule could be drafted to sort out the overlap among these roles, though it would probably be hard to come up with language that could be applied easily to every case. But before any attempt to amend Rule 706 is undertaken in this respect, it should be recognized that the Civil Rules Committee has before it a proposal to amend Civil Rule 53 to provide greater elaboration on the role that can be played by a special master. That proposal is attached to this memorandum. Any attempt to delineate an overlap between the roles that can be performed by an appointed expert should probably be accomplished in collaboration with the Civil Rules Committee. Indeed, commentators have expressed the opinion that the problems of dealing with court-appointed experts are ordinarily problems of case management and pre-trial practice that are more properly addressed in the Federal Rules of Civil Procedure than in the Federal Rules of Evidence. See Cecil and Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity,* 43 Emory L.J. 995 (1994). See also the letter to Ed Cooper from Margaret Berger, attached to the proposed amendment to FRCP 53 at the end of this memo. (It should be noted that the Civil Rules proposal is, at least currently, "on the shelf," due to the two major projects that the Civil Rules Committee is currently pursuing--discovery and class actions).

At any rate, any attempt to delineate the overlapping roles

of special master, technical adviser, and expert witness appears to be a difficult task. As Professor Berger notes in her letter, the expectations for each appointee will be very case-dependent. Flexibility is required to match the appointee's role with the needs of the case. In this light, it could be argued that the failure to delineate the various roles is actually a good thing, in that it gives the court and the appointee maximum flexibility. It may be appropriate, depending on the case, for the appointee to switch from role to role at various times throughout the case. Any attempt to write an all-encompassing set of rules would probably be a monumental task with little obvious pay-off--especially since appointments of any kind are so infrequently made, relatively speaking.

2. Funding in Civil Cases

It seems clear that a Federal Rule of Evidence cannot provide for federal funding. The funding grant must come from an independent statute. Indeed, Rule 706 currently recognizes this by stating that in criminal cases, compensation is payable from funds which may be provided by law. If the Committee makes the policy decision that public funding should at least be an option in certain civil cases, then the Rule could be amended along the follwing lines:

> (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~~. *Where no law provides for compensation of the expert, the expert's* 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.

Joe Cecil and Tom Willging, in their letter attached to this memorandum, raise another problem with the funding mechanism--the possibility that parties may be unable or unwilling to pay for the expert. Presumably this problem would be diminished if a public funding mechanism could be employed. But even in the absence of a public funding option, the current Rule seems to provide a good deal of flexibility and discretion in allocating, and enforcing payment of, the expert's expenses. That is to say, the court has the power, under the current Rule, to deal with the problem of a party's unwillingness or inability to pay. There seems little that an amendment could do to rectify any problem of enforcement. Any questions of fairness in allocation of expense do not result from the language of the Rule, but rather from the difficult policy questions that result when one party is unable or unwilling to pay for the court-appointed expert.

The Committee might also consider the option provided by Arizona Rule 706, which states, in its first sentence, that "Appointment of experts by the court is subject to the availability of funds or the agreement of the parties concerning compensation." This language presumably takes care of the reluctance of one or more parties to pay for the expert. The problem with that Rule, however, is that it could leave control of the appointment process solely in the hands of the parties--the parties could prevent the court from appointing an expert by simply refusing to agree on compensation. Rule 706, at least currently, presumes that the court should have authority to appoint an expert independent of the wishes of the parties.

The specific problem of fairness in funding experts in cases like the breast implant litigation is obviously not one that will arise very often; it is the relatively rare case where the testimony of a court-appointed expert in one case would be offered, or even admissible, in a later case. The problem does not seem so prevalent as to warrant an amendment to the Federal Rules of Evidence. Moreover, most of the cases where the question is presented are mass tort cases, where parties on both sides are very well-funded. While there is arguably a problem of fairness as to these litigants, there is not a problem of hardship. So again, the case for amending the Rule does not seem compelling.

3. Ex Parte Communications

Currently, Rule 706 does not address whether either the Judge or the parties can communicate ex parte with the court-appointed expert. As to judge-expert communications, there is a general recognition that ex parte communications are often essential, especially during the appointment process. However, safeguards have been suggested to allay concerns of the parties as to the ex parte nature of these communications. Apparently,

the preferred practice is to make a record of all discussions and disclose the record to the parties. *See Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988) (noting this procedure with approval).

The ABA Litigation Section has promulgated Civil Trial Practice Standards to cover the problem of ex parte communications between a judge and an appointed expert. Standard 11(b) provides as follows:

> **b. Communications between Court and Expert.** The court shall assure that the parties are aware of all communications between the court and a court-appointed expert by:
>
> i. Permitting the parties to be present when the court meets or speaks with the expert;
>
> ii. Providing that all communications between court and expert will be in writing with copies to the parties; or
>
> iii. Recording oral communications between court and expert and making a transcript or copy of the recording available to the parties.

If Rule 706 is to be amended, the Committee might consider adding something like the ABA proposal to the end of the Rule. However, whether the Rule needs amending to cover this problem is another question. There does not appear to be a lot of confusion or dispute in the cases or among judges as to the proper use and regulation of ex parte communications. See Cecil and Willging, 43 Emory L.J. at 1029-33.

As to ex parte communications between counsel and the court-appointed expert, it has been recognized that its permissibility is dependent on the expert's role in the case. If, for example, the expert must do a medical examination of the plaintiff, or if the expert must obtain specimens from one of the parties, then ex parte communications are not only warranted but essential. (See the letter from Joe Cecil and Tom Willging attached to this memorandum). On the other hand, the obvious due process concerns arising from ex parte communications indicate that they should not be permitted in the ordinary case, and that even where such communications are necessary, the safeguard of post-communication disclosure should be implemented.

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

> **c. Communications between Parties and Expert.** The court shall assure that every party is aware of all communications between any party and a court-appointed expert by:
>
> i. Permitting all parties to be present when any party meets or speaks with the expert, or
>
> ii. Providing that all communications between any party and the expert will be in writing [Reporter's note: shouldn't the possibility of tape recorded oral communications be added?]with copies to all parties.

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

If Rule 706 is to be amended, the Committee might consider amending the Rule in accordance with Standard 11(c), keeping in mind that it may be necessary to permit oral ex parte communications in certain unusual cases, so long as subsequent disclosure is made of the nature of those communications. See the bracketed comment in the quoted standard, immediately above. Again, however, it is not apparent that the Rule needs amending to cover this problem. The use of court-appointed experts is so infrequent that the problem of ex parte communications cannot be considered a critical one at this time.

4. Limitations on Cross-examination and Deposition

The Rule currently provides that court-appointed experts can be deposed by any party, called to testify by any party, and freely cross-examined when called. In their letter attached to this memo, Joe Cecil and Tom Willging inform me that court-appointed experts have expressed concern that they could be set upon by all sides absent court intervention. They note that John Kobayashi has been appointed to represent the panel of experts in the breast implant case. Joe and Tom make the suggestion that the rule could be clarified to provide that a court could limit depositions or cross-examination of court-appointed experts when necessary.

If the rule is to be amended, such clarification would

certainly be salutary, but there is little reason to amend the rule solely to provide a protective authority that the courts are currently exercising anyway. John Kobayashi's appointment is just one instance of a court's stepping in to protect a court-appointed expert, even without clarification of the rule. Another example is the Asbestos Cases in the Eastern District of New York, where the court provided for an informal hearing in lieu of depositions.

5. Informing and Instructing the Jury

As pointed out by Cecil and Willging in their Emory article at pages 1038-9, judges are not in agreement on whether the jury should be told that an expert is court-appointed. Rule 706(c) leaves the matter to the discretion of the judge. (A few states have refused to adopt this provision, and prohibit judicial comment on the court appointment).

There is, of course, a risk that the appointment of an expert will be outcome-determinative, and some commentators have proposed that because of this risk, Rule 706 should be amended to prohibit judicial comment on the court appointment. See Bua, *Experts--Some Comments Relating to Discovery and Testimony Under New Rules of Evidence,* 21 Trial Law. Guide 1 (1977). Others have suggested that the Rule be amended to require the judge to instruct the jury against excessive reliance on the appointed expert's testimony. See Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence,* 6 Yale Law and Policy Review 480 (1988).

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

> **d. Jury Instructions.** If an expert witness retained by the court testifies at trial,
>
> > **i. No Identification as Court Appointee.** The court ordinarily should not identify the witness as one appointed by the court.
> >
> > **ii. If Identified as Court Appointee.** If the court determines that, in the circumstances, it is appropriate to identify the witness as a court appointee, the court should instruct the jury that:

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

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

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

iii. Questioning. The witness should be examined by counsel, in an order determined by the court.

Amendment of Rule 706 along the lines of the ABA standard requires an affirmative answer to at least two questions: First, does the disclosure of court appointment, especially without a limiting instruction, create an unacceptable risk of outcome-determination? Second, does the Rule, which currently leaves the matter to judicial discretion, provide sufficient safeguards, or is a more specific articulation necessary?

These questions must be answered in a relative vacuum because the use of court-appointed experts in jury trials (indeed in any trial) is so infrequent. Cecil and Willging located only seven jury trials in which court-appointed experts testified. See 43 Emory L.J. at 1038.

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

6. Selection Process

Rule 706 provides that the court may, in its discretion, request the parties to submit nominees for appointment, and that the court can appoint an expert agreed to by the parties or an expert of the court's own selection. Thus, the selection process is essentially left to judicial discretion. Cecil and Willging

report, in the Emory Law Journal article, that in a large minority of the appointments (29 of 66), "the judge used pre-existing personal or professional contacts to identify an expert." The authors criticize this practice because it "may reflect a narrow spectrum of professional opinion that was suited to the interests of the judges' former clients and colleagues" and that the parties "may perceive such an expert as biassed."

The risk of a sweetheart appointment has led one commentator to suggest that Rule 706 be amended to require the parties to submit a list of proposed experts to be appointed for each area of disputed testimony. See Johnson, *Court-Appointed Scientific Expert Witnesses: Unfettering Expertise,* 2 High Tech L.J. 249 (1988).

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

a. Selection.

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

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

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

iv. Before selecting an expert unilaterally, the court should

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

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

These standards provide helpful guidance, and encourage a judge not to appoint an expert simply because of a pre-existing relationship. The Committee must decide whether the problem of sweetheart appointments is critical enough to warrant amending the Rule. Again, given the limited number of cases, it can be argued that the Committee should wait for further developments.

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January 27, 1997

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Dear Dan:

We promised to suggest issues that you may wish to keep in mind as you draft proposed amendments to FRE 706. Our suggestions grow out of interviews we conducted seven years ago with judges who had appointed such experts under authority of this rule. Our study is summarized in the enclosed law review article.[1] We have included additional reference material in endnotes.

Current practice under Rule 706 is an example of courts struggling to adapt existing authority to meet evolving needs. The existing rule anticipates that appointed experts will be present trial testimony in a manner similar to the parties' experts. In the past twenty-five years the role of court-appointed experts has expanded beyond this testimonial function. We found that only about half of the appointed experts in our study testified at a trial. Nontestimonial duties recognized by federal courts include educating the court about underlying science and technology issues,[2] aiding the court in screening expert testimony by commenting on the scientific validity of proffered expert testimony,[3] reviewing discovery documents and materials,[4] reviewing proposals for class action certification,[5] preparing reports regarding future claimants to guide a court in allocating the proceeds of a settlement fund,[6] preparing videotaped testimony on the state of scientific knowledge as part of a multi-district litigation pretrial process,[7] and even developing proposals for bring legal doctrines regarding protection of computer software into accord with current standards and practice of computer science.[8]

The strain that exists in adapting the existing rule to current needs also is indicated by the extent to which the authority of experts appointed under FRE 706 is supplemented by appointment as a special master under FRCivP 53.[9] Also, a number of current cases seem to favor of appointment of "technical advisors" under the courts inherent authority rather than its

codification in FRE 706.[10] The fundamental problem is confusion regarding the authority of the court to use this mix of overlapping procedures to engage in the activities listed above.

Before offering suggestions, we should mention that when we asked judges about the need for changes in Rule 706, most judges indicated that they were satisfied with the present form of the rule. This satisfaction likely was related to their satisfaction with the service provided by the expert (only two of the sixty-five judges expressed any reservations). We also suspect that the practice of some judges to supplement the authority of FRE 706 experts with the authority of FRCivP 53 special masters and the inherent common law authority of court to appoint experts and advisors, tended to disguise any shortcomings of the rule.

Also, most judges indicate that they view the use of a court-appointed experts to be an extraordinary procedure that should be reserved for the few cases where the dispute turns on evidence that is not readily comprehensible and where the traditional adversary process has failed to produce information for resolving a highly technical dispute. We offer these suggestions, not to replace the role of adversarial experts in common litigation,[11] but only to improve the use of appointed expert in that narrow spectrum of cases in which such information is required for a reasoned and principled resolution of the dispute.

Clarify Authority to Assess Costs to Compensate the Expert According to a Party's Ability to Pay. The judges' most common suggestion for changes in the rule was to clarify the court's authority to order compensation of the experts. Compensation of experts was often mentioned in our discussions with judges as an impediment to effective use of appointed experts under FRE 706. Such problems extend beyond the authority to compensate experts under the rule to the practical problem of enforcing payment terms. Concern about securing payment causes some judge to restrict appointment of experts to only those cases in which the parties consent.[12]

The problem of compensating appointed experts is most common in civil cases when one or both parties resists contributing to the costs of the experts. The current rule includes broad authority to permit courts to allocate costs as the court sees fit. Most judges require the parties to split the expert's fee, with the party prevailing at trial being reimbursed for its portion. When one party is indigent judges are reluctant to order the nonindigent party to advance the full cost of the expert, even though current case law indicates that a judge has discretion to allocate the fees among the parties as he or she finds appropriate, and to reconsider this allocation as part of the final award. This includes the authority to order one party to pay the entire costs.[13]

Clarify Expectation Regarding Ex Parte Communication between the Judge and Appointed Expert. FRE 706 does not explicitly address the issue of

whether the judge and the appointed expert may communicate *ex parte* during the course of the litigation. Conversations with judges indicated this is a particularly troubling issue.[14] Six judges mentioned the need for more guidance in the rule or advisory committee notes concerning appropriate forms of communication between the judge and the appointed expert. Case law and canons of judicial ethics discourage off-the-record contacts between a judge and an expert witness.[15] However, some judges have relied on the court's inherent authority to appoint an expert as a "technical advisor" to avoid constraints on such communication.[16]

Our interviews revealed considerable *ex parte* communication between judges and experts as well as some confusion concerning proper conduct. More than half of the judges indicated they communicated directly with the expert outside of the presence of the parties. About half of these judges limited their *ex parte* discussion to procedural aspects of the expert's service, including matters of availability. The remaining judges communicated with the court-appointed experts on at least some occasions to elicit technical advice outside the presence of the parties. In most of these situations the very purpose of the appointment was to provide the judge with one-to-one technical advice. (Many of these were patent cases.) We did not systematically ask about consent, but some judges indicated that the parties expressly consented to the *ex parte* communications. In all other cases it appeared from the context of the interviews that the parties were generally aware of the arrangements and either expressly consented or failed to object.

Consider noting in the rule the circumstances in which some form of *ex parte* communication will be permitted, and the safeguards that can be employed to minimize the opportunity that such communication can disadvantage a party. In *Reilly*,[17] the United States Court of Appeals for the First Circuit affirmed the inherent authority of the court to appoint a technical advisor and offered a number of suggestions for diminishing the concerns about *ex parte* communication. The court suggested that the expert should be instructed on the record and in the presence of the parties, or the duties of the expert should be recorded in a written order. And at the conclusion of his or her service, the technical advisor should file an affidavit attesting to his or her compliance with these instructions. The court noted with approval that some judges have gone further, making a record of discussions and disclosing the record to the parties. These safeguards may do little to comfort those who see any form of *ex parte* communication as an unforgivable intrusion into the adversarial system, but such safeguards will permit the parties to remain informed of the nature of the assistance and raise objections when the intended form of assistance encroaches on the duties of the judge. At the same time, information about the expert's advice will permit parties to challenge misplaced factual assumptions and debatable opinions.

Rule 706 also fails to address the question of whether *ex parte* communication should be permitted between the expert and the parties. We found that about half of the responding judges permitted direct, separate communication

between the expert and one or more parties. Often, the nature of the appointment and the role of the expert led naturally, if not inexorably, to that practice. The clearest example was the medical examination of a party by an expert to determine the extent of injuries. *Ex parte* communication may also be necessary when an expert must learn a trade secret in order to advise the court regarding a motion for a protective order or when the expert must assemble data from the parties. Such circumstances should be easy to anticipate and the order of appointment can specify the procedures and safeguards that will control such communications.

Clarify Authority to Limit Deposition and Cross-Examination of Appointed Expert. Currently the FRE 706 permits the appointed expert to be deposed and cross-examined without any indication of the need for limits on such inquiries. Judges in a number of cases have issued orders limiting such inquiries and have on occasion substituted informal hearings in court as a substitute for such procedures.[18] Those who have served as appointed experts have told us that they are concerned that absent court intervention, they will be set upon by attorneys for both sides without their own legal counsel to object to improper queries. Judge Pointer has recognized this concern in the multi-district litigation breast implant case and appointed a member of the Advisory Committee on Evidence Rules, John Kobayashi, to represent the national panel of experts during their depositions.[19] Some comment in the rule regarding the opportunity for limiting deposition and cross-examination, depending on the nature of the appointed expert's service, may be appropriate.

On the other hand, FRCivP 53 makes no explicit provision for the deposition of testimony of a special master. When the special master's report involves identifying expert evidence, one can imagine that the use of a special master procedure may be used to bypass the procedural safeguards in FRE 706.

Reconcile Overlap in Authority of Court-Appointed Expert, Special Master, and Technical Advisor. We saved the most ambitious task for last. As noted above, there is considerable overlap in the duties of FRCivP 53 special masters, FRE 706 court-appointed experts, and "technical advisors" appointed under the inherent authority of the courts. You may wish to work with the Advisory Committee on Civil Rules to try to sort out the overlap in authority for these two procedures. The Advisory Committee on Civil Rules has discussed amending Rule 53 and is aware of the overlap with court-appointed experts. Ed Cooper may have advice on how to proceed. (Even though FRE 706 experts can be appointed in criminal cases, separate statutory authority for such appointments may diminish the need for similar coordination with the Advisory Committee on Criminal Rules.)

These are the areas that our research indicate may benefit from attention in an amended rule. Please note that there are a number of other

problems with court-appointed experts: judges often fail to recognize the need for such assistance until the eve of trial; parties rarely participate in the identification of suitable experts, leaving judges to recruit experts through personal and professional contacts; and, judges and juries may give the advice of court-appointed experts more deference than it deserves. We believe that these issues are best addressed through pretrial procedures and expanding the opportunity to recruit experts from among scientific and professional societies. If you see opportunities to address such issues by amending the rule, please let us know and we will expand on our findings in these areas as well.

Please let us know if you want us to expand on any of these ideas or if we can be of further assistance.

Sincerely,

Joe S. Cecil

Tom

Thomas E. Willging

Enclosure

[1] Joe S. Cecil and Thomas E. Willging, Accepting Daubert's Invitation: Defining A Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L. J. 995 (1994).
[2] Unique Concepts, Inc. v. Brown, 659 F. Supp. 1008, 1011 (S.D.N.Y. 1987) (court-appointed expert for issues on patent construction, validity and infringement).
[3] Renaud v. Martin Marietta Corp., 972 F.2d 304, 308 n.8 (10th Cir. 1992) (court-appointed expert in geochemistry and hydrology assessed the narrow question of the scientific acceptability of using a single data point to estimate toxic exposure over several years). See also, Ellen Relkin, Some Implications of *Daubert* and Its Potential for Misuse: Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts, 15 Cardozo L. Rev. 2255 (1994) (Rule 706 experts will become more common following Daubert). This point may also be made in Margaret A. Berger, Procedural Paradigms for Applying the Daubert Test, 78 Minn. L. Rev. 1345 (1994).
[4] Kerasotes Mich. Theaters v. Nat'l Amusements, No. 85-CV-40448-FL (E.D. Mich. Feb. 2, 1989) (order appointing expert under Rule 706).
[5] Superior Beverage Co., Inc. v. Owens-Illinois, Inc., No. 83C512, Pretrial Order 87-1, 1987 WL9901 (N.D. Ill. Jan. 30, 1987) (expert "is to consider only whether the method of classwide proof proposed by plaintiffs presents . . . an economically and statistically valid alternative to individualized proof," explicitly prohibiting expert from drawing any conclusions regarding the ultimate issues in the case);
[6] In re Joint Eastern and Southern Districts Asbestos Litigation, 830 F.Supp. 686, (E. & S.D.N.Y., 1993).
[7] In re Silicone Gel Breast Implant Products Liability Litigation, MDL No. 926, Order No. 31 (May 30, 1997).
[8] Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713-14 (2d Cir. 1992).
[9] Students of Calif. School for the Blind v. Honig, 736 F.2d 538, 549 (9th Cir. 1984), *vacated on other grounds,* 471 U.S. 148 (1985); Hart v. Community Sch. Bd., 383 F. Supp. 699, 765-66 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). Another district court expressly granted a special master the power, subject to approval by the court, to "seek the assistance of court-appointed experts." Young v. Pierce, 640 F. Supp. 1476, 1478 (E.D. Tex. 1986), *vacated on other grounds*, 822 F.2d 1368 (5th Cir. 1987), *order reinstated*, 685 F. Supp. 984, 985-86 (E.D. Tex. 1988).
[10] Reilly v. U.S., 682 F.Supp. 150 (D.R.I.), *aff'd in part and remanded in part,* 863 F.2d 149, (1st Cir. 1988); Goetz v. Crosson 967 F.2d 29, 37 (2nd Cir. 1992) (VanGraafeiland, J., concurring and dissenting); Hall v. Baxter Healthcare Corp. ____ F.Supp. ____ (Civ. No. 92-182) (D. Or., 1996) (appointing technical experts to assess scientific reasoning and methodology underlying testimony of party's expert in breast implant litigation).
[11] For examples of suggestions that court-appointed experts should be preferred over parties' experts, see Samuel R. Gross, *Expert Evidence,* 1991

Wisc. L. Rev. 1113; Joanna A. Albers, et al., Toward a Model Expert Witness Act: An Examination of the Use of Expert Witnesses and a Proposal for Reform, 80 Iowa L. Rev. 1269 (1995).

[12] Cecil and Willging, supra note 1 at 1045-54 (discussion of issues that arise in compensating court-appointed experts).

[13] McKinney v. Anderson, 924 F.2d 1500, 1510-11 (9th Cir. 1991) (overruling magistrate's decision to deny appointment of an expert as unduly restrictive because "Rule 706 . . . allows the courts to assess the cost of the experts compensation as it deems appropriate").

[14] Id. at 1029-35 (discussion of *ex parte* communication with court-appointed experts).

[15] Canon 3A(4) of the Code of Conduct for United States Judges provides: "A judge should ... except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." See also, Edgar v. K.L., et al., 93 F.3d 256 (7th Cir. 1996) (judge's actions in meeting *ex parte* with panel of experts appointed by judge to investigate Illinois mental health institutions and programs to receive preview of panel's conclusions and to persuade judge that their methodology was sound was grounds for disqualification of judge); Cecil and Willging, supra note 1 at 1031.

[16] Reilly v. U.S., 682 F.Supp. 150 (D.R.I.), *aff'd in part and remanded in part,* 863 F.2d 149, (1st Cir. 1988).

[17] 863 F.2d 149, 159–61 (1st Cir. 1988).

[18] Hall v. Baxter Healthcare Corp. ____ F.Supp. ____, fnt. 8 (Civ. No. 92-182) (D. Ore, 1996); In re Joint Eastern and Southern Districts Asbestos Litigation, 151 F.R.D. 540 (E. & S.D.N.Y. 1993).

[19] In re Silicone Gel Breast Implant Products Liability Litigation, MDL No. 926, Order No. 31f (January 13, 1997).

Rule 53 Reporter's Note

These Rule 53 materials are not quite as daunting as the bulk may suggest. The same proposal is presented in two forms: the first set has everything rolled into a drastically revised Rule 53. The second set divides the same drastic revisions among three rules, 53, 53.1, and 53.2. It should be sufficient to concentrate on the combined Rule 53 in preparing for the October meeting.

The reason for providing both versions is simple enough. This project began with a casual proposal to amend Rule 53 that led to the decision to prepare a draft rule governing pretrial masters. There was some discussion about the best place to locate a pretrial master rule: Rule 16 was suggested because of the affinity with pretrial conference practice, Rule 26 was suggested because pretrial masters often supervise discovery, and Rule 53 was doubted because it is located with the trial rules. Draft Rule 16.1 was before the committee at its April, 1994 meeting. Only brief attention was devoted to the draft. The main conclusion was that the draft covered many matters that also should be included in the Rule 53 provisions for trial masters. The initial response to the Committee's instructions to provide a comprehensive draft was framed as three rules. All of the common provisions were included in Rule 53. Separate rules 53.1 and 53.2 dealt with pretrial and post-trial masters. The three rules were integrated by multiple cross-references. Judge Brazil commented extensively on first and second drafts cast in this form; one of his suggestions was that it might be better to incorporate all three into one, albeit lengthy, rule.

Several advantages follow incorporation of all provisions in a single rule. The common provisions are emphasized, and need not be incorporated by reference. The separate rule draft, moreover, cast Rule 53 in the central role, even though the use of trial masters has almost disappeared; it may seem misleading to emphasize implicitly the least common species of master. And one rule may fit better with statutory cross-references, e.g., 28 U.S.C. § 636(b)(2).

Separate rules also may have some advantages. The separateness emphasizes the desirability of thinking separately about different master roles, even if a single person is appointed to perform duties under more than one rule. It may prove easier to keep a separate Rule 53 in a form that supports the cross-references in other Rules — I have not yet attempted to check how well the combined draft fits with references to Rule 53 in other rules, e.g., Rule 71A(h).

Although both forms are provided, the combined draft is likely to prove the best focus for initial discussion.

With the encouragement of Judge Higginbotham, I sent copies of the July draft Rules 53, 53.1, and 53.2 to several people who know a great deal about special masters and the rulemaking process.

Only a few have responded yet, but more plan to do so. Comments from Margaret Berger, David Levine, and Judith Resnik are set out at the end. These comments will provide several useful grounds for reconsideration on rereading the draft. Although they are addressed to the multiple rule format, it is easy to carry the ideas over to the combined form.

The various underlinings, strikeovers, and backshadings indicate some of the points that were temporarily resolved in the course of the summer's discussions. They are only a few of the important matters that need to be considered in approaching the rule.

Perhaps the most important single question is whether to delete the provision for using trial masters in aid of a jury. The draft Note suggests the many difficulties with submitting a master's findings to a jury. It seems to be agreed that the findings have "prima facie" effect, but it is not clear what that means. Apparently the findings are sufficient to support a jury finding if there is no other evidence on an issue. Beyond that, the matter is more obscure.

Another important question is whether there is a need to discourage the use of pretrial and post-trial masters more than the draft seems to do.

And of course it is proper to ask whether there is too much detail. The draft follows the usual course of including everything that seems potentially worthy of inclusion, so as to launch discussion.

A version of current Rule 53 also is attached, attempting to show the location of present provisions in the new drafts. The changes are so drastic, however, that only confusion would follow from an attempt to set the new version out in the traditional form that strikes over deleted material and underscores new material.

RULE 53. MASTERS

(a) Appointing.

(1) A court may appoint a master only:

(A) if the parties consent, or

(B) if the master's duties cannot be adequately performed by an available district judge or magistrate judge [of the district], and — if the master is to exercise the powers described in subdivision (b)(8) or (9) — (i) in an action to be tried by a jury, if the issues are extraordinarily complicated and consideration of the master's report is likely to substantially assist the jury, or (ii) in an action to be tried to the court, if some exceptional condition requires reference to a master.

(2) The master must not have a relationship to the parties, counsel, action, or court that creates an actual or apparent conflict of interest unless the parties consent to appointment of a particular person. A master cannot, during the period of the appointment, appear as an attorney before the judge who made the appointment.

(3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties.

(b) Master's duties. The court may appoint a master to:

(1) mediate or otherwise facilitate settlement;

(2) formulate a [disclosure or] discovery plan; supervise [disclosure or] discovery; make [disclosure or] discovery orders under Rules 26 through 31, 32(d)(4), 33 through 36, and 45; make recommendations [to the court] for orders under Rules 26 through 36 and 45; make orders under Rule 37(a) or (g); or make recommendations [to the court] for orders under Rule 37;

(3) conduct conferences and make orders or recommendations for orders under Rule 16;

(4) hear and determine any other pretrial motion, except a motion:

(A) for injunctive relief,

(B) to dismiss for failure to state a claim,

(C) for judgment on the pleadings,

(D) to strike any claim or defense,

(E) for involuntary dismissal, transfer, or remand,

(F) for summary judgment,

(G) to certify, dismiss, or approve settlement of a class action, or

(H) to establish for trial under Evidence Rule 104 the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence;

(5) conduct hearings and make proposed findings and recommendations for disposition of a motion described in paragraph 4;

(6) manage other pretrial proceedings;

(7) assist in coordinating separate proceedings pending before the court or in other courts, state or federal;

(8) assist the court in discharging its trial duties in a nonjury case;

(9) preside over an evidentiary hearing and:

(A) report the evidence to the court in a nonjury action;

(B) recommend findings of fact and conclusions of law; or

(C) make findings of fact or conclusions of law in a nonjury action, subject to review as provided in subdivision (i);

(10) conduct ministerial matters of account;

(11) assist in framing an injunction when the parties have not been able to provide sufficient assistance;

(12) assist in supervising enforcement of a complex decree;

(13) assist in administering an award to multiple claimants;

(14) conduct independent investigations to assist in framing an injunctiver order or in enforcing a decree; or

(15) perform other duties agreed to by the parties.

(c) Order Appointing Master.

(1) Hearing. The court must give the parties notice and an opportunity for hearing before appointing a master. A party [Parties] may suggest candidates for appointment.

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state as clearly [precisely] as possible:

(A) the master's name [, business address, and numbers for telephone and other electronic communications];

(B) the master's duties under subdivision (b);

(C) any limits on the master's authority under subdivisions (e) and (f);

(D) the dates by which the master must first meet with the parties, make interim and final reports to the court, and complete the assigned duties;

(E) the circumstances[, if any,] in which the master may communicate ex parte with the court or a party;

(F) the time limits, procedures, and standards for reviewing the master's orders and recommendations;

[(G) any bond required of a master who is not a United States magistrate judge;] and

(H) the basis, terms, and procedure for fixing the master's compensation under subdivision (j).

(3) **Amendment.** The order appointing a master may be amended at any time [after notice to the parties].

(d) **Master's Powers.** Unless expressly limited by the appointing order, a master may regulate all proceedings and take all measures necessary or proper to perform efficiently the duties assigned under subdivision (b).

(e) **Master's Authority.** Unless limited by the appointing order, a master has authority to:

(1) set and give notice of reasonable dates and times for meetings of the parties, hearings, and other proceedings;

(2) proceed in the absence of any party who fails to appear after receiving actual notice under paragraph (1), or — in the master's discretion — adjourn the proceedings;

(3) hold hearings under subdivision (f); and

(4) do all things necessary or proper for ~~fair and~~ efficient performance of the master's duties.

(f) **Hearings.** When a master ~~is authorized to~~ conduct hearings:

(1) the parties or the master may compel witnesses to provide evidence by subpoena under Rule 45, and the master may compel a party to provide evidence without resort to Rule 45;

(2) the master may put the witnesses on oath;

(3) the parties and the master may examine the witnesses;

(4) the master may rule on the admissibility of evidence;

(5) the master must make a record of excluded evidence as provided in the Federal Rules of Evidence for a court sitting without a jury if requested by a party or directed by the court;

(6) the master may impose the noncontempt consequences, penalties, and remedies provided in Rules 37 and 45 on a party who fails to appear, testify, or produce evidence; and

(7) the master may recommend to the court sanctions against a nonparty witness, or contempt sanctions against a party, who fails to appear, testify, or give evidence.

(g) **Master's Orders.** A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(h) **Master's Reports.** A master must report to the court as required by the order of appointment~~, and may report on any other matter~~. Before filing a report, the master may submit a draft to counsel for all parties and receive their

suggestions. The master must:

(1) file the report;

(2) promptly serve a copy of the filed report on each party; and

(3) file with the report any relevant exhibits and a transcript of any relevant proceedings and evidence.

(i) **Action on Master's Order, Report, or Recommendations.**

(1) **Time and hearing.** A motion to review a master's order, or objections to — or a motion to adopt — a master's report or recommendations, must be filed within 10 days from the time the order or the report is served unless the court sets a different time. The court must afford opportunity for a hearing, and may receive evidence.

(2) **Action.** In acting on a master's order, report, or recommendations, the court may:

(A) adopt or affirm it;

(B) modify it;

(C) wholly or partly reject or reverse it; or

(D) resubmit it to the master with instructions.

(3) **Fact Findings.** The court in a nonjury case may set aside a master's fact findings or recommendations for fact findings only if clearly erroneous, unless:

(A) the order of appointment provides a more demanding standard of review, or

(B) the parties stipulate that the master's findings will be final.

(4) **Jury Issue Findings.** A trial master's findings on issues to be tried to a jury are admissible as evidence and may be read to the jury unless the court excludes them in its discretion or for legal error.

(5) **Legal questions.** The court must ~~independently~~ decide ~~de novo~~ questions of law raised by a master's order, report, or recommendations, unless the parties stipulate that the master's disposition will be final.

[(6) **Discretion.** *Alternative 1.* The court may establish standards for reviewing other acts or recommendations of a master ~~at the time of review or~~ by order under (c)(2)(F).]

[(6) **Discretion.** *Alternative 2.* The court may set aside a master's ruling on a matter of procedural discretion only for an abuse of discretion.]

(j) **Compensation.**

(1) **Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment unless a new basis and terms are set after notice and opportunity for hearing.

(2) **Payment.** The compensation fixed under subdivision (1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) **Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(k) **Application to Magistrate Judge.** A court may appoint a magistrate judge as master only for duties that cannnot be performed in the capacity of magistrate judge and only in exceptional circumstances. A magistrate judge is not eligible for compensation ordered under subdivision (j).

COMMITTEE NOTE

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform pretrial and post-trial functions. This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, and clarifies the provisions that govern the appointment and function of masters for all purposes. The core of the original Rule 53 remains. Rule 53 was adapted from equity practice, and reflected a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.

The new provisions reflect the need for care in defining a master's role. It may prove wise to appoint a single person to perform multiple master roles. Yet separate thought should be given to each role. Pretrial and post-trial masters are likely to be appointed more often than trial masters. The question whether to appoint a trial master is not likely to be ripe when a pretrial master is appointed. If appointment of a trial master seems appropriate after completion of pretrial proceedings, however, the pretrial master's experience with the case may be strong reason to appoint the pretrial master as trial master. The advantages of experience may be more than offset, nonetheless, by the nature of the pretrial master's role. A settlement master is particularly likely to have played roles that are incompatible with the neutral role of trial master, and indeed may be effective as settlement master only with clear assurance that the appointment will not be expanded to trial master duties. For similar reasons, it may be wise to appoint separate pretrial masters in cases that warrant reliance on a master both for facilitating settlement and for supervising pretrial proceedings. There may be fewer difficulties in appointing a pretrial master or trial master as post-trial master, particularly for tasks that involve facilitating party cooperation.

Subdivision (a). District judges bear initial and primary responsibility for the work of their courts. A master should be appointed only if the parties consent or the master's duties cannot adequately be performed by an available district judge or magistrate judge of the local district. The search for a judge need not be pursued by seeking an assignment from outside the district.

United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge. A magistrate judge is an experienced judicial officer who has no need to set aside nonjudicial responsibilities for master duties; the fear of delay that often deters appointment of a master is much reduced. There is no need to impose

on the parties the burden of paying master fees to a magistrate judge. A magistrate judge, moreover, is less likely to be involved in matters that raise conflict-of-interest questions.

Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of paragraph (1)(B) that restrict appointments to exercise the trial functions described in subdivision (b)(8) and (9). The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed; in addition, it embraces for this setting the deleted provision that a reference "shall be the exception and not the rule."

The use of masters in jury-tried cases is retained as well, but the practice is narrowed even further than former requirements that the issues be complicated and that reference be the exception. If the master's findings are to be of any use, the master must conduct a preliminary trial that reflects as nearly as possible the trial that will be conducted before the jury. This procedure imposes a severe dilemma on parties who believe that the truth-seeking advantages of the first full trial cannot be duplicated at a second trial. It also imposes the burden of two trials to reach even the first verdict. The actual usefulness of the master's findings as evidence also is open to doubt. It would be folly to ask the jury to consider both the evidence heard before the master and the evidence presented at trial, as reflected in the longstanding rule that the master "shall not be directed to report the evidence." If the jury does not know what evidence the master heard, however, nor the ways in which the master evaluated that evidence, it is impossible to appraise the master's findings in relation to the evidence heard by the jury. It might be better simply to abandon the use of masters in jury trials. Rather than take this final step, however, room is left for an exceptional circumstance that requires appointment of a master. Courts should be very reluctant to conclude that any circumstance is so special as to require the appointment.

The statute specifically authorizes appointment of a magistrate judge as special master. § 636(b)(2). In special circumstances, it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be ~~readily~~ undercut by resort to Rule 53. Subdivision (k) requires that appointment of a magistrate judge as master be justified by exceptional circumstances.

Despite the advantages of relying on district judges and magistrate judges to discharge judicial duties, the occasion may arise for appointment of another person as pretrial master. Appointment of a master is readily justified if the parties consent. Even then, however, a court is free to refuse appointment, exercising directly its own responsibilities. Absent party consent, the most common justifications will be the need for time or expert skills that cannot be supplied by an available magistrate judge. An illustration of the need for time is provided by discovery tasks that require review of numerous documents, or perhaps supervision of depositions at distant places. Post-trial accounting chores are another familiar example of time-consuming work that requires little judicial experience. Expert experience with the subject-matter of specialized litigation may be important in cases in which a judge or magistrate judge could devote the required time. At times the need for special knowledge or experience may be best served by appointment of an expert who is not a lawyer. In large-scale cases, it may be appropriate to appoint a team of masters who possess both legal and other skills.

(This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level of power, there must be a separate appointment as a master. Even with a separate appointment, the combination of roles can easily confuse and vitiate both functions. An expert witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. A master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination can be dangerous and can cause justifiable resentment. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer. Present experience is insufficient to justify more than cautious experimentation with combined functions.)

Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. A lawyer, for example, may be involved with other litigation before the appointing judge or in the same court, directly or through a firm. The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment. It does not prohibit other members of the same firm from appearing before the appointing judge, but special reasons should be found before appointing a master whose firm is likely to appear before the appointing judge. Other conflicts are not enumerated, but also must be avoided. For example, a lawyer may be involved in other litigation that involves parties, interests, or lawyers or firms engaged in the present action. A nonlawyer may be committed to intellectual, social, or political positions that are affected by the case.

Apart from conflicts of interest, there is ground for concern that appointments frequently are made in reliance on past experience and personal acquaintance with the master. The appointing judge's knowledge of the master's abilities can provide important assurances not only that the master can discharge the duties of master but also that the judge and master can work well together. It also is important, however, to ensure that the best possible person is found and that opportunities for this public service are equally open to all. Suggestions by the parties deserve careful consideration, particularly those made jointly by all parties. Other efforts as well may prove fruitful, including such devices as consulting professional organizations if the master may be a nonlawyer.

The benefits of appointing a master must be weighed against the cost to the parties. The fairness of imposing master fees is affected by many factors, including the stakes in the litigation, the means of the parties, the conduct of any party that contributes to the need for a master, and the ability to apportion responsibility for the fees between the parties.

Subdivision (b). The duties that may be assigned to a master are loosely grouped as pretrial duties in paragraphs (1) through (7), trial duties in paragraphs (8) and (9), post-trial duties in paragraphs (10) through (14), and other duties agreed to by the parties in paragraph (15). These groupings should not divert attention from the need to consider the justifications for assigning each particular duty to a master, and the need for care in assigning multiple duties to the same master.

Pretrial masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. Reflections of the practice are found in such cases as *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991), and *In re Armco*, 770 F.2d 103 (8th Cir. 1985). This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. A careful study has made a convincing case that the use of masters to supervise discovery was considered and explicitly rejected in framing Rule 53. See *Brazil, Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 ABF Research Journal 143. Rule 53 is amended to confirm the authority to appoint — and to regulate the use of — pretrial masters.

Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

The risk of imposing unfair costs on a party is a particular concern in determining whether to appoint a pretrial master. Appointment of a trial master under Rule 53 will be an exceptional event, and a post-trial master is likely to be appointed only in large-scale litigation in which the costs can fairly be imposed on parties able to bear them or be paid from a common fund. Pretrial masters may seem desirable across a broader range of litigation, more often involving one or more parties who cannot readily bear the expense of a master. Parties are not required to defray the costs of providing public judicial officers, and should not lightly be charged with the costs of providing private judicial officers. Disparities in party resources are not automatically cured by disproportionate allocations of fee responsibilities — there is some risk that a master may appear beholden to a party who pays most or all of the fees. Even when all parties can well afford master fees, appointment is justified only if the expense is reasonable in relation to the character and needs of the litigation. The character and needs of the litigation need not be assessed in a vacuum. Appointment of a master may be justified when economically powerful adversaries conduct their litigation in a manner that threatens to consume an unfair share of the limited resources of public judicial officers. Consent of all parties may significantly reduce these concerns, although even then courts should strive to avoid situations in which consent is constrained by the unavailability of reasonable attention from a judge or magistrate judge.

Pretrial masters have been used for a variety of purposes. The list of powers and duties in paragraphs (1) through (7) is intended to illustrate the range of appropriate assignments. The only explicit limitation is set out in paragraph (4), but courts must be careful in assigning pretrial tasks, just as care must be taken in assigning trial tasks. See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1926). Ordinarily public judicial officers should discharge public judicial functions. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort. At the extreme, broad and unreviewed delegations of pretrial responsibility can run afoul of Article III. See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir.1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir.1991); *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir.1991). Judicial time is not unlimited, however, and at some point fair allocation among the competing demands of the caseload may require that particularly time-consuming chores be delegated to a master. In addition, some special cases may call for special knowledge that few judges have and that is better supplied by a master.

Although many different functions may properly be performed by a pretrial master in an appropriate case, care should be taken in combining different functions. It is particularly important to remember that a master may be better able to facilitate settlement if this function is kept separate from other possible functions, if need be by appointment of separate masters.

Paragraph (1) confirms the frequent practice of relying on masters to mediate or otherwise facilitate settlement. A master may have several advantages in promoting settlement. The parties may share with a master information they would not reveal to a judge who might try the case or hear an important motion. The master may be able to offer assessments of the case and suggestions for settlement that would not be appropriate from a trial judge. The parties may have special respect for advice from a master with experience in a particular field, whether as litigator or otherwise. In multiparty cases, a master may be able to develop models of injury and damages that facilitate settlement of large numbers of claims. The advantages, however, do not all weigh in favor of a master. A master may lack the extensive experience and aura of office that can lend special weight to a judge's efforts to promote settlement. A master whose sole function is to promote settlement, moreover, may attach exaggerated importance to the value of settling.

Paragraph (2) {refers explicitly to discovery, but includes disclosure as well}[covers discovery and disclosure duties]. Supervision of discovery has been one of the tasks most frequently assigned to masters. The need for a master may be acute in overworked courts presented with claims that privilege, work-product, or protective order shield thousands of documents against discovery. A master also may be able to help the parties plan realistic discovery programs in ways that parallel help in settlement negotiations, to reduce the tensions of contentious discovery maneuvers, or to resolve disputes or even preside at depositions when reason fails. The limits of the adversary process must, however, be observed. It would be improper, for example, to appoint a master with "the power to restate the questions and to recommend the answers," see *Wilver v. Fisher*, 387 F.2d 66 (10th Cir.1967). Often the court will retain power to make orders, directing the master only to make recommendations. Often, however, the court will prefer to delegate initial power to make discovery and disclosure orders, retaining review power. The rule permits the court to delegate power to make many types of orders, but allows only recommendations as to categories of discovery orders that are closely tied to a party's ability to litigate its positions on the merits or the conduct of trial. ~~The master also may be given power to recommend more severe sanctions.~~

Paragraph (3) permits a master to conduct Rule 16 pretrial conferences and make or recommend pretrial orders. Final pretrial conferences directly focused on shaping the trial, however, ordinarily should be conducted by the trial judge. A pretrial master's special experience and knowledge of the case can be tapped by having the master participate in the conference. ~~The master likewise should be limited to making recommendations, rather than orders, as to particularly important aspects of pretrial management.~~

Paragraph (4) permits assignment of authority to hear and determine pretrial motions, with stated exceptions. The listed exceptions are frequently encountered matters of great importance. It is not possible to capture in a general list all matters that may be equally important in a particular case. Trial judges must be careful to

retain responsibility for the initial as well as final decision of all matters central to a case. Hearings conducted by a master are governed by ordinary court practices of notice, record, and public access.

Paragraph (5) complements paragraph (4) by permitting reference to a master for hearings and recommendations for disposition of any motion described in paragraph (4), including those listed in paragraphs (A) through (H). Even though the court retains responsibility for independent determination of matters of law, and can retain responsibility for independent determination of matters of fact in the order referring the proceedings to the master, references should be limited to cases presenting special needs. Courts have frequently noted the undesirability of referring dispositive motions to masters. See *Prudential Ins. Co. v. U.S. Gypsum Co.*, 991 F.2d 1080 (3d Cir.1993); *In re U.S.*, 816 F.2d 1083 (6th Cir.1987); *In re Armco*, 770 F.2d 103 (8th Cir.1985); *Jack Walters & Sons v. Morton Building, Inc.*, 737 F.2d 698, 711-713 (7th Cir.1984). An assignment to recommend disposition of a motion for a temporary restraining order or preliminary injunction, for example, should be made only if severe constraints make it impossible for a judicial officer to provide an opportunity for effective relief.

Paragraph (6) is a general authorization to assign authority to manage pretrial proceedings. This provision reflects the difficulty of foreseeing the innovative procedures that may evolve under the spur of litigation that is complex in subject matter, number of parties, or number of related actions. It also can encompass a variety of alternative dispute resolution devices. A master might, for example, preside at a summary jury trial. Matters that bear directly on the conduct of trial, however, are seldom apt to be suitable for delegation to a pretrial master. See Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U.Pa.L.Rev. 2131, 2147 n. 88 (1989).

Paragraph (7) reflects an emerging practice of relying on masters to help coordinate separate proceedings that involve the same subject matter. One form of coordination is to appoint the same person as master in several actions. Other, often informal, forms of coordination may be possible as well. As experience develops with this practice, it may be possible to achieve many of the benefits of consolidation without the complications that might arise from attempts to consolidate actions pending in different court systems.

Trial masters. The policies that have severely restricted — indeed nearly eliminated — appointment of masters to discharge trial functions are described with subdivision (a)(1)(B).

The central function of a trial master is to preside over an evidentiary hearing. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should

be a trial master appointed under subdivisions (b)(8) or (9). The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master may often need to conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials, and has prohibited a master's report of the evidence in a jury trial. These features are retained. There may be cases in which a mere report of the evidence is useful to the trial judge, although responsibility for credibility determinations must prove difficult. A report of the evidence in a jury trial, on the other hand, would compound unbearably the burdens of the master system. Trial before the master would be followed by simultaneous jury review of the first trial and a second trial.

Recommended findings may prove useful in nonjury trials as a focus for deliberation, leaving the judge free to decide without any required deference to the master. If a master is ever to be used in a jury-tried case, recommended findings represent the outer limit of proper authority.

If a master is to hold an evidentiary hearing in a nonjury case, the most common and sensible practice is to delegate the task of decision as well as hearing, retaining the power of review. Under subdivision (i), fact findings are reviewed only for clear error unless a different standard is specified by the court.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing. Courts occasionally have appointed judicial adjuncts to perform a variety of tasks that mingle the duties of court-appointed expert witnesses with more active functions, or that involve giving advice to the court. Perhaps the clearest combination of functions may arise when a court-appointed expert witness is given power to gather information on which to base expert testimony. Courts should observe great caution in making such appointments until there is a sufficient body of experience to provide substantial guidance. The order of appointment should be framed with particular care to define the powers and authority of a master appointed to relatively unfamiliar trial tasks.

Post-trial masters. Courts have come to rely extensively on masters to assist in framing and enforcing complex decrees, particularly in institutional reform litigation. Current Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes.

It may prove desirable to appoint as post-trial master a person who has served in the same case as a pretrial or trial master. Intimate familiarity with the case may enable the master to act much more quickly and more surely. The skills required by post-trial tasks, however, may be significantly different from the skills required for earlier tasks. This difference may outweigh the advantages of familiarity. In particularly complex litigation, the range of required skills may be so great that it is

better to appoint two or even more persons. The sheer volume of work also may conduce to appointing more than one person. The additional persons may be appointed as co-equal masters, as associate masters, or in some lesser role — one common label is "monitor."

Absent party consent, a post-trial master should be appointed only if no district judge or magistrate judge is available to perform the master's duties in adequate fashion. As with other masters, strong reasons must be found before the parties are forced to pay for the services of private judicial adjuncts. Masters — except those with prior public judicial service — ordinarily have little experience with the judicial role. Adding another layer to the judicial process can easily add to delay as well as cost. Yet masters may make important contributions. Overburdened courts simply may not have enough time to tend to all current business. A particularly complex case could absorb far too much of a judge's time, defeating the opportunity of litigants in many more ordinary cases to receive prompt official attention. A master may not only free up judge time but also give more time to the complex case than a judge could. The master also may bring to bear specialized training and experience that cannot be matched by any available judge. If all parties consent to appointment of a master, on the other hand, the court may freely grant the request if it wishes. Consent greatly reduces concern for possible burdens of cost, delay, and denial of direct judicial attention. Of course party consent does not require appointment of a master. The court may prefer to supervise post-trial matters directly, particularly in cases that affect broad public interests that may not be adequately represented by the parties.

Paragraph (10) establishes authority to appoint a master to conduct ministerial matters of account on terms somewhat different from the provision in former Rule 53(b). It is not required that the reference be "the exception and not the rule." This change reflects the restriction of the appointment to ministerial matters that do not call for judicial resolution. More complicated matters, whether referred to as accounting or damages, should be treated under the trial master provisions of paragraphs (8) or (9) if the case involves the ordinary trial function of resolving fact disputes. Administration of an award to multiple claimants is covered by paragraph (13).

Paragraph (11) reflects the increasingly frequent practice of using masters to help frame injunctions. Several factors may combine in different proportions to support this practice. Ordinarily the subject is quite complicated. Often the parties remain at loggerheads even after disposition of the basic issues of liability, advancing widely different remedy proposals that offer little help in framing a fair and workable decree. The parties, moreover, may not adequately represent public interests — even when one or more parties are public officials or agencies. Frequently expert knowledge is important. If a court-appointed expert has testified at trial, it may be appropriate to appoint that expert as post-trial master. A party's expert, however, should not be appointed.

Paragraph (12) authorizes appointment of a master to supervise enforcement of complex decrees in circumstances that require substantial investments of time or expert knowledge. Masters also may be important when the parties have proved unable to provide sufficient guidance on implementing a workable decree, and may be particularly important when independent inquiry is needed to supplement adversary presentation. As with framing the decree, a master also may be important because the parties do not fully represent and protect larger public interests.

It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional circumstance" requirement of original Rule 53(b) for trial masters in nonjury cases. The tasks of framing and enforcing an injunction may be less important than the liability decision as a matter of abstract principle, but may be even more important in practical terms. The detailed decree and its operation, indeed, often provide the most meaningful definition of the rights recognized and enforced. Great reliance, moreover, is often placed on the discretion of the trial judge in these matters, underscoring the importance of direct judicial involvement. Experience with mid- and late Twentieth Century institutional reform litigation, however, has convinced many trial judges and appellate courts that masters often are indispensable. Apart from requiring that a decree be "complex," the rule does not attempt to capture these competing considerations in a formula. Reliance on a master is inappropriate when responding to such routine matters as contempt of a simple decree; see *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-1097 (3d Cir. 1987). Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). Among the many appellate decisions are *In re Pearson*, 990 F.2d 653 (1st Cir.1993); *Williams v. Lane*, 851 F.2d 867 (7th Cir, 1988); *NORML v. Mulle*, 828 F.2d 536 (9th Cir.1987); *In re Armco, Inc.*, 770 F.2d 103 (8th Cir.1985); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-112 (3d Cir.1979); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir.1979); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir.1979).

Paragraph (13) covers administration of an award to multiple claimants, another task that may call for appointment of a master or even creation of a small administrative organization. Class action awards may require creation of procedures and facilities for identifying claimants entitled to participate in the award, determining the shares of different claimants, maintaining the financial and ethical integrity of a common fund, and other purposes. In truly mammoth cases, these arrangements may take on the character of claims processing facilities.

Paragraph (14) contemplates powers of investigation quite unlike the traditional role of judicial officers in an adversary system. The master in the *Pearson* case, for example, was appointed by the court on its own motion to gather information about the operation and efficacy of a consent decree that had been in effect for nearly twenty years. A classic explanation of the need for — and limits on — sweeping

investigative powers is provided in *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163, 1170-1171 (5th Cir.1982), cert. denied 460 U.S. 1042.

Party consent can be helpful in defining the duties of a post-trial master. Party consent, however, no more controls definition of the master's duties than it controls the decision whether to appoint a master. **Other duties.** Paragraph (15) emphasizes the importance of party consent. Just as parties may consent to arbitration, so consent has an important bearing on the means of processing disputes under judicial auspices. Party consent reduces concerns about expense and limiting access to public judges. Courts cannot, however, be asked to abandon all responsibility for proceedings conducted under their authority or judgments entered on their rolls. There are many illustrations of settings in which courts need not — and at times should not — accede to party consent. Consent of representative parties should be reviewed carefully in class actions. Arrangements that significantly alter the nature of adversary litigation also should be undertaken carefully; the use of masters to organize investigations by the parties, or to become active investigators, must be approached with caution. Usually it is better that the assigned judge directly resolve requests for interim relief, such as temporary restraining orders or preliminary injunctions.

Subdivision (c). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and powers. Care must be taken to make the order as clear [precise] as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment.

Long experience has demonstrated the danger that appointment of a master may lengthen, not reduce, the time required to reach judgment. From the beginning, Rule 53 has included a variety of terms designed to encourage prompt execution of the master's duties. These provisions are summarized in the phrase in paragraph (2), carried over from the original rule, requiring that a master proceed with all reasonable diligence. Additional assurances are provided by the requirement that deadlines be set. A party may make a motion to the master or to the court to compel expeditious action.

The simple requirement that the master be named does not address the means of selecting the master. Often it will be useful to engage the parties in the process, inviting nominations and review of potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement. However much the parties are involved, courts should guard against repetitive selection of a single small group of familiar candidates.

Precise designation of the master's duties and powers is essential. There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance. Clear delineation of topics for any reports or recommendations is an important part of this

process. It also is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.

Ex parte communications between master and court present troubling questions. Often the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that would not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exhanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule does not provide direct guidance, but does require that the court address the topic in the order of appointment.

There should be few occasions for requiring that a master be bonded. If special circumstances suggest a risk that inadequate performance may cause significant harm, however, a court may wish to ensure a source of damage payments. Although a court rule cannot address the question of official immunity, it is proper to provide for a bond that — in the manner of an injunction bond furnished under Rule 65(c) — provides a source of compensation without regard to the possibility of individual liability.

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guides to control total expense. The order of appointment should state the basis, terms, and procedures for fixing compensation. If compensation is to be fixed by an hourly rate, it may help not only to set the rate but also to set an expected time budget. When there is an apparent danger that the expense may prove unjustifiably burdensome to a party or disproportionate to the needs of the case, it also may help to provide for regular reports on cumulative expenses. The court has power under subdivision (j) to change the basis and terms for determining compensation, but should recognize the risk of unfair surprise to the parties.

The provision for amending the order of appointment is as important as the

provisions for the initial order. New opportunities for useful assignments may emerge as the pretrial process unfolds, or even in later stages of the litigation. Conversely, experience may show that an initial assignment was too broad or ambitious, and should be limited or revoked. It even may happen that the first master is ill-suited to the case and should be replaced. Anything that could be done in the initial order can be done by amendment.

Subdivision (d). Subdivision (c) requires that the subdivision (b) duties of the master must be specified in the appointing order. Subdivision (e) describes the general scope of a master's authority. This subdivision recognizes that it is not possible to capture in a detailed rule all powers that may be necessary or appropriate for a master, and confirms the existence of powers that otherwise would have to be inferred.

Subdivision (e). The general authority of a master described in subdivision (e) is taken from past practice.

Subdivision (f). The provisions for hearings are taken from present Rule 53. Stylistic changes have been made. The present rule's detailed description of the power to compel production of documents is included in the Rule 45 power to compel production of documents or tangible things, or inspection of premises. This power to compel production of evidence may be exercised in advance of a hearing in order to make the hearing as fair and efficient as possible.

It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

Subdivision (g). A master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (h). The report is the master's primary means of communication with the court. The nature of the report determines the need to file relevant exhibits, transcripts, and evidence. A report at the conclusion of unsuccessful settlement efforts, for example, often will stand alone. A report recommending action on a motion for summary judgment, on the other hand, should be supported by all of the summary judgment materials. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report against public access — a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Sealing is much less likely to be appropriate with respect to a trial master's report. ~~Recognition of the possibility of reporting on matters not specifically delegated to the master does not imply a broad license to exceed the bounds of the court's assignment. Diligent discharge of assigned duties, however, may inform the master of important matters that should be brought to the court's~~

~~attention. A formal report, available to the parties, may be the best means of highlighting these matters.~~

A master may learn of matters outside the scope of the reference. Rule 53 does not address the question whether — or how — such matters may properly be brought to the court's attention. Matters dealing with settlement efforts, for example, often should not be reported to the court. Other matters may deserve different treatment. If a master concludes that something should be brought to the court's attention, ordinarily the parties should be informed of the master's report.

Subdivision (i). The time limits for seeking review of a master's order, or objecting to — or seeking adoption of — a report, are important. They are not jurisdictional. The subordinate role of a master means that although a court may properly refuse to entertain untimely review proceedings, there must be power to excuse the failure to seek timely review.

The clear error test provides the presumptive standard of review for findings of fact. ~~The clear error phrase is used in place of the clearly erroneous standard of Rule 52 to suggest the subtle distinctions that may justify somewhat more searching review of a master.~~ The "clearly erroneous" phrase is as malleable in this context as it is in Rule 52, and account may be taken of the fact that the relationship between a court and master is not the same as the relationship between an appellate court and a trial court. A court may provide a more demanding standard of review in the order of appointment. The order should be amended to provide more searching review only for compelling reasons. Special characteristics of the case that suggest more searching review ordinarily should be apparent at the time of appointment, and action at that time avoids any concern that the standard may have been changed because of dissatisfaction with the master's result. In addition, the parties may rely on the standard of review in proceedings before the master. A court may not provide for less searching review without the consent of the parties; clear error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may stipulate that the master's findings will be final.

The use of masters in jury cases is discouraged by subdivision (b)(2)(B). A master's findings cannot be binding on the jury, and may confuse the jury as to any finding contested by a party. The court must exclude any finding that is affected by legal error, and may in its discretion exclude any finding. If a finding on an issue is admitted in evidence and no other evidence is admitted on that issue, judgment should be entered as a matter of law as to that issue. If other evidence is admitted, the finding is to be treated as any other evidence on the same issue, and does not affect the burden of persuasion.

Absent consent of the parties, questions of law cannot be delegated for final resolution by a master. The subordinate role of the master may at times warrant treating as questions of law matters that would be treated as questions of fact on reviewing a trial court.

Apart from factual and legal questions, masters often may make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The subordinate and ad hoc character of the master often will justify more searching review or de novo determination by a judge. It is important, however, to establish the master's strong working authority. Appointment of a master would be counterproductive or worse if the court routinely duplicates the master's efforts, encouraging frequent review requests by parties who are dissatisfied or who simply hope to increase delay and expense. If an "abuse of discretion" standard is used, the master's discretion is less broad than the discretion of a judge as to comparable matters. The rule does not catalogue these matters or attempt to suggest more specific standards of review. The court may, for the guidance of the parties and master, establish standards for specific topics in the order appointing the master. ~~Ordinarily, however, the standard of review will be determined during the review process.~~ The standard of review set in the appointing order may not foresee all questions, however, or may appear inappropriate when review is actually undertaken. The court has power under subdivision (c)(3) to amend the standard initially set.

Subdivision (j). The need to pay compensation is a substantial reason for care in appointing private persons as masters. The burden can be reduced to some extent by recognizing the public service element of the master's office. One court has endorsed the suggestion that an attorney-master should be compensated at a rate of about half that earned by private attorneys in commercial matters. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir.1979). Even if that suggestion is followed, a discounted public-service rate can impose substantial burdens.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. Many factors, too numerous to enumerate, may affect the allocation. The amount in controversy may provide some guidance in making the allocation, although it is likely to be more important in the initial decision whether to appoint a master and whether to set an expense limit at the outset. The means of the parties also may be considered, and may be particularly important if there is a marked imbalance of resources. Although there is a risk that a master may feel somehow beholden to a well-endowed party who pays a major portion of the fees, there are even greater risks of unfairness and strategic manipulation if costs can be run up against a party who can ill afford to pay. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case. The factors that informed the initial allocation remain important, however. It may be unfair to impose these payments on a relatively poor party, and a victory on the merits is little reason to relieve an obstreperous party from the expenses of a master appointed to control that party's behavior. There is no

presumption that a master's fees should be paid by the least successful party.

The basis and terms for fixing compensation should be stated in the order of appointment under subdivision (c)(2)(I). The court retains power to alter the initial basis and terms, after notice and opportunity for hearing, but should protect the parties against unfair surprise.

Subdivision (k). This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize the need to confuse the roles of magistrate judge and master only when justified by exceptional circumstances. See the Note to Subdivision (a).

Rule 53. Masters

The text of current Rule 53 is redistributed so thoroughly that it is not feasible to show the changes by the customary underlining and overstriking. This version strikes out the passages that were deleted as unnecessary. The remaining provisions are followed by italicized references to the corresponding provisions in the new draft. The corresponding provisions may differ substantially, at times nearly reversing the present rule. The draft also includes many provisions that have no close analogue in the present rule.

(a) Appointing~~ment and Compensation.~~ The court in which any action is pending may appoint a special master therein. ~~As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor.~~ The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; *(j)* provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master *(k)*. ~~The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.~~

(b) Reference. A reference to a master shall be the exception and not the rule. *(a)(1)*. In actions to be tried by a jury, a reference shall be made only when the issues are complicated *(a)(1)(B)*; in actions to be tried without a jury, save in matters of account and of difficult computation of damages *(a)(1)(B), cf. (b)(10)*, a reference shall be made only upon a showing that some exceptional condition requires it.*(a)(1)(B)* Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision *(k)*.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report.*(b)* Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. *(c), (d), (e)*. The master may require the production before the master of evidence upon all matters embraced in the reference *(f)*~~, including the production of all books, papers, vouchers, documents, and writings applicable thereto.~~ The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them ~~and may call the parties to the action and examine them upon oath~~. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.*(f)*

(d) Proceedings.

(1) *Meetings.* ~~When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides,~~ the master shall forthwith set a time and place for the first meeting of their parties or their attorneys ~~to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys~~.*(c)(2)(D)* ~~It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report.~~*(cf. (c)(2))* If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent

party of the adjournment.*(e)(2)*

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.*(f)*

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.*((b)(10), much shortened; the powers and authorities provisions cover this)*

(e) Report.

(1) *Contents and filing.* The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing.*(h)* In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits.*((h)(3) — note not limited to nonjury actions)* Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.*(h)(2)*

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.*(i)(3)* Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. ~~Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d).~~*(i)(1)* The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.*(i)(2)*

(3) *In Jury Actions.* In an action to be tried to a jury the master shall not be directed to report the evidence.*(b)(9)(A)* The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.*(i)(4).*

(4) *Stipulation as to Findings.* ~~The effect of a master's findings is the same whether or not the parties have consented to the reference; but,~~ when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.*(i)(3)(b)*

(5) *Draft report.* Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.*(h)*

(f) Application to Magistrate Judges. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.*(k)*

RULE 53. MASTERS

(a) **Appointing.** A court may appoint a pretrial master under Rule 53.1, a trial master under this rule, or a post-trial master under Rule 53.2 only if the parties consent or if the master's duties cannot be adequately performed by an available district judge or magistrate judge [of the district]. The person appointed must not have a relationship to the parties, counsel, action, or court that creates an actual or apparent conflict of interest unless the parties consent to appointment of a particular person. A master cannot, during the period of the appointment, appear as an attorney before the judge who made the appointment.

(b) **Grounds for Appointing.**

(1) **Pretrial Master.** A court may appoint a pretrial master under Rule 53.1.

(2) **Trial Master.** A court may appoint a trial master to exercise any of the powers described in subdivision (d) only as follows:

(A) with the consent of the parties;

(B) in an action to be tried by a jury, if the issues are extraordinarily complicated and consideration of the master's report is likely to substantially assist the jury; and

(C) in an action to be tried to the court, if some exceptional condition requires reference to a master.

(3) **Post-Trial Master.** A court may appoint a post-trial master under Rule 53.2.

(4) **Expense.** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties.

(c) **Order Appointing Master.**

(1) **Hearing.** The court must give the parties notice and an opportunity for hearing before appointing a master. A party [Parties] may suggest candidates for appointment.

(2) **Contents.** The order appointing a master must direct the master to proceed with all reasonable diligence and must state as clearly [precisely] as possible:

(A) the master's name [, business address, and numbers for telephone and other electronic communications];

(B) the master's powers under subdivision (d);

(C) any limits on the master's authority under subdivisions (e) and (f);

(D) the dates by which the master must first meet with the parties, make interim and final reports to the court, and complete the assigned duties;

(E) the circumstances[, if any,] in which the master may communicate ex parte with the court or a party;

(F) the time limits, procedures, and standards for reviewing the master's orders and recommendations;

[(G) any bond required of a master who is not a United States magistrate judge;] and

(H) the basis, terms, and procedure for fixing the master's compensation under subdivision (j).

(3) **Amendment.** The order appointing a master may be amended at any time [after notice to the parties].

(d) **Master's Powers.**

(1) The court may appoint a trial master to

(A) assist the court in discharging its trial duties in a nonjury case; or

(B) preside over an evidentiary hearing and: (i) report the evidence to the court in a nonjury action; or (ii) recommend findings of fact or conclusions of law; or (iii) make findings of fact or conclusions of law in a nonjury action, subject to review as provided in subdivision (i).

(2) A master may exercise any power authorized by Rules 53.1 or 53.2 and by the appointing order.

(3) Unless expressly limited by the appointing order, a master may regulate all proceedings and take all measures necessary or proper to perform the assigned duties efficiently.

(e) **Master's Authority.** Unless limited by the appointing order, a master has authority to:

(1) set and give notice of reasonable dates and times for meetings of the parties, hearings, and other proceedings;

(2) proceed in the absence of any party who fails to appear after receiving actual notice under paragraph (1), or — in the master's discretion — adjourn the proceedings;

(3) hold hearings under subdivision (f); and

(4) do all things necessary or proper for fair and efficient performance of the master's duties.

(f) **Hearings.** When a master ~~is authorized to~~ conduct hearings:

(1) the parties or the master may compel witnesses to provide evidence by subpoena under Rule 45, and the master may compel a party to provide evidence without resort to Rule 45;

(2) the master may put the witnesses on oath;

(3) the parties and the master may examine the witnesses;

(4) the master may rule on the admissibility of evidence;

(5) the master must make a record of excluded evidence as provided in the Federal Rules of Evidence for a court sitting without a jury if requested by a party or directed by the court;

(6) the master may impose the noncontempt consequences, penalties, and remedies provided in Rules 37 and 45 on a party who fails to appear, testify, or produce evidence; and

(7) the master may recommend to the court sanctions against a nonparty witness, or contempt sanctions against a party, who fails to appear, testify, or give evidence.

(g) **Master's Orders.** A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(h) **Master's Reports.** A master must report to the court as required by the order of appointment~~, and may report on any other matter~~. Before filing a report, the master may submit a draft to counsel for all parties and receive their suggestions. The master must:

(1) file the report;

(2) promptly serve a copy of the ~~filed~~ report on each party; and

(3) file with the report any relevant exhibits and a transcript of any relevant proceedings and evidence.

(i) **Action on Master's Order, Report, or Recommendations.**

(1) **Time and hearing.** A motion to review a master's order, or objections to — or a motion to adopt — a master's report or recommendations, must be filed within 10 days from the time the order or the report is served unless the court sets a different time. The court must afford opportunity for a hearing, and may receive evidence.

(2) **Action.** In acting on a master's order, report, or recommendations, the court may:

(A) adopt or affirm it;

(B) modify it;

(C) wholly or partly reject or reverse it; or

(D) resubmit it to the master with instructions.

(3) **Fact Findings.** The court in a nonjury case may set aside a master's fact findings or recommendations for fact findings only if clearly erroneous, unless:

(A) the order of appointment provides a more demanding standard of review, or

(B) the parties stipulate that the master's findings will be final.

(4) **Jury Issue Findings.** A trial master's findings on issues to be tried to a jury are admissible as evidence and may be read to the jury

unless the court excludes them in its discretion or for legal error.

(5) **Legal questions.** The court must ~~independently~~ decide ~~de novo~~ questions of law raised by a master's order, report, or recommendations, unless the parties stipulate that the master's disposition will be final.

[(6) **Discretion.** *Alternative 1.* The court may establish standards for reviewing other acts or recommendations of a master ~~at the time of review or~~ by order under (c)(2)(F).]

[(6) **Discretion.** *Alternative 2.* The court may set aside a master's ruling on a matter of procedural discretion only for an abuse of discretion.]

(j) **Compensation.**

(1) **Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment unless a new basis and terms are set after notice and opportunity for hearing.

(2) **Payment.** The compensation fixed under subdivision (1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) **Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the

reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(k) **Application to Magistrate Judge.** A court may appoint a magistrate judge as master only for duties that cannnot be performed in the capacity of magistrate judge and only in exceptional circumstances. A magistrate judge is not eligible for compensation ordered under subdivision (j).

COMMITTEE NOTE

Rule 53 is revised in conjunction with adoption of new Rules 53.1 and 53.2. Rule 53 focuses primarily on masters who perform trial functions. Since its adoption in 1938, however, courts have gained experience with masters appointed to perform pretrial and post-trial functions. Rules 53.1 and 53.2 recognize that in appropriate circumstances masters may properly be appointed to perform these functions and regulate such appointments. Rule 53 continues to address trial masters, and in addition sets out the common provisions that govern the appointment and function of masters under all rules. Rule 53 has been revised to reflect this integration, and also to clarify or modify some of its provisions. The core of Rule 53, however, remains. Rule 53 was adapted from equity practice, and reflected a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.

The adoption of separate but integrated rules reflects the need for care in defining a master's role. It may prove wise to appoint a single person to perform multiple master roles. Yet separate thought should be given to each role. Pretrial and post-trial masters are likely to be appointed more often than trial masters. The question whether to appoint a trial master is not likely to be ripe when a pretrial master is appointed. If appointment of a trial master seems appropriate after completion of pretrial proceedings, however, the pretrial master's experience with the case may be strong reason to appoint the pretrial master as trial master. The advantages of experience may be more than offset, nonetheless, by the nature of the pretrial master's role. A settlement master is particularly likely to have played roles that are incompatible with the neutral role of trial master, and indeed may be effective as settlement master only with clear assurance that the appointment will not be expanded to trial master duties. For similar reasons, it may be wise to appoint separate pretrial masters in cases that warrant reliance on a master both for facilitating settlement and for supervising pretrial proceedings. There may be fewer difficulties in appointing a pretrial master as post-trial master, particularly for tasks that involve facilitating party cooperation.

Subdivision (a). District judges bear initial and primary responsibility for the work of their courts. A master should be appointed only if the parties consent or the master's duties cannot adequately be performed by an available district judge or magistrate judge of the local district. The search for a judge need not be pursued by seeking an assignment from outside the district.

United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge. A magistrate judge is an experienced judicial officer who has no need to set aside nonjudicial responsibilities for master duties; the fear of delay that

often deters appointment of a master is much reduced. There is no need to impose on the parties the burden of paying master fees to a magistrate judge. A magistrate judge, moreover, is less likely to be involved in matters that raise conflict-of-interest questions.

The statute specifically authorizes appointment of a magistrate judge as special master. § 636(b)(2). In special circumstances, it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be ~~readily~~ undercut by resort to Rule 53. See subdivision (k), which requires that appointment of a magistrate judge as master be justified by exceptional circumstances.

Despite the advantages of relying on district judges and magistrate judges to discharge judicial duties, the occasion may arise for appointment of another person as pretrial master. Appointment of a master is readily justified if the parties consent. Even then, however, a court is free to refuse appointment, exercising directly its own responsibilities. Absent party consent, the most common justifications will be the need for time or expert skills that cannot be supplied by an available magistrate judge. An illustration of the need for time is provided by discovery tasks that require review of numerous documents, or perhaps supervision of depositions at distant places. Post-trial accounting chores are another familiar example of time-consuming work that requires little judicial experience. Expert experience with the subject-matter of specialized litigation may be important in cases in which a judge or magistrate judge could devote the required time. At times the need for special knowledge or experience may be best served by appointment of an expert who is not a lawyer. ~~In~~ large-scale cases, it may be appropriate to appoint a team of masters that includes both legal and other skills.

~~This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level of power, there must be a separate appointment as a master. Even with a separate appointment, the combination of roles can easily confuse and vitiate both functions. An expert witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. A master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination can be dangerous and can cause justifiable resentment. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer.~~

Present experience is insufficient to justify more than cautious experimentation with combined functions.)

Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. A lawyer, for example, may be involved with other litigation before the appointing judge or in the same court, directly or through a firm. The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment. It does not prohibit other members of the same firm from appearing before the appointing judge, but special reasons should be found before appointing a master whose firm is likely to appear before the appointing judge. Other conflicts are not enumerated, but also must be avoided. For example, a lawyer may be involved in other litigation that involves parties, interests, or lawyers or firms engaged in the present action. A nonlawyer may be committed to intellectual, social, or political positions that are affected by the case.

Apart from conflicts of interest, there is ground for concern that appointments frequently are made in reliance on past experience and personal acquaintance with the master. The appointing judge's knowledge of the master's abilities can provide important assurances not only that the master can discharge the duties of master but also that the judge and master can work well together. It also is important, however, to ensure that the best possible person is found and that opportunities for this public service are equally open to all. Suggestions by the parties deserve careful consideration, particularly those made jointly by all parties. Other efforts as well may prove fruitful, including such devices as consulting professional organizations if the master may be a nonlawyer.

Subdivision (b). The grounds for appointing pretrial and post-trial masters are governed by Rules 53.1 and 53.2. Rule 53(b)(2) sets out the grounds for appointing a trial master.

Use of masters for the core functions of trial has been progressively limited. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed; in addition, it embraces for this setting the deleted provision that a reference "shall be the exception and not the rule."

The use of masters in jury-tried cases is retained as well, but the practice is narrowed even further than former requirements that the issues be complicated and that reference be the exception. If the master's findings are to be of any use, the master must conduct a preliminary trial that reflects as nearly as possible the trial that will be conducted before the jury. This procedure imposes a severe dilemma on

parties who believe that the truth-seeking advantages of the first full trial cannot be duplicated at a second trial. It also imposes the burden of two trials to reach even the first verdict. The actual usefulness of the master's findings as evidence also is open to doubt. It would be folly to ask the jury to consider both the evidence heard before the master and the evidence presented at trial, as reflected in the longstanding rule that the master "shall not be directed to report the evidence." If the jury does not know what evidence the master heard, however, nor the ways in which the master evaluated that evidence, it is impossible to appraise the master's findings in relation to the evidence heard by the jury. It might be better simply to abandon the use of masters in jury trials. Rather than take this final step, however, room is left for an exceptional circumstance that requires appointment of a master. Courts should be very reluctant to conclude that any circumstance is so special as to require the appointment.

The benefits of appointing a master must be weighed against the cost to the parties. The fairness of imposing master fees is affected by many factors, including the stakes in the litigation, the means of the parties, the conduct of any party that contributes to the need for a master, and the ability to apportion responsibility for the fees between the parties.

Subdivision (c). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and powers. Care must be taken to make the order as clear [precise] as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment.

Long experience has demonstrated the danger that appointment of a master may lengthen, not reduce, the time required to reach judgment. From the beginning, Rule 53 has included a variety of terms designed to encourage prompt execution of the master's duties. These provisions are summarized in the phrase in paragraph (2), carried over from the original rule, requiring that a master proceed with all reasonable diligence. Additional assurances are provided by the requirement that deadlines be set. A party may make a motion to the master or to the court to compel expeditious action.

The simple requirement that the master be named does not address the means of selecting the master. Often it will be useful to engage the parties in the process, inviting nominations and review of potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement. However much the parties are involved, courts should guard against repetitive selection of a single small group of familiar candidates.

Precise designation of the master's duties and powers is essential. There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance. Clear delineation of topics for any reports or recommendations is an important part of this process. It also is important to protect against delay by establishing a time schedule

for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.

Ex parte communications between master and court present troubling questions. Often the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that would not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exhanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule does not provide direct guidance, but does require that the court address the topic in the order of appointment.

There should be few occasions for requiring that a master be bonded. If special circumstances suggest a risk that inadequate performance may cause significant harm, however, a court may wish to ensure a source of damage payments. Although a court rule cannot address the question of official immunity, it is proper to provide for a bond that — in the manner of an injunction bond furnished under Rule 65(c) — provides a source of compensation without regard to the possibility of individual liability.

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guides to control total expense. The order of appointment should state the basis, terms, and procedures for fixing compensation. If compensation is to be fixed by an hourly rate, it may help not only to set the rate but also to set an expected time budget. When there is an apparent danger that the expense may prove unjustifiably burdensome to a party or disproportionate to the needs of the case, it also may help to provide for regular reports on cumulative expenses. The court has power under subdivision (j) to change the basis and terms for determining compensation, but should recognize the risk of unfair surprise to the parties.

The provision for amending the order of appointment is as important as the provisions for the initial order. New opportunities for useful assignments may emerge

as the pretrial process unfolds, or even in later stages of the litigation. Conversely, experience may show that an initial assignment was too broad or ambitious, and should be limited or revoked. It even may happen that the first master is ill-suited to the case and should be replaced. Anything that could be done in the initial order can be done by amendment.

Subdivision (d). The central function of a trial master is to preside over an evidentiary hearing. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master appointed under Rule 53(b)(2). The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master may often need to conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials, and has prohibited a master's report of the evidence in a jury trial. These features are retained. There may be cases in which a mere report of the evidence is useful to the trial judge, although responsibility for credibility determinations must prove difficult. A report of the evidence in a jury trial, on the other hand, would compound unbearably the burdens of the master system. Trial before the master would be followed by simultaneous jury review of the first trial and a second trial.

Recommended findings may prove useful in nonjury trials as a focus for deliberation, leaving the judge free to decide without any required deference to the master. If a master is ever to be used in a jury-tried case, recommended findings represent the outer limit of proper authority.

If a master is to hold an evidentiary hearing in a nonjury case, the most common and sensible practice is to delegate the task of decision as well as hearing, retaining the power of review. Under subdivision (i), fact findings are reviewed only for clear error unless a different standard is specified by the court.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing. Courts occasionally have appointed judicial adjuncts to perform a variety of tasks that mingle the duties of court-appointed expert witnesses with more active functions, or that involve giving advice to the court. Perhaps the clearest combination of functions may arise when a court-appointed expert witness is given power to gather information on which to base expert testimony. Courts should observe great caution in making such appointments until there is a sufficient body of experience to provide substantial guidance. The order of appointment should be framed with particular care to define the powers and authority of a master appointed to relatively unfamiliar trial tasks.

Subdivision (e). The general powers of a master described in subdivision (e)

are taken from past practice. They flesh out the more distinctive powers and responsibilities described in Rules 53.1, and 53.2.

Subdivision (f). The provisions for hearings are taken from present Rule 53. Stylistic changes have been made. The present rule's detailed description of the power to compel production of documents is included in the Rule 45 power to compel production of documents or tangible things, or inspection of premises. This power to compel production of evidence may be exercised in advance of a hearing in order to make the hearing as fair and efficient as possible.

It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

Subdivision (g). A pretrial master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (h). The report is the master's primary means of communication with the court. The nature of the report determines the need to file relevant exhibits, transcripts, and evidence. A report at the conclusion of unsuccessful settlement efforts, for example, often will stand alone. A report recommending action on a motion for summary judgment, on the other hand, should be supported by all of the summary judgment materials. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report against public access — a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Sealing is much less likely to be appropriate with respect to a trial master's report. ~~Recognition of the possibility of reporting on matters not specifically delegated to the master does not imply a broad license to exceed the bounds of the court's assignment. Diligent discharge of assigned duties, however, may inform the master of important matters that should be brought to the court's attention. A formal report, available to the parties, may be the best means of highlighting these matters.~~

A master may learn of matters outside the scope of the reference. Rule 53 does not address the question whether — or how — such matters may properly be brought to the court's attention. Matters dealing with settlement efforts, for example, often should not be reported to the court. Other matters may deserve different treatment. If a master concludes that something should be brought to the court's attention, ordinarily the parties should be informed of the master's report.

Subdivision (i). The time limits for seeking review of a master's order, or objecting to — or seeking adoption of — a report, are important. They are not jurisdictional. The subordinate role of a master means that although a court may properly refuse to entertain untimely review proceedings, there must be power to

excuse the failure to seek timely review.

The clear error test provides the presumptive standard of review for findings of fact. ~~The clear error phrase is used in place of the clearly erroneous standard of Rule 52 to suggest the subtle distinctions that may justify somewhat more searching review of a master.~~ The "clearly erroneous" phrase is as malleable in this context as it is in Rule 52, and account may be taken of the fact that the relationship between a court and master is not the same as the relationship between an appellate court and a trial court. A court may provide a more demanding standard of review in the order of appointment. The order should be amended to provide more searching review only for compelling reasons. Special characteristics of the case that suggest more searching review ordinarily should be apparent at the time of appointment, and action at that time avoids any concern that the standard may have been changed because of dissatisfaction with the master's result. In addition, the parties may rely on the standard of review in proceedings before the master. A court may not provide for less searching review without the consent of the parties; clear error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may stipulate that the master's findings will be final.

The use of masters in jury cases is discouraged by subdivision (b)(2)(B). A master's findings cannot be binding on the jury, and may confuse the jury as to any issue contested by a party. The court must exclude any finding that is affected by legal error, and may in its discretion exclude any finding. If a finding on an issue is admitted in evidence and no other evidence is admitted on that issue, judgment should be entered as a matter of law as to that issue. If other evidence is admitted, the finding is to be treated as any other evidence on the same issue, and does not affect the burden of persuasion.

Absent consent of the parties, questions of law cannot be delegated for final resolution by a master. The subordinate role of the master may at times warrant treating as questions of law matters that would be treated as questions of fact on reviewing a trial court.

Apart from factual and legal questions, pretrial masters often may make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The subordinate and ad hoc character of the master often will justify more searching review or de novo determination by a judge. ~~It is important, however,~~ to establish the master's strong working authority. Appointment of a master would be counterproductive or worse if the court routinely duplicates the master's efforts, encouraging frequent review requests by parties who are dissatisfied or who simply hope to increase delay and expense. If an "abuse of discretion" standard is used, the master's discretion is less broad than the discretion of a judge as to comparable matters. The rule does not catalogue these matters or attempt to suggest more specific standards of review. The court may, for the guidance of the parties and master, establish standards for specific topics in the order appointing the master.

~~Ordinarily, however, the standard of review will be determined during the review process.~~ The standard of review set in the appointing order may not foresee all questions, however, or may appear inappropriate when review is actually undertaken. The court has power under subdivision (c)(3) to amend the standard initially set.

Subdivision (j). The need to pay compensation is a substantial reason for care in appointing private persons as masters. The burden can be reduced to some extent by recognizing the public service element of the master's office. One court has endorsed the suggestion that an attorney-master should be compensated at a rate of about half that earned by private attorneys in commercial matters. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir.1979). Even if that suggestion is followed, a discounted public-service rate can impose substantial burdens.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. Many factors, too numerous to enumerate, may affect the allocation. The amount in controversy may provide some guidance in making the allocation, although it is likely to be more important in the initial decision whether to appoint a master and whether to set an expense limit at the outset. The means of the parties also may be considered, and may be particularly important if there is a marked imbalance of resources. Although there is a risk that a master may feel somehow beholden to a well-endowed party who pays a major portion of the fees, there are even greater risks of unfairness and strategic manipulation if costs can be run up against a party who can ill afford to pay. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case. The factors that informed the initial allocation remain important, however. It may be unfair to impose these payments on a relatively poor party, and a victory on the merits is little reason to relieve an obstreperous party from the expenses of a master appointed to control that party's behavior. There is no presumption that a master's fees should be paid by the least successful party.

The basis and terms for fixing compensation should be stated in the order of appointment under subdivision (c)(2)(I). The court retains power to alter the initial basis and terms, after notice and opportunity for hearing, but should protect the parties against unfair surprise.

Subdivision (k). This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize the need to confuse the roles of magistrate judge and master only when justified by exceptional circumstances. See the Note to Subdivision (a).

RULE 53.1. PRETRIAL MASTERS

(a) **Appointing.** Rule 53 (a), (c), (e), (f), (g), (h), (i), (j), and (k) governs appointment of a pretrial master under this rule.

(b) **Grounds for Appointing.** A court may appoint a pretrial master to perform any of the duties described in subdivision (c) when it is likely that:

(1) service by a master will substantially advance the just, speedy, and economical determination of the action; and

(2) the master's fees and expenses will not impose an unfair or unjustified burden on any party.

(c) **Master's Powers.** A pretrial master may be appointed to:

(1) mediate or otherwise facilitate settlement;

(2) formulate a [disclosure or] discovery plan; supervise [disclosure or] discovery; make [disclosure or] discovery orders under Rules 26 through 31, 32(d)(4), 33 through 36, and 45; make recommendations [to the court] for orders under Rules 26 through 36 and 45; make orders under Rule 37(a) or (g); or make recommendations [to the court] for orders under Rule 37;

(3) conduct conferences and make orders or recommendations for orders under Rule 16;

(4) hear and determine any other pretrial motion, except a motion:

(A) for injunctive relief,

(B) to dismiss for failure to state a claim,

(C) for judgment on the pleadings,

(D) to strike any claim or defense,

(E) for involuntary dismissal, transfer, or remand,

(F) for summary judgment,

(G) to certify, dismiss, or approve settlement of a class action, or

(H) to establish for trial under Evidence Rule 104 the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence;

(5) conduct hearings and make proposed findings and recommendations for disposition of a motion described in (4)(A) through (H);

(6) manage other pretrial proceedings;

(7) assist in coordinating separate proceedings pending before the court or in other courts, state or federal; or

(8) perform ~~any~~ similar duties agreed to by the parties.

(d) **Master's Authority.** The court may grant a pretrial master any authority authorized by Rule 53.

COMMITTEE NOTE

The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. Reflections of the practice are found in such cases as *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991), and *In re Armco*, 770 F.2d 103 (8th Cir. 1985). This practice is not well regulated by Rule 53, which focuses on masters as trial participants. A careful study has made a convincing case that the use of masters to supervise discovery was considered and explicitly rejected in framing Rule 53. See *Brazil, Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 ABF Research Journal 143. Rule 53.1 is adopted to confirm the authority to appoint — and to regulate the use of — pretrial masters.

Subdivision (a). Rule 53.1 is integrated with Rule 53, which provides the common provisions governing pretrial masters, trial masters, and post-trial masters appointed under Rule 53.2. As noted with those rules, the lines that separate these three types of masters are not sharp. In some circumstances, indeed, it may be appropriate to appoint a single person to serve in two or even all three of these roles. The distinctions are important, however, and should be carefully observed in each order that appoints a master or defines the master's powers and duties.

Subdivision (b). Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

The risk of imposing unfair costs on a party is a particular concern in determining whether to appoint a pretrial master. Appointment of a trial master under Rule 53 will be an exceptional event, and a post-trial master is likely to be appointed under Rule 53.2 only in large-scale litigation in which the costs can fairly be imposed on parties able to bear them or be paid from a common fund. Pretrial masters may seem desirable across a broader range of litigation, more often involving one or more parties who cannot readily bear the expense of a master. Parties are not required to defray the costs of providing public judicial officers, and should not lightly be charged with the costs of providing private judicial officers. Disparities in party resources are not automatically cured by disproportionate allocations of fee responsibilities — there is some risk that a master may appear beholden to a party who pays most or all of the fees. Even when all parties can well afford master fees, appointment is justified only if the expense is reasonable in relation to the character and needs of the litigation. The character and needs of the litigation need not be assessed in a vacuum. Appointment of a master may be justified when economically powerful adversaries conduct their litigation in a manner that threatens to consume an unfair share of the limited resources of public judicial officers. Consent of all parties may significantly reduce these concerns, although even then courts should strive to avoid situations in which consent is constrained by the unavailability of reasonable attention from a judge or magistrate judge.

Subdivision (c). Pretrial masters have been used for a variety of purposes. The list of powers and duties in subdivision (c) is intended to illustrate the range of appropriate assignments. The only explicit limitation is set out in paragraph (4), but courts must be careful in assigning pretrial tasks, just as care must be taken in assigning trial tasks. See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1926). Ordinarily public judicial officers should discharge public judicial functions. Direct judicial performance of judicial functions may be particularly important in cases that involve important public

issues or many parties. Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort. At the extreme, broad and unreviewed delegations of pretrial responsibility can run afoul of Article III. See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir.1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir.1991); *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir.1991). Judicial time is not unlimited, however, and at some point fair allocation among the competing demands of the caseload may require that particularly time-consuming chores be delegated to a master. In addition, some special cases may call for special knowledge that few judges have and that is better supplied by a master.

Although many different functions may properly be performed by a pretrial master in an appropriate case, care should be taken in combining different functions. It is particularly important to remember that a master may be better able to facilitate settlement if this function is kept separate from other possible functions, if need be by appointment of separate masters.

Paragraph (1) confirms the frequent practice of relying on masters to mediate or otherwise facilitate settlement. A master may have several advantages in promoting settlement. The parties may share with a master information they would not reveal to a judge who might try the case or hear an important motion. The master may be able to offer assessments of the case and suggestions for settlement that would not be appropriate from a trial judge. The parties may have special respect for advice from a master with experience in a particular field, whether as litigator or otherwise. In multiparty cases, a master may be able to develop models of injury and damages that facilitate settlement of large numbers of claims. The advantages, however, do not all weigh in favor of a master. A master may lack the extensive experience and aura of office that can lend special weight to a judge's efforts to promote settlement. A master whose sole function is to promote settlement, moreover, may attach exaggerated importance to the value of settling.

Paragraph (2) {refers explicitly to discovery, but includes disclosure as well}[covers discovery and disclosure duties]. Supervision of discovery has been one of the tasks most frequently assigned to masters. The need for a master may be acute in overworked courts presented with claims that privilege, work-product, or protective order shield thousands of documents against discovery. A master also may be able to help the parties plan realistic discovery programs in ways that parallel help in settlement negotiations, to reduce the tensions of contentious discovery maneuvers, or to resolve disputes or even preside at depositions when reason fails. The limits of the adversary process must, however, be observed. It would be improper, for example, to appoint a master with "the power to restate the questions and to recommend the answers," see *Wilver v. Fisher*, 387 F.2d 66 (10th Cir.1967). Often the court will retain power to make orders, directing the master only to make recommendations. Often, however, the court will prefer to delegate initial power to make discovery and disclosure orders, retaining review power. The rule permits the

court to delegate power to make many types of orders, but allows only recommendations as to categories of discovery orders that are closely tied to a party's ability to litigate its positions on the merits or the conduct of trial. ~~The master also may be given power to recommend more severe sanctions.~~

Paragraph (3) permits a master to conduct Rule 16 pretrial conferences and make or recommend pretrial orders. Final pretrial conferences directly focused on shaping the trial, however, ordinarily should be conducted by the trial judge. A pretrial master's special experience and knowledge of the case can be tapped by having the master participate in the conference. The master likewise should be limited to making recommendations, rather than orders, as to particularly important aspects of pretrial management.

Paragraph (4) permits assignment of authority to hear and determine pretrial motions, with stated exceptions. The listed exceptions are frequently encountered matters of great importance. It is not possible to capture in a general list all matters that may be equally important in a particular case. Trial judges must be careful to retain responsibility for the initial as well as final decision of all matters central to a case. Hearings conducted by a master are governed by ordinary court practices of notice, record, and public access.

Paragraph (5) complements paragraph (4) by permitting reference to a master for hearings and recommendations for disposition of any motion described in paragraph (4), including those listed in paragraphs (A) through (H). Even though the court retains responsibility for independent determination of matters of law, and can retain responsibility for independent determination of matters of fact in the order referring the proceedings to the master, references should be limited to cases presenting special needs. Courts have frequently noted the undesirability of referring dispositive motions to masters. See *Prudential Ins. Co. v. U.S. Gypsum Co.*, 991 F.2d 1080 (3d Cir.1993); *In re U.S.*, 816 F.2d 1083 (6th Cir.1987); *In re Armco*, 770 F.2d 103 (8th Cir.1985); *Jack Walters & Sons v. Morton Building, Inc.*, 737 F.2d 698, 711-713 (7th Cir.1984). An assignment to recommend disposition of a motion for a temporary restraining order or preliminary injunction, for example, should be made only if severe constraints make it impossible for a judicial officer to provide an opportunity for effective relief.

Paragraph (6) is a general authorization to assign authority to manage pretrial proceedings. This provision reflects the difficulty of foreseeing the innovative procedures that may evolve under the spur of litigation that is complex in subject matter, number of parties, or number of related actions. It also can encompass a variety of alternative dispute resolution devices. A master might, for example, preside at a summary jury trial. Matters that bear directly on the conduct of trial, however, are seldom apt to be suitable for delegation to a pretrial master. See Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U.Pa.L.Rev. 2131, 2147 n. 88 (1989).

Paragraph (7) reflects an emerging practice of relying on masters to help coordinate separate proceedings that involve the same subject matter. One form of coordination is to appoint the same person as master in several actions. Other, often informal, forms of coordination may be possible as well. As experience develops with this practice, it may be possible to achieve many of the benefits of consolidation without the complications that might arise from attempts to consolidate actions pending in different court systems.

Paragraph (8), finally, emphasizes the importance of party consent. Just as parties may consent to arbitration, so consent has an important bearing on the means of processing disputes under judicial auspices. Party consent reduces concerns about expense and limiting access to public judges. Courts cannot, however, be asked to abandon all responsibility for proceedings conducted under their authority or judgments entered on their rolls. There are many illustrations of settings in which courts need not — and at times should not — accede to party consent. Consent of representative parties should be reviewed carefully in class actions. Arrangements that significantly alter the nature of adversary litigation also should be undertaken carefully; the use of masters to organize investigations by the parties, or to become active investigators, must be approached with caution. Usually it is better that the assigned judge directly resolve requests for interim relief, such as temporary restraining orders or preliminary injunctions.

Subdivision (d). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and powers. Care must be taken to make the order as clear as possible. Rule 53 governs these matters, as well as hearings, orders, reports, review, and compensation.

Rule 53.2. Post-Trial Masters

(a) **Appointing.** Rule 53(a), (c), (e), (f), (g), (h), (i), (j), and (k) governs appointment of a post-trial master under this rule.

(b) **Grounds for Appointing.** A court may appoint a post-trial master to perform any of the duties described in subdivision (c) if the parties consent or if the master's duties cannot be adequately performed by an available district judge or magistrate judge.

(c) **Master's Powers.** A post-trial master may be appointed to:

(1) conduct ministerial matters of account;

(2) assist in framing an injunction when the parties have not been able to provide sufficient help;

(3) assist in supervising enforcement of a complex decree;

(4) assist in administering an award to multiple claimants; or

(5) perform other duties agreed to by the parties.

(d) **Master's Authority.** The court may grant a post-trial master any authority permitted by Rule 53 and the authority to conduct independent investigations to assist in framing an injunctive order or in enforcing a decree.

COMMITTEE NOTE

Courts have come to rely extensively on masters to assist in framing and enforcing complex decrees, particularly in institutional reform litigation. Current Rule 53 does not directly address this practice. Rule 53.2 authorizes appointment of post-trial masters for these and similar purposes.

Subdivision (a). A post-trial master is governed by the provisions of Rule 53 as to all matters not expressly addressed by Rule 53.2.

It may prove desirable to appoint as post-trial master a person who has served in the same case as a pretrial or trial master. Intimate familiarity with the case may enable the master to act much more quickly and more surely. The skills required by post-trial tasks, however, may be significantly different from the skills required for earlier tasks. This difference may outweigh the advantages of familiarity. In particularly complex litigation, the range of required skills may be so great that it is better to appoint two or even more persons. The sheer volume of work also may conduce to appointing more than one person. The additional persons may be appointed as co-equal masters, as associate masters, or in some lesser role — one common label is "monitor."

Subdivision (b). Absent party consent, a post-trial master should be appointed only if no district judge or magistrate judge is available to perform the master's duties in adequate fashion. As with Rule 53.1 pretrial masters, strong reasons must be found before the parties are forced to pay for the services of private judicial adjuncts. Masters — except those with prior public judicial service — ordinarily have little experience with the judicial role. Adding another layer to the judicial process can easily add to delay as well as cost. Yet masters may make important contributions. Overburdened courts simply may not have enough time to tend to all current business. A particularly complex case could absorb far too much of a judge's time, defeating the opportunity of litigants in many more ordinary cases to receive prompt official attention. A master may not only free up judge time but also give more time to the complex case than a judge could. The master also may bring to bear specialized training and experience that cannot be matched by any available judge. If all parties consent to appointment of a master, on the other hand, the court may freely grant the request if it wishes. Consent greatly reduces concern for possible burdens of cost, delay, and denial of direct judicial attention. Of course party consent does not require appointment of a master. The court may prefer to supervise post-trial matters directly, particularly in cases that affect broad public interests that may not be adequately represented by the parties.

Subdivision (c). The authority to appoint a master to conduct ministerial matters of account is somewhat different from the provision in former Rule 53(b). It is not required that the reference be "the exception and not the rule." This change reflects the restriction of the Rule 53.2 appointment to ministerial matters that do not call for judicial resolution. More complicated matters, whether referred to as accounting or damages, should be treated under the trial master provisions of Rule 53 if the case involves the ordinary trial function of resolving fact disputes. Administration of an award to multiple claimants is covered by paragraph (4).

Courts have used masters to help frame injunctions with growing frequency. Several factors may combine in different proportions to support this practice. Ordinarily the subject is quite complicated. Often the parties remain at loggerheads even after disposition of the basic issues of liability, advancing widely different remedy proposals that offer little help in framing a fair and workable decree. The parties, moreover, may not adequately represent public interests — even when one or more parties are public officials or agencies. Frequently expert knowledge is important. If a court-appointed expert has testified at trial, it may be appropriate to appoint that expert as post-trial master. A party's expert, however, should not be appointed.

Masters have been used to supervise enforcement of complex decrees in circumstances that require substantial investments of time or expert knowledge. Masters also may be important when the parties have proved unable to provide sufficient guidance on implementing a workable decree, and may be particularly important when independent inquiry is needed to supplement adversary presentation. As with framing the decree, a master also may be important because the parties do not fully represent and protect larger public interests.

It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional circumstance" requirement of Rule 53(b) for trial masters in nonjury cases. The tasks of framing and enforcing an injunction may be less important than the liability decision as a matter of abstract principle, but may be even more important in practical terms. The detailed decree and its

operation, indeed, often provide the most meaningful definition of the rights recognized and enforced. Great reliance, moreover, is often placed on the discretion of the trial judge in these matters, underscoring the importance of direct judicial involvement. Experience with mid- and late Twentieth Century institutional reform litigation, however, has convinced many trial judges and appellate courts that masters often are indispensable. Apart from requiring that a decree be "complex," the rule does not attempt to capture these competing considerations in a formula. Reliance on a master is inappropriate when responding to such routine matters as contempt of a simple decree; see *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-1097 (3d Cir. 1987). Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). Among the many appellate decisions are *In re Pearson*, 990 F.2d 653 (1st Cir.1993); *Williams v. Lane*, 851 F.2d 867 (7th Cir, 1988); *NORML v. Mulle*, 828 F.2d 536 (9th Cir.1987); *In re Armco, Inc.*, 770 F.2d 103 (8th Cir.1985); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-112 (3d Cir.1979); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir.1979); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir.1979).

Administration of an award to multiple claimants is another task that may call for appointment of a master or even creation of a small administrative organization. Class action awards may require creation of procedures and facilities for identifying claimants entitled to participate in the award, determining the shares of different claimants, maintaining the financial and ethical integrity of a common fund, and other purposes. In truly mammoth cases, these arrangements may take on the character of claims processing facilities.

Party consent can be helpful in defining the duties of a post-trial master. Party consent, however, no more controls definition of the master's duties than it controls the decision whether to appoint a master.

Subdivision (d). A post-trial master can be given any of the authority described in Rule 53. The invocation of Rule 53 by Rule 53.2(a) includes the requirement that the appointing order specify the master's powers. In addition to the Rule 53 powers, post-trial masters have been given powers of investigation quite unlike the traditional role of judicial officers in an adversary system. The master in the *Pearson* case, for example, was appointed by the court on its own motion to gather information about the operation and efficacy of a consent decree that had been in effect for nearly twenty years. A classic explanation of the need for — and limits on — sweeping investigative powers is provided in *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163, 1170-1171 (5th Cir.1982), cert. denied 460 U.S. 1042.

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Dear Ed:

Thank you for sending me your draft with regard to special masters. Since time is of the essence, I'm deferring comments on the draft in general because I have not had time to study it in depth. I have looked at the comments relating to Fed.R.Evid. 706. Before making some suggestions, I thought it might be helpful if I provided some concrete examples about situations that arise involving court-appointed expert witnesses and special masters.

A good deal of the discussion that follows stems from my experience as a Rule 706 expert in the Manville asbestos litigation. I apologize for personalizing this problem, but I think my experience may be helpful in illustrating the issues.

I was appointed as an expert and not as a master only because Rule 53 does not apply in bankruptcy proceedings, and at the time I was appointed (though this seems to have changed), matters concerning the Manville Personal Injury Settlement Trust were proceeding jointly before the bankruptcy court and the district court. Although my appointment survived a mandamus challenge in the Second Circuit, which seemed to regard my appointment as within the inherent power of the court, the tasks I performed don't fit neatly into Rule 706. But for the bankruptcy problem, which probably needs fixing given the realities of toxic tort litigation, I think a special master designation would have been more appropriate -- even though Rule 53 in its present form does not apply to what I did any more clearly than Rule 706 does. Allowing courts to appoint assistants who are not regulated by either the Civil or Evidence Rules does not seem satisfactory either, although there are a number of cases approving of judges appointing "technical advisors" and the like. See, e.g., Reilly v. United States, 863 F.2d 149, 154-56 (1st Cir. 1988). The solution I would prefer is to amend Rule 53.

The reason I think Rule 53 is more suited to the kind of role I played is that my expertise did not relate to any of the factual issues before the court and provided assistance with regard to the evidence before the court only indirectly. I assume Rule 706 incorporates some of the general requirements about experts stated in Rule 702. Therefore, I'm not sure that I really fell into any category of witness contemplated by the Rules of Evidence. Furthermore, almost everything I did occurred prior to trial and the Rules of Evidence operate primarily as rules for trial.

The court needed assistance in Manville on how much money to pay claimants now. The Manville Trust has insufficient assets to pay all present claims in full. According to the agreement worked out between the parties, however, future claimants are entitled to the same percentage of their claims as present claimants. In order to decide what percentage of a claim may be safely paid to present claimants without depleting the fund so that moneys will not be available for the futures, projections had to be made about the number of future claims that would be made against the Trust. Making these projections was an unbelievably complex task for a myriad of reasons.

My first task, after being appointed by Judge Weinstein, was to make recommendations to the court about experts who could make such projections. This required deciding which disciplines were relevant (epidemiology, biostatistics, economics, medicine, occupational health?), and then finding persons in the relevant fields who were qualified, available, willing, unconnected to other asbestos litigation, and capable of functioning as witnesses if need be.

Once the Rule 706 panel I recommended was in place, I acted as supervisor, translator and conduit between the court and the panel. For instance, I nagged the experts who were doing the actual projections about their work, arranged for them to get data from Manville, worked out a confidentiality agreement with Duke University where the work was done, set up joint meetings with the Trust, set up meetings with the panel and counsel for all interested parties, advised the experts about dates in the court proceedings that would affect their work, and ultimately helped prepare them to testify. I am now waiting to see whether there will be fairness hearings at which they will have to testify again.

I also explained to the experts what kinds of questions their projections had to answer. For instance, the agreement between the parties provided that a claimant who initially suffered from one of the more minor asbestos diseases, such as pleural plaque, would not be precluded from claiming for a subsequent asbestos-caused cancer. The fact that some claimants might claim for more than one disease over time had to be taken into account in the projections. Other times as well I requested the experts to undertake certain tasks because of their legal significance. In preparing the experts to testify, the process worked in reverse -- their scientific data had to be translated back into legally significant terms.

Although the Manville case is perhaps an extreme example of a complex case, many other cases would benefit from having supervised court-appointed experts. A court might be more inclined to use court-appointed experts if it had assistance in framing specific questions for the experts to answer, and help in screening appropriate experts from appropriate disciplines. Consequently, I would like to see a Rule 53.1 that would be more specific about the role a special master could play vis a vis court-appointed experts. Such an amendment might have an educational effect as well as making clearer the applicable rules. How about adding to the "Master's Powers" in (c), to:

> recommend the appointment of experts pursuant to Rule 706 of the Federal Rules of Evidence; coordinate and supervise the work of court-appointed experts; conduct conferences with the experts and the parties and take other measures that will facilitate the experts' assistance to the court and jury.

In addition to furnishing written reports, I also testified, very briefly, about how I came to recommend the experts whom the court appointed. No one bothered to cross-examine me. Aren't there analogous situations in which special masters ought to be available to testify on the record about how they organized a particular matter, such as discovery? Your Note suggests that testimony by the special master is inconsistent with the master's role of judicial officer, but there is a difference between the master who is fact finding and the master who performs other functions. When the special master is not playing an adjudicatory role, but is functioning, e.g., as a settlement master, might not

some of the expressed due process concerns over the increasing use of masters be mitigated by allowing a more adversarial process? Perhaps it would be helpful to split off inquiries into the special master's decision making from inquiries into other functions performed by a special master?

I wonder also if so much decision making should be allocated to special masters instead of magistrate judges? Allowing special masters to conduct Daubert hearings and make proposed findings about the qualification of expert witnesses gives me a chill. Whether the expert may testify is going to be dispositive of the case in quite a number of instances. When the qualification issue rests on determinations about scientific validity, the question is often intertwined with enormous public policy concerns. I don't think a special master should be allowed to make initial findings in such cases.

I hope this is helpful. I'll try to send some comments about non-evidentiary issues in the future.

Best regards.

Sincerely yours,

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Agenda Item III F

Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: The Witness Requirement of Rule 803(6)
Date: March 3, 1997

I was instructed by the Committee to analyze the possibility of an amendment to Rule 803(6), which would permit introduction of business records without the necessity of producing a qualified witness at trial. This memorandum does not consider the policy question of whether such an amendment is advisable. That question is left to the Committee. Rather, this memo seeks to provide information and a proposed draft to the Committee, should the Committee make the policy decision that business records should be proveable without the necessity for an in-court witness.

This memorandum is divided into three parts. Part one provides a short review of the case law concerning the language in Rule 803(6) requiring proof of the foundation requirements "by the testimony of the custodian or other qualified witness." Part two considers some state provisions providing that the business records foundation requirement may be proved other than through a testifying witness. Part three sets forth proposed language for an amendment, and a proposed Advisory Committee note. I conclude that if the Committee decides to amend Rule 803(6) to permit proof through certification, then it must also amend Rule 902 to provide for self-authentication of such business records. Therefore, Part three also includes a draft and Advisory Committee Note for a Rule 902(11) (covering domestic records) and a Rule 902(12) (covering foreign records).

Case Law Under Current Rule 803(6)

Currently, Rule 803(6) provides that the foundation requirements of the Rule must be "shown by the *testimony* of the custodian or other qualified witness". Most courts have construed this language to mean that business records cannot be admitted without the in-court testimony of a custodian or other qualified witness. See, e.g., *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records proven by way of affidavit of a qualified person). The Court in *Tongil* reasoned that the foundation requirements of Rule 803(6) could not be proven through hearsay declarations at trial, since such a practice would itself violate the hearsay rule. See also *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983) (Rule 803(6) calls for a proper foundation to be made through the testimony of a live witness).

Some courts have, in limited and unusual circumstances, permitted admission of business records without the testimony of a foundation witness. The leading case for a more permissive view of Rule 803(6) is *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), where the court stated:

> It would make little sense to require live witness testimony every time a business record is offered when, from the other materials open for the court's consideration, it can make the required finding to its own satisfaction.

The Ninth Circuit in *Tongil* distinguished *Japanese Products* as a summary judgment case. But there are a few cases that have employed the liberal *Japanese Products* interpretation of Rule 803(6) at trial as well. See e.g., *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992) (noting that live foundation testimony is not required, even in a criminal case, but reversing a conviction nonetheless because the government made no attempt, through the testimony of a witness or otherwise, to prove that the foundation requirements of the business records exception were met); *United States v. Mendel*, 746 F.2d 155 (2d Cir. 1984) (stating that foundation testimony is not required "when circumstances otherwise demonstrate trustworthiness"); *FDIC v. Staudinger*, 797 F.2d 908 (10th Cir. 1986) (foundation for admissibility of a business record was properly based on judicial notice that bank records are regularly kept); *United States v. Seelig*, 622 F.2d 207 (6th Cir. 1980) (party-admission made during discovery established foundation for business records).

The problem with admitting business records in the absence of foundation testimony is that it conflicts with the plain language of the Rule. The Rule sets forth the foundation requirements, and then specifically states that these requirements must be shown by "testimony." The provision

concerning testimony represents an additional requirement that was not included in predecessor statutes--therefore it must have been intended to mean something. Thus, if the Committee decides, as a policy matter, that a foundation witness should not be a sine qua non for admissibility of a business record, the Rule must be amended to reach that result. No reliance can fairly be placed on a few scattered cases, which are contrary to the Rule on its face.

18 U.S.C. § 3505

It must be kept in mind that foreign business records are already proveable in criminal cases through a certification process. See 18 U.S.C. § 3505. This statute has been routinely upheld against confrontation clause challenges. See, e.g., *United States v. Chan*, 680 F.Supp. 521 (E.D.N.Y. 1988). Section 3505 provides as follows:

3505. Foreign records of regularly conducted activity

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that--

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

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

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term--

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in

any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Any amendment of Rule 803(6) and corresponding authentication rules must take account of the existence of section 3505. See the discussion on this point below.

State Provisions

States treating the witness requirement of the business records exception differently from the federal model fall into three categories. Some states provide for proof by affidavit for specific types of records, most commonly hospital records. See, e.g., Alabama Code § 12-21.5; KRS 422.310 (Ky.); 16 Maine Rev. Stat. § 357; Wis.Stat.Ann. § 908.06(m). These particularized rules provide little guidance for an amendment of Rule 803(6). They deal with specific kinds of records that routinely arise in state litigation; it is hard to believe that this Committee could isolate the types of records most worthy of proof through affidavit in a federal court.

A few states simply drop the language "all as shown by the testimony of the custodian or other qualified witness" from their version of the Rule. See, e.g., Conn.Stat. Ann. § 52-180; Ga.Stat.Ann. 24-3-14. Assuming arguendo that Rule 803(6) should be amended to permit foundation through certification, that goal could probably not be accomplished successfully at this point by simply deleting the language concerning testimony from the Rule. There would be no explicit language authorizing the proof of foundation requirements by way of certification. This could leave courts so inclined to hold, as many have already, that a business record cannot be proven through hearsay evidence. It makes little sense to go to all the trouble of an amendment only to leave the amended rule purposely vague.

At least three states explicitly provide for the potential admissibility of any business record through certification. These provisions are set forth below.

Indiana

The Indiana version of the Rule uses the simple expedient of adding the language "or affidavit" after the word "testimony" in the rule. That is, after setting forth the foundation requirements, the rule reads: "all as shown by the testimony or affidavit of the custodian or other qualified witness." The Committee Note to the Indiana Rule indicates that the intent was to "eliminate the need for time-consuming foundation witnesses."

The Indiana Rule also adds two provisions to Rule 902, to provide for self-authentication of business records proven by way of affidavit. Indiana Rule 902(9) specifies that the following domestic records are self-authenticating:

> **(9) Certified domestic records of regularly conducted activity.** *Unless the source of information or the circumstances of preparation indicate a lack of trustworthiness, the original or a duplicate of a domestic record of regularly conducted activity within the scope of Rule 803(6), which the custodian thereof or another qualified person certifies under oath (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity; and (iii) was made by the regularly conducted activity as a regular practice. A record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.*

Indiana Rule 902(10) provides for self-authentication of foreign business records:

> **(10) Certified foreign records of regularly conducted activity.** *Unless the source of information or the circumstances of preparation indicate lack of trustworthiness, the original or a duplicate of a foreign record of regularly conducted activity within the scope of Rule 803(6), which is accompanied by a written declaration by the custodian thereof or another qualified person that the record (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted*

*activity; and (iii) was made by the regularly conducted activity as a regular practice. The record must be signed in a foreign country in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of that country, and the signature certified by a government official * * *. The record is not self-authenticating under this subsection unless the proponent makes his or her intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to prove the adverse party with a fair opportunity to challenge it.*

Maryland

Maryland Rule 803(6) drops the testimony requirement from the Rule. The intent of that omission is not, however, left vague, as it probably would be under the Federal Rule, because Maryland provides a specific rule providing for the possibility of self-authentication of a business record. This provision, together with the omission of a witness requirement, makes it clear that foundation requirements for a business record in Maryland can be met through affidavit. Maryland Rule 902(11) provides for self-authentication of the following:

> (11) ***Certified Records of Regularly Conducted Business Activity.*** *The original or a duplicate of a record of regularly conducted business activity, within the scope of [the business records exception], which the custodian or another qualified individual certifies (A) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (B) is made and kept in the course of the regularly conducted business activity, and (C) was made and kept by the regularly conducted business activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.*

Texas

Texas Civil and Criminal Rules 803(6) both explicitly permit proof of business record foundation requirements through affidavit. The witness clause of the Texas provision states: "all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10)."

Texas Criminal and Civil Rules 902(10) provide for self-authentication of the following:

(10) Business Records Accompanied by Affidavit.

(a) *Records or Photocopies; Admissibility; Affidavit; Filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court of this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by [procedural rule providing for manner of notice], fourteen days prior to commencement of trial in said cause.*

(b) Form of Notice. [Sample affidavit]

Comment by Reporter:

Analyzing the different approaches taken by the states, it would appear that the most efficient way to provide for admissibility of business records through affidavit is to make a minor amendment to the witness clause of the Rule, and then to add a new rule on self-authentication. Concerns over the difficulty of attacking a foundation made by affidavit have led the states to impose a notice requirement; similar concerns at the federal level could be addressed by a similar requirement, though there is no need to duplicate the long and involved provision employed by Texas.

One wrinkle at the federal level is that 18 U.S.C. § 3505 already provides for admissibility of foreign business records in a criminal case through a process of certification. The Committee would not, I believe, wish to create conflict or confusion about the relationship between an amended Federal Rule and section 3505. One solution is to provide separate authentication provisions for domestic and foreign business records, using the language of section 3505 for the foreign records provision, and expanding it to cover civil as well as criminal cases. This is one approach taken below. I also provide an alternative approach.

Proposed Amendment to Rule 803(6) for the Committee to Consider

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

Proposed Advisory Committee Note

The amendment provides a means to satisfy the foundation requirements of Rule 803(6) without the expense and inconvenience of producing time-consuming foundation witnesses. See, e.g., *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records proven by way of affidavit of a qualified person). Protections are provided by the authentication requirements of Rule 902(11) for domestic records and Rule 902(12) for foreign records.

Proposed Amendment to Rule 902 for Advisory Committee to Consider

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity, which would be admissible under Rule 803(6), and which the custodian thereof or another qualified person certifies under oath (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) was kept in the course of the regularly conducted activity; and (iii) was made by the regularly conducted activity as a regular practice. A record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to all adverse parties and makes it available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

Proposed Advisory Committee Comment to Rule 902(11)

The Rule provides a means for parties to authenticate domestic records of regularly conducted activity other than through the testimony of a foundation witness. See the proposed amendment to Rule 803(6). The notice requirement is intended to provide the opponent of the evidence with a full opportunity to test the adequacy of the foundation set forth in the certification. [The court has the discretion to require testimony from a foundation witness if the circumstances of preparation of the certification appear untrustworthy].

Proposed Amendment to Rule 902 for Advisory Committee to Consider

(12) Certified foreign records of regularly conducted activity. A foreign record of regularly conducted activity, if a foreign certification attests that--(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters; (B) such record was kept in the course of a regularly conducted business activity; (C) the business activity made such a record as a regular practice; and (D) if such record is not the original, such record is a duplicate of the original; unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. A foreign certification under this subsection shall authenticate such record or duplicate.

At the arraignment in a criminal case or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. In civil cases, the proponent must make an intention to offer a foreign record under this subsection known to all adverse parties and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

A motion opposing admission in evidence of a foreign record shall be made by a party and determined by the court before trial. Failure by a party to file such motion before trial shall

constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

As used in this subsection, the term "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country; the term "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and the term "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Proposed Advisory Committee Comment to Rule 902(12)

The Rule incorporates the provisions of 18 U.S.C. § 3505, which applies to criminal cases and permits proof of foreign records of regularly conducted activity through a process of certification. See *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994) (upholding the statute against a Confrontation Clause challenge). The Rule extends these statutory provisions to civil cases, in order to provide for self-authentication of properly certified foreign records of regularly conducted activity, in accordance with the proposed amendment to Rule 803(6).

Reporter's Comment: I recognize that the proposed 902(12) is awkward and wordy. This results from two factors--(1) the wordiness of the statute itself; and (2) the difficulty of adding civil trial components into a statute that was drafted with criminal trials in mind (e.g., the reference to arraignment). I note that the Justice Department proposal to expand section 3505 to civil cases (attached to this memo) takes a somewhat different approach, but the provision remains awkward.

If the committee is concerned about the awkwardness of the Rule, another alternative is possible. This would be to write Rule 902(12) solely for civil cases. Then the Advisory Committee comment could mention that criminal cases are handled by section 3505. This would hardly be a trap for the unwary, since section 3505 is used almost exclusively by the government; government attorneys are obviously aware of its existence. Under this alternative, Rule 902(12) would read as follows:

Alternate Draft Rule 902(12)

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity which would be admissible under Rule 803(6), and which is accompanied by a written declaration by the custodian thereof or another qualified person that the record (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) was kept in the course of the regularly conducted activity; and (iii) was made by the regularly conducted activity as a regular practice. The record must be signed in a in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of the country where the record is signed. The record is not self-authenticating under this subsection unless the proponent makes his or her intention to offer it known to all adverse parties and makes it available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

Alternate Advisory Committee Comment to Rule 902(12)

The Rule provides a means for parties to authenticate foreign records of regularly conducted activity other than through the testimony of a foundation witness. See the proposed amendment to Rule 803(6). The notice requirement is intended to provide the opponent of the evidence with a full opportunity to test the adequacy of the foundation set forth in the certification. [The court has the discretion to require testimony from a foundation witness if the circumstances of preparation of the certification appear untrustworthy]. The Rule applies only to civil cases. Authentication of foreign records of regularly conducted activity in criminal cases is controlled by statute. See 18 U.S.C. § 3505.

Final Comments of Reporter:

1. The whole problem of correlating section 3505 with a provision on self-authentication of foreign records may be resolved outside the Federal Rules of Evidence if the Justice Department has its way. The Justice Department has proposed that section 3505 be expanded to cover civil cases. See the letter to Vice President Gore from the Justice Department, attached to this memo. If that proposal is enacted, only one self-authentication provision would have to be enacted by way of Federal Rule--i.e., Rule 902(11), covering domestic business records. The Advisory Committee comment to that Rule could then refer to the existence of the amended section 3505. My draft of Rule 803(6) would also have to be changed, to delete the reference to Rule 902(12).

2. I included in Advisory Committee Note to Rule 902(11), and to the alternative note for Rule 902(12) a bracketed sentence referencing the fact that the trial judge would have discretion to reject an affidavit and demand production of a qualified witness. Obviously, the appropriateness of this sentence is a matter for discussion and resolution by the Committee.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 27 1996

The Honorable Al Gore
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

Enclosed for referral to the appropriate committee is a legislative proposal aimed at combatting money laundering, organized crime, drug trafficking, terrorism, and other forms of international crime. International crime poses an increasing threat to the safety and security of U.S. citizens and to the national security interests of the United States and its allies.

In October 1995, President Clinton issued a directive to the Departments of Justice, State and Treasury, the Coast Guard, National Security Council, Intelligence Community, and other federal agencies to step-up their efforts against international crime syndicates. The President also directed the Department of Justice, in conjunction with other agencies, to develop a comprehensive package of legislation to give U.S. law enforcement agencies additional tools to prevent, investigate and punish international crime. The International Crime Control Act of 1996 ("ICCA") responds to the President's directive. The ICCA would expand U.S. law enforcement authority in several key areas, close gaps in existing law, and facilitate cooperation against international criminal activity.

The ICCA focuses on five essential areas to improve the U.S. government's ability to prevent, investigate and punish international criminal activity.

Denying Safe Haven to International Fugitives

* Authorizes the United States to extradite suspected terrorists and other international criminals (under strict procedural and substantive safeguards) to foreign nations in the absence of an extradition treaty with the requesting nation.

* Authorizes the Attorney General to deny entry into the United States of persons who attempt to enter the United States in order to avoid prosecution in another country.

Striking at the Financial Underpinnings of International Crime

* Expands the list of money laundering "predicate crimes" to include certain violent crimes, international terrorism, and public corruption against foreign governments.

* Expands the definition of "financial institution" to include foreign banks, closing a loophole involving criminally derived funds laundered through foreign banks in the U.S.

Punishing Acts of Violence Committed Against U.S. Citizens Abroad

* Broadens U.S. criminal law to authorize the investigation and punishment of organized criminal groups who commit serious criminal acts abroad against U.S. citizens abroad.

* Eliminates the statute of limitations for serious violent crimes committed outside the United States. This change will ensure that international criminals are not shielded from prosecution due to delays in gathering evidence and other information from abroad.

Responding to Emerging International Organized Crime Problems

* Responds to the increasing problem of alien smuggling by authorizing the forfeiture of the instrumentalities and proceeds of alien smuggling.

* Cracks down on the international shipment of "precursor chemicals," which are used to manufacture methamphetamine -- which is re-emerging as a major threat in the U.S.

* Provides extraterritorial jurisdiction for fraud involving ATM cards and other "access devices," fraud that costs U.S. businesses hundreds of millions of dollars every year.

Fostering Multilateral Cooperation

* Authorizes U.S. law enforcement agencies to more effectively share the seized assets of international criminals with foreign law enforcement agencies.

* Establishes a new fund to defray translation and other costs of state and local law enforcement agencies in cases involving fugitives or evidence overseas.

The International Crime Control Act would substantially assist U.S. law enforcement agencies in their efforts against drug traffickers, terrorists, and other international crime syndicates. The legislation would enhance our ability to go after violent international criminals by vigorously investigating and prosecuting them, taking their money, and depriving them of their ability to cross our borders and strike at our domestic institutions.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Andrew Fois
Assistant Attorney General

Enclosure

States Code, is amended by inserting the following at the end:

"556. Smuggling Goods from the United States".

Sec. 432. **ADMISSIBILITY BY CERTIFICATION OF CERTAIN FOREIGN RECORDS**

(a) Section 3505 of title 18, United States Code, is amended --

(1) in paragraph (a)(1), by striking: "In a criminal proceeding" through "attests that ---" and inserting the following:

"In any civil or criminal proceeding in a court of the United States, including proceedings in the United States Court of Federal Claims and the United States Tax Court, a foreign record of regularly conducted activity, or a copy of such record, or a statement that after diligent search no such record or entry therein of a specified tenor was found to exist, obtained through an official request, shall be authenticated and shall not be excluded as evidence by the hearsay rule if a foreign certification, obtained through the same or another official request, attests that --";

(2) in subparagraphs (a)(1)(B) and (C), by inserting "or official" after "business";

(3) in subparagraphs (a)(1)(A) and (C), by inserting "or kept" after "made";

(4) in paragraph (a)(2), by striking: "A foreign certification under this section shall authenticate such record or duplicate" and inserting the following:

"The certification required under this section is unnecessary if the record or statement and attestation are certified as provided in a treaty or convention to which the United States and the relevant country are parties, or if it is otherwise admissible under the Federal Rules of Evidence.";

(5) in subsection (b), by striking "At the arraignment or as soon after the arraignment as practicable," and inserting "In a criminal case, at the arraignment or as soon thereafter as practicable, or in a civil case as soon as practicable after the filing of a responsive pleading,"; and

(6) in subsection (c), by striking "and" at the end of paragraph (2), by striking the period at the end of paragraph (3) and inserting "; and", and by adding the following new paragraph:

"(4) 'official request' means a letter rogatory, a request under a treaty, convention, or agreement providing for assistance in civil or criminal matters, or any other request for information or evidence made by a court of the United States or an authority of the United States having law enforcement responsibility, to a court or other authority of a foreign country.".

Sec. 433. **EXEMPTING INFORMATION FROM DISCLOSURE**

(a) Section 203 of the International Emergency Powers Act (50 U.S.C. 1702(a)), is amended --

(1) by redesignating paragraph (3) as paragraph (4),

(2) and by inserting after paragraph (2) the following new paragraph:

"(3) Exemptions From Disclosure.-- Information obtained under this title before or after the enactment of this section may be withheld only to the extent permitted by statute, except that information submitted, obtained, or considered in connection with any transaction prohibited under this title, including license applications, licenses or other authorizations, information or evidence obtained in the course of any

The permissive statutory presumption and definitional sections proposed are patterned after similar provisions in 18 U.S.C. § 545. However, no separate provision for civil forfeiture of the goods involved in a violation of this provision is necessary because Congress has already provided that authority under current law in 22 U.S.C. § 401.

Sec. 432. Section by section analysis

This section provides a statutory basis to authenticate and admit into evidence, in federal judicial proceedings, foreign-based records of regularly conducted activity obtained pursuant to official requests. The section expands the extant statutory basis with respect to foreign business records, making records produced in accordance with the statute admissible in civil proceedings (whereas the statute currently authorizes admission only in criminal proceedings). The section also provides an independent statutory basis for foreign official records, treating official records produced in accordance with the statute as admissible in a fashion similar to foreign business records. The section continues to incorporate elements of the Federal Rules of Evidence, especially Rule 803(6), that ensure the reliability of the foreign records and maintains the requirement of a foreign certification or similar certification provided by treaty, convention, or agreement.

To make foreign business records admissible in a civil proceeding under Federal Rules of Evidence 803(6) and 901(a)(1), a foreign custodian or other qualified witness must give testimony, either by appearing at a proceeding in the U.S. or by providing a deposition taken abroad and introduced at the U.S. proceeding, which testimony or deposition establishes that the foreign business records are authentic (901(a)(1)) and reliable (Rule 803(6)). The United States has no means by which to compel the attendance of a foreign custodian or other qualified foreign witness at a U.S. proceeding to testify. Thus, to adduce the requisite testimony, U.S. authorities must (1) rely on the prospective witness' willingness to voluntarily appear (which is rare and subject to vicissitude) or (2) attempt to depose the witness abroad. The latter process is unduly cumbersome and not available in many situations (e.g., in matters involving tax administration pursuant to tax treaties or agreements). This section provides a streamlined process for making foreign business records admissible without having to rely on the unpredictability of a foreign witness' voluntary travel to the U.S. or the unpredictable and cumbersome process of deposing the witness abroad.

Foreign official records include records of birth, vehicle registry, property transfer and liens, foreign business incorporation, and the like. Such records are routinely kept in much the same manner as business records. This section authorizes a single certification for both self-authentication and foundation for an exception to the hearsay rule similar to that currently available for foreign business records. It, likewise, will streamline the process of securing documents admissible in U.S. judicial proceedings while, at the same time, maintaining assurances of reliability.

Agenda Item IV A

The report on the *Effect of Automation* will be distributed to you separately.

FORDHAM
University

Agenda Item IV B

School of Law

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Circuit Splits
Date: February 21, 1997

In accordance with one of the long-term goals of the Committee, I have begun to keep a file on circuit splits on Federal Rules of Evidence questions. This file is not scientifically kept and I have made no attempt to be comprehensive. The file does not cover pre-existing circuit splits as to which no further cases have been decided after November, 1996. I am just setting aside cases indicating a circuit split as I find them when going through the advance sheets.

Here is a summary of the recent cases discussing circuit splits:

1. Standard of Review for *Daubert* determinations: *Duffee v. Murray Ohio Manufacturing Co.*, 91 F.3d 1410 (10th Cir. 1996): Affirming the Trial Court's exclusion of testimony by the plaintiff's expert concerning the safety of brakes on a bicycle, the Court reached the question of which standard would be used to review decisions to exclude expert testimony under *Daubert* that result in summary judgment. The Court reviewed cases in other circuits and analyzed the question as follows:

> Ordinarily we review the grant or denial of summary judgment de novo. *Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995). Evidentiary rulings, however, are generally reviewed for abuse of discretion. *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1047 (10th Cir. 1993). The Third and Eleventh Circuits, while acknowledging that evidentiary rulings usually receive greater deference, have nonetheless held that "when the district court's exclusionary evidentiary rulings with respect to scientific

opinion testimony will result in a summary or directed judgment, we will give them a 'hard look' (more stringent review) to determine if a district court has abused its discretion in excluding evidence as unreliable." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-750 (3d Cir. 1994) (citation omitted); see *Joiner v. General Elec. Co.*, 78 F.3d 524, 529 (11th Cir. 1996) (applying "a particularly stringent standard of review to the trial judge's exclusion of expert testimony.") The Seventh Circuit, on the other hand, has held that the trial judge's decision to exclude evidence under *Daubert* should be reviewed for abuse of discretion, even when that decision results in summary judgment. *Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 292-93 (7th Cir. 1996).

Daubert requires district judges to act as gatekeepers to ensure that scientific evidence is both relevant and reliable. This entails two inquiries: whether the reasoning and methodology underlying the testimony is scientifically valid, and whether the reasoning and methodology can properly be applied to the facts. Like the Supreme Court, we "are confident that federal judges possess the capacity to undertake this review." Their decisions, therefore, are properly reviewed under the traditional abuse of discretion standard. In this case, the district judge found that the testimony of the plaintiff's expert was not supported by appropriate validation, and therefore was inadmissible under *Daubert*. After reviewing the record, we conclude that the district judge did not abuse his discretion by excluding this testimony.

Comment by Reporter: It can be argued that the standard of review for an evidentiary determination should not be governed by the Federal Rules of Evidence, but rather by rules directly applicable to appellate courts such as the Federal Rules of Appellate Procedure. Rule 103(d) does appear to refer to the standard of appellate review, however, so if the Committee were inclined to resolve this split, it might be appropriate to do so by adding to Rule 103. The problem with dealing with the standard of review for *Daubert* rulings, however, is that it seems a piecemeal effort. It might be better for the Committee to decide what, if anything, should be done in light of *all* the post-*Daubert* developments.

2. The Relationship Between Rule 703 and FRCP 56: *First United Financial Corp. v. United States Fidelity and Guaranty Co.*, 96 F.3d 135 (5th Cir. 1996) (concurring opinion): In this concurring opinion, Judge Garza notes that there is tension between Rule 56(e)'s requirement that summary judgment evidence

"set forth specific facts" and Rule 703's provision that facts or data relied upon by an expert need not be admissible in evidence. He notes that the First and Seventh Circuits require experts to set forth in their affidavits the reasoning process underlying their opinions. *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88 (1st Cir. 1993); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago,* 877 F.2d 1333 (7th Cir. 1989). The Ninth Circuit does not require experts to set forth their reasoning process during summary judgment proceedings. *Bulthuis v. Rexall Corp.*, 789 F.2d 1315 (9th Cir. 1985). Judge Garza would have opted for a requirement of some disclosure of the expert's reasoning; otherwise, a party would have a "free pass to trial every time that a conflict of fact is based on expert testimony."

Reporter's Comment: This conflict is not so much over an Evidence Rule as over the meaning of FRCP 56(e). The question is whether the language "specific facts" covers the expert's reasoning process. This conflict might be referred to the Civil Rules committee for their consideration.

3. Applicability of Coast Guard Regulations: *In re Complaint of Nautilus Motor Tanker Co.*, 85 F.3d 105 (3d Cir. 1996): Affirming a judgment for a terminal owner in a suit by the owner of a tanker who sought to impose liability on the terminal owner for an oil spill, the Court held that the Trial Judge properly admitted a Coast Guard report of an investigation into the grounding of a vessel, notwithstanding a Coast Guard regulation (46 C.F.R. § 4.07) stating that investigations are undertaken for promotion of safety, not to fix civil or criminal responsibility.

The Court held that federal regulations may not "trump" acts of Congress, such as the Federal Rules of Evidence, and that Coast Guard reports that qualify under Rule 803 (8)(C) are admissible. In so holding, the Court rejected contrary reasoning in *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988), which was followed in *Petition of Cleveland Tankers,* Inc., 67 F.3d 1200 (6th Cir. 1995). The Ninth Circuit in *Huber* relied on the policy of the regulation--to encourage truthful reporting by Coast Guard officials--and did not directly discuss the relationship between a regulation and a Federal Rule of Evidence.

Reporter's Comment: This split is not really over the wording or construction of one of the Federal Rules of Evidence. Rather, it is over a legal question--whether regulations take precedence over the Federal Rules. There does not seem to be much that the Committee can say or do to resolve this dispute.

FORDHAM Agenda Item IV.C.
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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Statutes Affecting Admissibility of Evidence in Federal Courts.
Date: March 3, 1997

At the November, 1996 meeting, the possibility was discussed that the Federal Rules could be amended to include a reference to federal statutes which affect admissibility of evidence in the federal courts. I did a search for all such statutes. I include a short description below of each of the statutes I found--making no claim that I found them all. The length of the list should, I believe, give the Committee some indication of the enormity of the task of referencing, in the Federal Rules, all of the statutes affecting admissibility of evidence.

STATUTES BEARING ON ADMISSIBILITY IN ANY JUDICIAL PROCEEDING

- **2 USCA § 25 Oath of Speaker, Members, and Delegates (Congress)** (bearing on records, provides that signed or certified copies of the oath of office are admissible in any court as conclusive proof that the signer took the oath of office).

- **5 USCA § 1214 Investigation of prohibited personnel practices; corrective action** (bearing on records, provides that a written statement prepared by the Special Counsel pursuant to this section, at the close of an investigation into the allegation of prohibited personnel practices, shall not be admissible in any judicial or administrative proceeding without the consent of the person who made the allegation).

- **7 USCA § 15b. Cotton futures contracts** (bearing on records, provides that certificates as to the classification of cotton shall be accepted as evidence in all courts).

- **7 USCA § 79a Weighing authority** (bearing on records, provides that official certificates of weighing shall be accepted as evidence in all courts).

- **7 USCA § 94 Supply duplicates of standards; examination, etc., of naval stores and certification thereof** (bearing on records, provides that certificates issued by the Secretary of Agriculture showing the analysis, classification, or grade of naval stores shall be accepted as evidence in all courts).

- **7 USCA § 2276 Confidentiality of information (Department of Agriculture)** (bearing on records, provides that information furnished pursuant to this section shall not be admitted as evidence in any judicial or administrative proceeding without consent).

- **8 USCA § 1360 Establishment of central file; information from other departments and agencies (Aliens)** (bearing on the absence of records, provides that a written certification that after a diligent search no records were found shall be admissible as evidence in any proceeding to show that no such records exist).

- **8 USCA § 1435 Former citizens regaining citizenship** (bearing on records, provides that a certified copy of an oath of allegiance (of a woman who lost her citizenship through marriage) shall be admissible in any U.S. court).

- **8 USCA § 1443 Administration** (bearing on authentication, provides that certifications and certified copies of papers, documents, certificates and records required or authorized to be kept by the Nationality and Naturalization provisions, shall be equally admissible as the originals in all cases in which the originals are admissible and in all cases pursuant to this chapter).

- **10 USCA § 1102 Confidentiality of medical quality assurance records: qualified immunity for participants (Armed Forces)** (bearing on privileges and records, provides that medical quality assurance records shall not be admissible in any judicial or administrative proceeding except as provided).

- **10 USCA § 2254 Treatment of reports of aircraft accident investigations (Armed Forces)** (bearing on admissions and records, provides that the opinion of accident investigators as to the cause or contributing factors of an accident, set forth in an accident report, may not be considered as evidence or as an admission of liability by the person referred to in any criminal or civil proceeding arising from the accident).

- **12 USCA § 1820 Administration of Corporation (FDIC)** (bearing on authentication, provides that photographs, microphotographs, photographic film or copies taken pursuant to this section shall be admissible in all State and Federal courts or administrative agencies as an original record to prove any act therein).

- **13 USCA § 9 Information as confidential; exception** (provides that copies of census reports shall not be admitted as evidence in any judicial or administrative proceeding without consent of the parties concerned).

- **14 USCA § 645 Confidentiality of medical quality assurance records; qualified immunity for participants (Coast Guard)** (bearing on privileges and records, provides that medical quality assurance records shall not be admissible in any judicial or administrative proceeding except as provided).

- **15 USCA § 77z-1 Private securities litigation (Domestic Securities)** (bearing on admissions and relevance, provides that a statement concerning damages, made in accordance with this section, shall not be admissible in any judicial or administrative proceeding except one arising out of such statement).

- **15 USCA § 78u-4 Private securities litigation (Securities Exchanges)** (bearing on admissions and relevance, provides that a statement concerning damages, made in accordance with this section, shall not be admissible in any judicial or administrative proceeding except one arising out of such statement).

- **15 USCA § 281a Structural failures** (bearing on records, provides that a report by the National Institute of Standards and Technology of an investigation into the causes of a structural failure of a public building shall not be admissible in any suit for damages that arises from a matter mentioned in such report).

- **15 USCA § 1115 Registration on principal register as evidence of exclusive right to use mark; defenses (Trademarks)** (bearing on records, provides that certain trademark registrations shall be admissible in evidence).

- **15 USCA § 1693d Documentation of transfers (Electronic Funds Transfers)** (bearing on records, provides that documentation required by this section shall be admissible as evidence of such transfer in any action involving a consumer).

- **15 USCA § 2074 Private remedies (Consumer Product Safety)** (bearing on relevance, provides that the Commission's failure to take action with respect to the safety of a consumer product shall not be admissible in litigation relating to such product).

- **15 USCA § 2310 Remedies in consumer disputes (Consumer Product Warranties)** (provides that decisions from informal dispute settlement procedures shall be admissible in related warranty obligation civil actions).

- **15 USCA § 4015 Judicial review; admissibility (Export Trade Certificates of Review)** (bearing on relevance, provides that determinations denying applications for or amendments to a certificate of review, and statements supporting such determinations, shall not be admissible to support any claim under the antitrust laws in any judicial or administrative proceeding).

- **15 USCA § 4305 Disclosure of joint venture (Cooperative Research)** (provides: (1) that the facts of disclosure of conduct and publication of notice, pursuant to this section, shall be admissible in any judicial or administrative proceeding; and (2) that actions, taken pursuant to this section, by the Attorney General or the FTC shall not be admissible to support or answer antitrust claims in any proceeding).

- **18 USCA § 3491 Foreign documents** (bearing on records and hearsay generally, provides that any foreign book, paper, statement, record, account, writing or other document, shall be admissible in any criminal action if it satisfies the certification requirements of 18 USCA § 3491 and the authentication requirements of the Federal Rules of Evidence).

- **18 USCA § 3501 Admissibility of confessions** (bearing on hearsay, provides that any confession that is voluntarily given shall be admitted in any criminal prosecution).

- **18 USCA § 3502 Admissibility in evidence of eye witness testimony** (provides that such evidence shall be admissible in any criminal prosecution).

- **18 USCA § 3505 Foreign records of regularly conducted activity** (bearing on records, provides that such records are admissible in any criminal proceeding if foreign certification attests that such records meet (what are in essence) the requirements of Rule 803(6)).

- **18 USCA § 3507 Special master at foreign deposition** (provides that the refusal to appoint a special master under this section shall not affect the admissibility of depositions).

- **18 USCA § 3509 Child victims' and child witnesses' rights** (bearing on witness testimony, but not abrogating Rule 601, permits the court to admit a child's videotaped deposition, in lieu of live-testimony, if the child would be unable to testify).

- **18 USCA § 4241 Determination of mental competency to stand trial** (bearing on relevance, provides that a finding of mental competence shall not be admissible in a trial for the offense charged).

- **18 USCA § 5032 Delinquency proceedings in district courts; transfer for criminal prosecution** (bearing on admissions and statements against interest, provides that statements made by a juvenile prior to or at a transfer hearing shall not be admissible in subsequent criminal proceedings).

- **18 USCA App. 3 § 6 Procedure for cases involving classified information** (provides that if the United States fails to meet its obligations under this act, the court may exclude the subject evidence and prohibit examination by the U.S. of any witness with respect to such information).

- **18 USCA App. 3 § 8 Introduction of classified information** (provides that the court may exclude portions of writings, recordings or photographs in order to protect classified information).

- **19 USCA § 1484 Entry of merchandise (Tariff Act of 1930)** (bearing on records, provides that any electronically transmitted entry or information shall be admissible in all administrative or judicial proceedings as evidence of such entry or information).

- **20 USCA § 9007 Confidentiality (National Education Statistics)** (bearing on privileges and records, provides that copies of reports containing individually identifiable information shall not be admissible for any purpose in any judicial or administrative proceeding without the consent of the individual concerned).

- **21 USCA § 360i Records and reports on devices (Drugs and Devices)** (bearing on records and competency, provides that reports made by certain individuals shall not be admissible in any civil action unless the preparer had knowledge of the falsity contained in the report).

- **21 USCA § 885 Burden of proof; liabilities (Drug Abuse Prevention and Control)** (provides that labels identifying controlled substances shall be admissible in the case of persons charged, under 21 USCA § 844(a), with the possession of a controlled substance).

- **22 USCA § 4221 Depositions and notarial acts; perjury (Foreign Service)** (bearing on authentication, provides that documents certified under this act shall be admitted into evidence without proof of the genuineness of any seals or signatures used).

- **22 USCA § 4222 Authentication of documents of State of Vatican City by consular officer in Rome** (bearing on authentication and records, provides that documents of record or on file in a public office of the State of the Vatican City, when certified and authenticated by a consular office of the United States, shall be admissible in any U.S. court).

- **23 USCA § 402 Highway safety programs** (bearing on records, provides that a report, list, schedule or survey prepared pursuant to this section shall not be admissible in any suit for damages arising out of a matter mentioned in such report, list schedule or survey).

- **23 USCA § 409 Discovery and admission as evidence of certain reports and surveys (Highway Safety)** (bearing on records, provides that reports, surveys, etc., compiled for the purpose of identifying, evaluating or planning safety enhancement or developing any highway safety construction improvement project, shall not be admissible in any action for damages arising from an occurrence at a location mentioned in such reports, etc., in any State or Federal court proceeding).

- **26 USCA § 5555 Records, statements, and returns (IRC)** (bearing on authenticity, provides that copies of required records shall be admissible to the same extent as the originals).

- **26 USCA § 6103 Confidentiality and disclosure of returns and return information (IRC)** (bearing on privileges and authenticity, provides that: (1) returns shall not be admissible in proceedings pursuant to this section if such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation; and (2) a reproduction of a return or documents shall be admissible in any judicial or administrative proceedings as if it were the original).

- **28 USCA § 655 Trial de novo (Arbitration)** (provides that the district court in a trial de novo shall not admit evidence that there has been an arbitration proceeding, the nature or amount of an award, or any matter concerning the prior arbitration proceeding unless such evidence would otherwise be admissible under the Federal Rules, or the parties have stipulated to the admission of such evidence).

- **28 USCA § 1732 Record made in regular course of business; photographic copies** (bearing on authentication, provides that a satisfactorily identified copy of a record both made and copied in the regular course of business is admissible in any administrative or judicial proceeding to the same extent as the original, regardless of whether the originals are in existence or not).

- **28 USCA § 1744 Copies of Patent Office documents, generally** (bearing on authentication, provides that copies of Patent Office documents which are authenticated under seal and certified by the Commissioner of Patents shall be admissible with the same effect as the originals).

- **33 USCA § 555a Petroleum product information** (bearing on authentication, provides that a reproduction made in accordance with the section shall, if properly authenticated, be admissible in any judicial or administrative proceeding as if it were the original, regardless of whether or not the original is in existence).

- **38 USCA § 8506 Notice of sale (Disposition of Deceased Veterans' Personal Property)** (provides that an affidavit setting forth the time and place of a posting of notice of sale of property shall be admissible).

- **42 USCA § 2240 Licensee incident reports as evidence (Development of Atomic Energy)** (bearing on records, provides that a report, made by a licensee pursuant to a requirement of the Commission, of an incident arising from licensed activity shall not be admissible in any suit for damages arising from any matter mentioned in such a report).

- **42 USCA § 3505 Seal (Department of Health and Human Services)** (bearing on authentication, provides that copies, under seal of the Department, of any books, records, papers, or other documents shall be admissible equally with the originals).

- **42 USCA § 3789g Confidentiality of information (Judicial System Improvement)** (provides that research and statistical information obtained pursuant to this chapter shall not be admissible in any proceeding).

- **42 USCA § 7412 Hazardous air pollutants** (bearing on records, provides that conclusions, findings, or recommendation of the Board relating to an accidental release or an investigation of an accidental relief shall not admissible in any suit for damages arising from a matter mentioned in such report).

- **42 USCA § 9622 Settlements (CERCLA)** (bearing on relevance, provides that a person's participation in processes pursuant to this section shall not be considered as an admission of liability, and the fact of participation shall not be admissible in any judicial or administrative proceeding except as otherwise provided in the Federal Rules).

- **42 USCA § 10604 Administrative provisions (Victim Compensation and Assistance)** (bearing on records, provides that research or statistical information furnished under this chapter is inadmissible in any judicial or administrative proceeding absent consent of the person revealing the information).

- **42 USCA § 10708 Administrative provisions (State Justice Institute)** (bearing on records, provides that research or statistical information furnished under this chapter is inadmissible in any judicial or administrative proceeding absent consent of the person revealing the information).

- **43 USCA § 58 Transcripts from records of Louisiana** (bearing on records, provides that a copy of a plat of survey or a transcript from the records of the office of the former surveyor-general that is duly certified shall be admissible in all courts).

- **43 USCA § 83 Transcripts of records as evidence** (bearing on records and authentication, provides that transcripts of records of district land offices, when made and certified to by the Secretary of the Interior, shall be admissible in all courts and shall have the same force and effect as the originals).

- **43 USCA § 545 Appointment of agents to receive payments; record of payments and amounts owing** (bearing on authentication, provides that copies of records of entries authenticated as provided by the Secretary of the Interior, shall be admissible in evidence).

- **44 USCA § 2116 Legal status or reproductions; official seal; fees for copies and reproduction** (bearing on authentication, provides that reproductions authenticated by the seal for the National Archives and certified by the Archivist, shall be admissible equally with the originals).

- **44 USCA § 3312 Photographs or microphotographs or records considered as originals; certified reproductions admissible in evidence** (bearing on authenticity, provides that photographs or microphotographs of records made in compliance with 44 USCA § 3302 shall be admissible equally with the originals).

- **45 USCA § 744 Termination and continuation of rail services** (bearing on relevance, provides that a determination of reasonable payment for use of rail properties is inadmissible in action for damages arising under this chapter).

- **46 USCA § 10902 Complaints of unfitness (Proceedings on Unseaworthiness)** (bearing on records, provides that a report made by an official pursuant to this section shall be admissible in any legal proceeding).

- **47 USCA § 154 Federal Communications Commission** (provides that authorized publications of the Commission's reports and decisions shall be admissible in all courts).

- **49 USCA § 504 Reports and records (Department of Transportation)** (bearing on records, provides that a report of an accident or investigation that is required by the Secretary of Transportation shall not be admissible in any civil action for damages relating to a matter mentioned in such report or investigation).

- **49 USCA § 1154 Discovery and use of cockpit voice and other material** (bearing on records, imposes conditions on the admissibility of a cockpit voice recorder transcript that is not publicly available, and provides that a report, made by the National Transportation Safety Board, of an accident or investigation shall not be admissible in any civil action for damages relating to a matter mentioned in such report or investigation).

- **49 USCA § 20703 Accident reports and investigations (locomotives)** (bearing on records, provides that a report, made pursuant to this section, of an accident or investigation shall not be admissible in any civil action for damages relating to a matter mentioned in such report or investigation).

- **49 USCA § 47507 Inadmissibility of noise exposure map and related information as evidence (airport development and noise)** (provides that no part of a noise exposure map or related information may be admitted in any civil action asking for relief from noise resulting from the operation of an airport).

- **Illegal immigration reform and immigrant responsibility act of 1996 PL 104-208 (HR 3610), 110 Stat. 3009 (slip copy)** (bearing on authentication, provides conditions for the admission of an electronically submitted record of conviction, and provides for the admission of a videotaped deposition of a witness who has been deported or otherwise expelled from the United States, notwithstanding any provision of the Federal Rules, if the deposition otherwise complies with the Federal Rules).

- **Coast Guard Authorization Act of 1996; PL 104-324 (S 1004) 110 Stat. 3901** (bearing on records, provides that no part of a marine casualty investigation conducted pursuant to § 6301 of this title shall be admissible in any civil or administrative proceedings, other than an administrative proceeding initiated by the United States).

STATUTES APPLICABLE TO SPECIFIC TYPES OF PROCEEDINGS

- **5 USCA § 574 Confidentiality** (bearing on relevancy in alternative dispute resolution proceedings, provides that communications disclosed in violation of this section are inadmissible in any proceeding relating to that issue).
- **8 USCA § 1252a Expedited deportation of aliens convicted of committing aggravated felonies** (provides that the court abide by 18 USCA 1252b, not the Federal Rules of Evidence, in deportation proceedings for aliens convicted of specific offenses).
- **8 USCA § 1328 Importation of alien for immoral purpose** (bearing on privileges, provides that testimony of a husband and wife shall be admissible against each other in prosecutions pursuant to this section).
- **8 USCA § 1446 Investigation of applicants; examination of applications** (provides that the record of the examination of an applicant for naturalization shall be admissible as evidence in any hearing pursuant to 8 USCA § 1447(a)).
- **15 USCA § 16 Judgments (Monopolies)** (bearing on records, provides that a competitive impact statement filed under this section is not admissible in district court proceedings pursuant to this section).
- **15 USCA § 80a-39 Procedure for issuance of orders (Investment Companies)** (bearing on hearsay, provides that applications which are verified under oath may be admissible in any proceeding before the Commission).
- **15 USCA § 1071 Appeal to courts (Trademarks)** (bearing on hearsay, provides that the records in the Patent and Trademark Office shall be admitted without prejudice in suits brought pursuant to this section).
- **18 USCA § 981 Civil forfeiture** (bearing on prior testimony, provides that judgments or orders of forfeiture by courts of foreign countries, along with recordings and transcripts of such proceedings, and, orders or judgments of conviction for drug activities by foreign courts, along with recordings and transcripts of such proceedings, shall be admissible in evidence in proceedings brought pursuant to this section).
- **18 USCA § 2339B Providing material support or resources to designated foreign terrorist organizations** (requires the court to guard against the compromise of classified information in determining whether a response is admissible in any civil proceeding brought by the United States pursuant to this section).
- **18 USCA § 3118 Implied consent for certain tests** (applying in special maritime and territorial jurisdictions, allows a person's refusal to submit to sobriety tests to be admitted into evidence in any case arising from that person's driving under the influence in such jurisdiction).
- **18 USCA § 3504 Litigation concerning sources of evidence** (pertaining to proceedings to determined the admissibility of evidence, provides that where the evidence is alleged to be a product of an unlawful act, disclosure of the information contained in the evidence shall not be required unless relevant).
- **20 USCA § 1234 Office of Administrative Law Judges (Education)** (bearing on Evidence Rule 408, provides that conduct or statements made in compromise negotiations is inadmissible in proceedings before the Office of Administrative Law Judges).

- **26 USCA § 6103 Confidentiality and disclosure of returns and return information (IRC)** (bearing on privileges and authenticity, provides: (1) returns shall not be admissible in proceedings pursuant to this section if such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation; and (2) a reproduction of a return or documents shall be admissible in any judicial or administrative proceedings as if it were the original).
- **28 USCA § 2245 Certificate of trial judge admissible in evidence (Habeas Corpus Proceedings)** (provides that the certificate, setting forth the facts of the petitioner's trial, made by the presiding judge shall be admissible in evidence in habeas corpus proceedings).
- **28 USCA § 2247 Documentary evidence (Habeas Corpus Proceedings)** (provides that transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony shall be admissible in habeas corpus proceedings).
- **28 USCA § 2639 Burden of proof; evidence of value (Court of International Trade)** (bearing on hearsay and records, provides that reports or depositions of consuls, customs officers and others as provided, as well as relevant and authenticated price lists and catalogs, are admissible in any civil action in the Court of International Trade where the value of merchandise is in issue).
- **42 USCA § 666 Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement (Social Security)** (bearing on expert testimony, lists requirements for the admissibility of genetic testing in a child support enforcement proceeding).

- **47 USCA § 223 Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications** (provides that the use of measures to restrict access shall be admissible in criminal proceedings involving sexually offensive communications online).

STATUTES PROVIDING THAT THE RULES OF EVIDENCE ARE NOT APPLICABLE TO CERTAIN TYPES OF PROCEEDINGS

- **5 USCA § 579 Arbitration proceedings** (bearing on all rules, provides that *any* oral or documentary evidence is admissible, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded).
- **8 USCA § 1254 Suspension of deportation** (permits the Attorney General to consider "any credible evidence relevant to the application" when making a determination on whether to suspend the deportation of certain aliens).
- **16 USCA § 825g Hearings; rules of procedure (Licensees and Public Utilities)** (provides that the Rules of Evidence do not apply to proceedings pursuant to this chapter).
- **18 USCA § 1467 Criminal forfeiture (Obscenity)** (allows the court to consider, at hearings pursuant to this section, evidence that would be inadmissible under the Federal Rules).
- **18 USCA § 1512 Tampering with a witness, victim, or an informant** (allows the court to consider, at prosecutions pursuant to this section, inadmissible or privileged evidence).
- **18 USCA § 1736 Restrictive use of information (Postal Service)** (bearing on admissions, provides that compliance with 39 USCA § 3010 shall not be considered as an admission or used against a person in a criminal proceeding, except as provided).
- **18 USCA § 1963 Criminal penalties (RICO)** (permits the court to consider, at hearings pursuant to this section, evidence that would be inadmissible under the Federal Rules).
- **18 USCA § 2253 Criminal forfeiture (Sexual Exploitation and Other Abuse of Children)** (permits the court to consider, at hearings pursuant to this section, evidence that would be inadmissible under the Federal Rules).
- **18 USCA § 3142 Release or detention of a defendant pending trial** (provides that the Rule of Evidence do not apply to such hearings).
- **18 USCA § 3593 Special hearing to determine whether a sentence of death is justified** (provides that the Rules of Evidence do not apply to such hearings, however, information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury).
- **21 USCA § 848 Continuing criminal enterprise (Drug Abuse Prevention and Control)** (bearing on all rules, provides that information relevant to mitigating or aggravating factors may be considered, regardless of its admissibility under the Rules, at sentencing hearings pursuant to this section, however, information may be excluded if its probative valued is substantially outweighed by the danger of unfair prejudice, confusion or misleading the jury).
- **21 USCA § 853 Criminal forfeitures (Drug Abuse Prevention and Control)** (provides that the court may consider evidence, at forfeiture hearings pursuant to this section, that would be inadmissible under the Federal Rules).

- **22 USCA § 4136 Foreign Service Grievance Board procedures** (bearing on all rules, provides that any oral or documentary evidence may be received, except irrelevant, immaterial or unduly repetitious evidence shall be excluded, in any hearing held by the Board).
- **42 USCA § 405 Evidence, procedure, and certification for payments (Social Security)** (provides that the Federal Rules are inapplicable to hearings before the Commissioner of Social Security).
- **42 USCA § 1383 Procedure for payment of benefits (Social Security)** (provides that the Federal Rules are inapplicable to hearings before the Commissioner of Social Security).
- **42 USCA § 1395oo Provider Reimbursement Review Board (Social Security)** (provides that the Federal Rules are inapplicable to hearings pursuant to this section).
- **42 USCA § 11112 Standards for professional review actions** (provides that evidence may be considered in hearings reviewing the professional conduct of a physician, regardless of its admissibility under the Federal Rules).

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Agenda Item IV D

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Outmoded and/or incorrect Advisory Committee Notes
Date: February 20, 1997

At the November, 1996 meeting of the Committee, the question arose whether the original Advisory Committee notes could be revised or updated by the Committee, in order to correct obsolescences or inaccuracies. I was asked to bring the issue up with the Reporters of the other Advisory Committees. I did so at the meeting of the Standing Committee in January, 1997. It was the unanimous and vociferous view of all of the other Reporters that original Advisory Committee Notes are legislative history that cannot be changed retroactively. The Reporters were also of the view that the Advisory Committees are not in the business of being Treatise writers.

I brought up the possibility of reenacting the Federal Rules of Evidence with a whole new set of Advisory Committee notes. The other Reporters were unanimously of the view that this would be a Herculean task not worth the effort. It would also, in their view, be impossible to do outside the ordinary three-year rulemaking process. Moreover, a reenactment might create the possibility of, or arguments for, a line-by-line review and reworking of the entirety of the FRE--something that I believe is beyond the mission of the Committee.

Given this unanimous view of the Reporters, I decided to investigate a less onerous alternative--one that was discussed at the November meeting of this Committee. I obtained from John Rabiej a list of all official publishers of the Federal Rules of Evidence. If the Committee approves, I will write each of them a letter asking whether they might be interested in inserting editorial comments to correct the misstatements and obsolescences that are currently in the Advisory Committee Notes. If the Committee approves of this solution, we will have to decide just where the problem areas are, and whether the editorial comments are to be prepared by and attributed to the Advisory Committee.

There are two possible means of providing editorial

comments, without having to reinvent the wheel. One is to simply ask the publishers to include the Federal Judicial Center Notes to each Rule. These notes indicate how the Supreme Court version of the Rule was changed by Congress. A sample FJC note is attached to this memorandum. One possible problem with this solution is that it is sometimes hard to work through the general FJC note and apply it to each of the specific statements in the Advisory Committee Note.

Another solution is to lift the editorial comments from the Federal Rules of Evidence Manual. Sample pages from the Manual are attached to this memorandum. These editorial comments are spread throughout the Advisory Committee Notes, telling the readers just what principles became outmoded after Congressional action. It is for the Committee to decide which is the better approach.

Proposed Sample Letter to Publishers of the Federal Rules of Evidence

Dear ---:

I am the Reporter to the Judicial Conference's Advisory Committee on the Federal Rules of Evidence. The Committee has expressed some concern that a few of the original Advisory Committee Notes to the Federal Rules of Evidence, which you publish together with the Rules, are misleading in some respects. In the Committee's view, this could constitute a trap for the unwary.

The major reason why a lawyer might be misled by relying on the unedited Advisory Committee Notes is that some of the Rules proposed by the Advisory Committee were substantially changed by Congress. The Advisory Committee Notes provide comment on the Advisory Committee draft. Where the Rule was either changed or abrogated by Congress, there is room for confusion. For example, the Advisory Committee Note to Rule 804(b)(1) provides comment on a version of the Rule that is broader than that actually adopted by Congress. There are also references throughout the Notes, such as in Rule 301, to Rules that were never adopted by Congress.

We believe that any possible misconception left by any of the original Advisory Committee Notes can be clarified through the use of short editorial comments at the end of each provision that is currently misleading . If you are interested in including such comments in your publication of the Rules, the Committee would be interested in providing them. The best way to do this, we believe, would be for you to send us proof pages that we could mark up with short comments where appropriate. These notes, we believe, should be styled as editorial notes rather than as comments from this Committee.

If you are interested in this proposal, please call, mail, or e-mail me. Thank you for your consideration.

Reporter's Comment--The letter would be changed accordingly if the Committee were to decide that inclusion of the FJC notes is the better approach.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, 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.

(As amended P.L. 94–149, § 1(12), (13), Dec. 12, 1975, 89 Stat. 806; Mar. 2, 1987, eff. Oct. 1, 1987; Nov. 18, 1988, P.L. 100–690, Title VII, § 7075(b), 102 Stat. 4405.)

Section references, McCormick 4th ed.

Generally, § 253, § 326

(a). § 253

(b). § 320

(1). § 301, § 302, § 303, § 304, § 308

(2). § 310, § 311, § 312, § 313, § 315

(3). § 254, § 316, § 317, § 318, § 319, § 271

(4). § 322

(5). § 324, § 324.3, § 353

Note by Federal Judicial Center

The rule prescribed by the Supreme Court was amended by the Congress in a number of respects as follows:

Subdivision (a). Paragraphs (1) and (2) were amended by substituting "court" in place of "judge," and paragraph (5) was amended by inserting "(or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)".

Subdivision (b). Exception (1) was amended by inserting "the same or" after "course of," and by substituting the phrase "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" in place of "at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered."

Exception (2) as prescribed by the Supreme Court, dealing with statements of recent perception, was deleted by the Congress.

. . . Exception (2) as enacted by the Congress is Exception (3) prescribed by the Supreme Court, amended by inserting at the beginning, "In a prosecution for homicide or in a civil action or proceeding".

Exception (3) as enacted by the Congress is Exception (4) prescribed by the Supreme Court, amended in the first sentence by deleting, after "another," the phrase "or to make him an object of hatred, ridicule, or disgrace," and amended in the second sentence by substituting, after "unless," the phrase, "corroborating circumstances clearly indicate the trustworthiness of the statement," in place of "corroborated."

Exception (4) as enacted by the Congress is Exception (5) prescribed by the Supreme Court without change.

Exception (5) as enacted by the Congress is Exception (6) prescribed by the Supreme Court, amended by substituting "equivalent" in place of "comparable" and by adding all after "trustworthiness."

Advisory Committee's Note

56 F.R.D. 183, 322

As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803.

Subdivision (a). The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explications of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in McCormick §§ 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5). See Rule 45(e) of the Federal Rules of Civil Procedure and Rule 17(e) of the Federal Rules of Criminal Procedure.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). Wyatt v. State, 35 Ala.App. 147, 46 So.2d 837 (1950); State v. Stewart, 85 Kan. 404, 116 P. 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); California Evidence Code § 240(a)(1); Kansas Code of Civil Procedure § 60–459(g)(1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. Johnson v. People, 152 Colo. 586, 384 P.2d 454 (1963); People v. Pickett, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). Contra, Pleau v. State, 255 Wis. 362, 38 N.W.2d 496 (1949).

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is

FEDERAL RULES OF EVIDENCE MANUAL, SAMPLE PAGES

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. Johnson v. People, 152 Colo. 586, 384 P.2d 454 (1963); People v. Pickett, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). Contra, Pleau v. State, 255 Wis. 362, 38 N.W.2d 496 (1949).

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

(4) Death and infirmity find general recognition as grounds. McCormick §§ 234, 257, 297; Uniform Rule 62(7)(c); California Evidence Code § 240(a)(3); Kansas Code of Civil Procedure § 60-459(g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in Rule 32(a)(3) of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Rules of Criminal Procedure.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. McCormick § 234; Uniform Rule 62(7)(d) and (e); California Evidence Code § 240(a)(4) and (5); Kansas Code of Civil Procedure § 60-459(g)(4) and (5); New Jersey Rule 62(6)(b) and (d). See the discussion of procuring attendance of witnesses who are nonresidents or in custody in Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant.

Subdivision (b). Rule 803 *supra* is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

Exception (1). Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803 *supra*. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now

offered is the one *against* whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e., by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCormick § 246, pp. 526-27; 4 Wigmore § 1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L. Rev. 651, n.1 (1963); McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.* Testimony given at a preliminary hearing was held in California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra*, at 652; McCormick § 232, pp. 487-88. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. The position is supported by modern decisions. McCormick § 232, pp. 489-90; 5 Wigmore § 1388. [This approach was rejected by the Congress. — Ed.]

Provisions of the same tenor will be found in Uniform Rule 63(3)(b); California Evidence Code §§ 1290-1292; Kansas Code of Civil Procedure § 60-460(c)(2); New Jersey Evidence Rule 63(3). Unlike the rule, the latter three provide either that former testimony is not admissible if the right of confrontation is denied or that it is not admissible if the accused was not a party to the prior hearing. The genesis of these limitations is a caveat in Uniform Rule 63(3) Comment that use of former testimony against an accused may violate his right of confrontation. Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895), held that the right was not violated by the government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the question (1) whether direct and redirect are equivalent to cross-examination for purposes of confrontation, (2) whether testimony given in a different proceeding is acceptable, and (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose. Professor Falknor concluded that, if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend against confrontation. Falknor, *supra*, at 659-60. The constitutional acceptability of dying declarations has often been conceded. Mattox v. United States, 156 U.S. 237, 243, 15 S. Ct. 337,

39 L. Ed. 409 (1895); Kirby v. United States, 174 U.S. 47, 61, 19 S. Ct. 574, 43 L. Ed. 890 (1899); Pointer v. Texas, 380 U.S. 400, 407, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[The Advisory Committee's Note accompanying proposed, but not enacted, exception (b)(2) ("statement of recent perception") is found in Part Five *infra*. We have renumbered the remainder of the headings to conform to the Rules as enacted. — Ed.]

Exception (2). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52-1-20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 223, n. 4. Kansas by decision extended the exception to civil cases. Thurston v. Fritz, 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602. [The Congress adopted a more limited exception. — Ed.]

Comparable provisions are found in Uniform Rule 63(5); California Evidence Code § 1242; Kansas Code of Civil Procedure § 60-460(e); New Jersey Evidence Rule 63(5).

Exception (3). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. Highman v. Ridgway, 10 East 109, 103 Eng. Rep. 717 (K.B. 1808); Reg. v. Overseers of Birmingham, 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861); McCormick § 256, p. 551, nn.2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548-49. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in Donnelly v. United States, 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact

of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377 (1964); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J. Super. 522, 163 A.2d 465 (1960); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication. [The Congress adopted a more limited exception. — Ed.]

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965), and Bruton v. United States, 389 U.S. 818, 88 S. Ct. 126, 19 L. Ed. 2d 70 (1967), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

The balancing of self-serving against disserving aspects of a declaration is discussed in McCormick § 256.

For comparable provisions, see Uniform Rule 63(10); California Evidence Code § 1230; Kansas Code of Civil Procedure § 60-460(j); New Jersey Evidence Rule 63(10).

Exception (4). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i) specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii) deals with declarations concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. *Id.* § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. *Id.* § 1491.

For comparable provisions, see Uniform Rule 63(23), (24), (25); California Evidence Code §§ 1310, 1311; Kansas Code of Civil Procedure § 60-460(u), (v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

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Agenda Item V A

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

February 20, 1997
Via Facsimile

MEMORANDUM TO JUDGES JENSEN AND SMITH

SUBJECT: *Forfeiture Proceedings in Comprehensive Crime Act*

I am attaching section 314 of the Omnibus Crime Control Act of 1997 (S. 3), which creates a federal offense prohibiting chemical weapons. A major part of the section sets up an elaborate criminal forfeiture process. In the past, we have not commented on legislative bills that set up separate forfeiture proceedings for distinct offenses. But you may wish to consider commenting on it for this bill.

First, the bill could be used as precedent for future expansion regarding other offenses which may be at odds with proposals under the Criminal Rules Committee's consideration. For example, a third party has no right to a jury for claims to the forfeitable property in this bill. In addition, if a rule amendment, which sets up a uniform criminal forfeiture proceeding, is proposed by the Criminal Rules Committee, we would have to consider whether it supersedes section 314. In the event, it may be wise to alert Congress to this possibility.

Section 314 also exempts the forfeiture proceedings from the Federal Rules of Evidence and directly amends Rule 1101(d)(3). The Evidence Rules Committee had considered, but deferred, explicitly extending the evidence rules to forfeiture proceedings.

The agency is considering its response to Congress on the many judiciary-related provisions contained in the bill, including the rules-related provisions. We are still exploring whether a single comprehensive letter from Judge Kazen, chair of the Criminal Law Committee, or individual letters from the Conference committees should be sent to the Hill. Hearings and serious consideration of this bill will not

occur sooner than the summer. But we may want to present our position early in the game.

I am also sending to you section 602, which amends Criminal Rule 35(b). It is virtually identical to section 821 in the same bill. Apparently Congress really wants this one.

JKR

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor David A. Schlueter
Professor Daniel J. Capra
Professor Daniel R. Coquillette

"(3) DEATH.—Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person, including any public safety officer performing duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life, fined under this title, or both.".

SEC. 314. CHEMICAL WEAPONS RESTRICTIONS.

(a) IN GENERAL.—Section 2332c of title 18, United States Code, is amended—

(1) in subsection (a), by inserting after paragraph (2) the following:

"(3) RESTRICTIONS.—

"(A) IN GENERAL.—Whoever without lawful authority knowingly develops, produces, acquires, stockpiles, retains, transfers, owns, or possesses any chemical weapon, or knowingly assists, encourages or induces any person to do so, or attempts or conspires to do so, shall be punished under paragraph (2).

"(B) JURISDICTION.—The United States has jurisdiction over an offense under this paragraph if—

"(i) the prohibited activity takes place in the United States; or

"(ii) the prohibited activity takes place outside the United States and is committed by a national of the United States.

"(C) ADDITIONAL PENALTY.—The court shall order any person convicted of an offense under this paragraph to pay to the United States any expenses incurred incident to the seizure, storage, handling, transportation, and destruction or other disposition of property seized for violation of this section.";

(2) by adding at the end the following:

"(c) CRIMINAL FORFEITURE.—

"(1) PROPERTY SUBJECT TO CRIMINAL FORFEITURE.—A person who is convicted of an offense under this section shall forfeit to the United States the interest of that person in—

"(A) any chemical weapon, including any component thereof;

"(B) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and

"(C) any property, real or personal, used or intended to be used to commit or to promote the commission of the offense.

"(2) THIRD PARTY TRANSFERS.—

"(A) IN GENERAL.—All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section.

"(B) FORFEITURE.—Except as provided in subparagraph (C), any property referred to in subparagraph (A) that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States.

"(C) EXCEPTION.—The property referred to in subparagraph (B) shall not be ordered forfeited if the transferee establishes in a hearing conducted pursuant to subsection (l) that the party is a bona fide purchaser for value of such property who, at the time of purchase, was reasonably without cause to believe that the property was subject to forfeiture under this section.

"(3) PROTECTIVE ORDERS.—

"(A) IN GENERAL.—Upon application of the United States, the court may enter a restraining order or injunction, require the execu-

tion of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

"(i) upon the filing of an indictment or information—

"(I) charging a violation of this chapter for which criminal forfeiture may be ordered under this section; and

"(II) alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

"(ii) prior to the filing of an indictment or information referred to in clause (i), if, after providing notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

"(I) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in

the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

"(II) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered;

except that an order entered pursuant to subparagraph (B) shall be effective for a period not to exceed 90 days, unless extended by the court for good cause shown or unless an indictment or information described in this subparagraph has been filed.

"(B) TEMPORARY RESTRAINING ORDERS.—

"(i) IN GENERAL.—A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the

property, if the United States demonstrates that there is probable cause to believe that—

"(I) the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; and

"(II)(aa) exigent circumstances exist that place the life or health of any person in danger; or

"(bb) that provision of notice will jeopardize the availability of the property for forfeiture.

"(ii) EXPIRATION.—A temporary restraining order described in clause (i) shall expire not later than 10 days after the date on which the order is entered, unless—

"(I) the order is extended for good cause shown; or

"(II) the party against whom it is entered consents to an extension for a longer period.

"(iii) HEARING.—A hearing requested concerning an order entered under this

paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

"(C) INAPPLICABILITY OF FEDERAL RULES OF EVIDENCE.—The court may receive and consider, at a hearing held pursuant to this paragraph, evidence and information that would otherwise be inadmissible under the Federal Rules of Evidence.

"(d) WARRANT OF SEIZURE.—

"(1) IN GENERAL.—The Government of the United States may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant.

"(2) DETERMINATIONS BY COURT.—The court shall issue a warrant authorizing the seizure of the property referred to in paragraph (1) if the court determines that there is probable cause to believe that—

"(A) the property to be seized would, in the event of conviction, be subject to forfeiture; and

"(B) an order under subsection (c) may not be sufficient to ensure the availability of the property for forfeiture.

"(e) ORDER OF FORFEITURE.—The court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, by a preponderance of the evidence, that the property is subject to forfeiture.

"(f) EXECUTION.—

"(1) IN GENERAL.—Upon entry of an order of forfeiture or temporary restraining order under this section, the court shall authorize the Attorney General to seize all property ordered forfeited or restrained on such terms and conditions as the court determines to be appropriate.

"(2) ACTIONS BY COURT.—Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited.

"(3) OFFSET.—Any income accruing to or derived from property ordered forfeited under this sec-

tion may be used to offset ordinary and necessary expenses to the property that—

"(A) are required by law; or

"(B) are necessary to protect the interests of the United States or third parties.

"(g) DISPOSITION OF PROPERTY.—

"(1) IN GENERAL.—Following the seizure of property ordered forfeited under this section, the Attorney General shall, making due provision for the rights of any innocent persons—

"(A) destroy or retain for official use any article described in paragraph (1) of subsection (a); and

"(B) retain for official use or direct the disposition of any property described in paragraph (2) or (3) of subsection (a) by sale or any other commercially feasible means.

"(2) REVERSION PROHIBITED.—With respect to the forfeiture, any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with the defendant or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States.

"(3) RESTRAINT OF SALE OR DISPOSITION.—Upon application of a person, other than the defendant or person acting in concert with the defendant or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to the applicant.

"(h) AUTHORITY OF ATTORNEY GENERAL.—With respect to property ordered forfeited under this section, the Attorney General may—

"(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this section, or take any other action to protect the rights of innocent persons that—

"(A) is in the interest of justice; and

"(B) is not inconsistent with this section;

"(2) compromise claims arising under this section;

"(3) award compensation to persons providing information resulting in a forfeiture under this section;

"(4) direct the disposition by the United States, under section 616 of the Tariff Act of 1930 (19 U.S.C. 1616a), of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

"(5) take such appropriate measures as are necessary to safeguard and maintain property ordered forfeited under this section pending the disposition of that property.

"(i) BAR ON INTERVENTION.—Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

"(1) intervene in a trial or appeal of a criminal case involving the forfeiture of that property under this section; or

"(2) commence an action at law or equity against the United States concerning the validity of the alleged interest of that party in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

"(j) JURISDICTION TO ENTER ORDERS.—Each district court of the United States shall have jurisdiction to

enter an order of forfeiture under this section without regard to the location of any property that—

"(1) may be subject to forfeiture under this section; or

"(2) has been ordered forfeited under this section.

"(k) DEPOSITIONS.—In order to facilitate the identification and location of property declared forfeited under this section and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States under this section, the court may, upon application of the United States, order that—

"(1) the testimony of any witness relating to the property forfeited be taken by deposition; and

"(2) any designated book, paper, document, record, recording, or other material that is not privileged be produced at the same time and place, and in the same manner, as provided for the taking of depositions under rule 15 of the Federal Rules of Criminal Procedure.

"(l) THIRD PARTY INTERESTS.—

"(1) IN GENERAL.—

"(A) NOTICE.—Following the entry of an order of forfeiture under this section, the Unit-

ed States Government shall publish notice of the order and of the intent of the Government to dispose of the property in such manner as the Attorney General may direct.

"(B) DIRECT WRITTEN NOTICE.—In addition to providing the notice described in subparagraph (A), the Government may, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

"(2) PETITION BY PERSON OTHER THAN DEFENDANT.—

"(A) IN GENERAL.—Any person, other than the defendant, who asserts a legal interest in property that has been ordered forfeited to the United States pursuant to this section may petition the court for a hearing to adjudicate the validity of his alleged interest in the property not later than the earlier of—

"(i) the date that is 30 days after the final publication of notice; or

"(ii) the date that is 30 days after the receipt of notice by the person under paragraph (1).

"(B) REQUIREMENTS FOR HEARING.—A hearing described in subparagraph (A) shall be held before the court without a jury.

"(3) REQUIREMENTS FOR PETITION.—A petition referred to in paragraph (2) shall—

"(A) be signed by the petitioner under penalty of perjury; and

"(B) set forth—

"(i) the nature and extent of the petitioner's right, title, or interest in the property;

"(ii) the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property;

"(iii) the relief sought; and

"(iv) any additional facts supporting the petitioner's claim.

"(4) DATE; CONSOLIDATION.—

"(A) DATE OF HEARING.—The hearing on a petition referred to in paragraph (2) shall, to the extent practicable and consistent with the

interests of justice, be held not later than 30 days after the filing of the petition.

"(B) CONSOLIDATION.—The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

"(5) ACTIONS AT HEARINGS.—

"(A) IN GENERAL.—At a hearing referred to in paragraph (4)—

"(i) the petitioner may testify and present evidence and witnesses on his or her own behalf, and cross-examine witnesses who appear at the hearing; and

"(ii) the Government may present evidence and witnesses in rebuttal and in defense of its claim to the property that is the subject and cross-examine witnesses who appear at the hearing.

"(B) CONSIDERATION BY COURT.—In addition to considering testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case that resulted in the order of forfeiture.

"(6) AMENDMENT OF ORDER OF FORFEITURE.—If, after holding a hearing under this subsection, the court determines that a petitioner has established by a preponderance of the evidence that—

"(A)(i) the petitioner has a legal right, title, or interest in the property that is the subject of the hearing; and

"(ii) that right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest—

"(I) was vested in the petitioner rather than the defendant; or

"(II) was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

"(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

"(7) ACTIONS OF COURT AFTER DISPOSITION OF PETITION.—After the disposition of the court of all petitions filed under this subsection, or if no such petitions are filed after the expiration of the period specified in paragraph (2), the United States—

"(A) shall have clear title to property that is the subject of the order of forfeiture; and

"(B) may warrant good title to any subsequent purchaser or transferee.

"(m) CONSTRUCTION.—This section shall be liberally construed in such manner as to effectuate the remedial purposes of this section.

"(n) SUBSTITUTE ASSETS.—

"(1) IN GENERAL.—In accordance with paragraph (2), the court shall order the forfeiture of property of a defendant other than property described in subsection (a) if, as a result of an act or omission of the defendant, any of the property of the defendant that is described in subsection (a)—

"(A) cannot be located upon the exercise of due diligence;

"(B) has been transferred or sold to, or deposited with, a third party;

"(C) has been placed beyond the jurisdiction of the court;

"(D) has been substantially diminished in value; or

"(E) has been commingled with other property which cannot be divided without difficulty.

"(2) VALUE OF PROPERTY.—The value of any property subject to forfeiture under paragraph (1) shall not exceed the value of property of the defendant with respect to which subparagraph (A), (B), (C), (D), or (E) of paragraph (1) applies."; and

(3) by amending the section heading to read as follows:

"SEC. 2332c. USE AND STOCKPILING OF CHEMICAL WEAPONS.".

(b) CONFORMING AMENDMENT TO FEDERAL RULES OF EVIDENCE.—Section 1101(d)(3) of the Federal Rules of Evidence is amended by striking "; and proceedings with respect to release on bail or otherwise" and inserting ", proceedings with respect to release on bail or otherwise; and proceedings under section 2232c(c)(3) of title 18, United States Code (except that the rules with respect to privilege under subsection (c) of this section also shall apply).".

(c) CONFORMING AMENDMENT.—The chapter analysis for chapter 113B of title 18, United States Code, is amended by striking the item relating to section 2332b and inserting the following:

"2332c. Use and stockpiling of chemical weapons.".

Subtitle B—International Terrorism

SEC. 321. MULTILATERAL SANCTIONS.

(a) POLICY ON ESTABLISHMENT OF SANCTIONS REGIMES.—

(1) POLICY.—Congress urges the President to commence immediately after the date of enactment of this Act diplomatic efforts, in appropriate international fora (including the United Nations) and bilaterally, with allies of the United States, to establish, as appropriate, a multilateral sanctions regime against each country that the Secretary of State determines under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) to have repeatedly provided support for acts of international terrorism.

(2) REPORT.—The President shall include in the annual report on patterns of global terrorism prepared under section 143 a description of the extent to which the diplomatic efforts referred to in

and Export Act (21 U.S.C.960(b)(2)(H)) is amended by—

(A) striking "10 grams or more of methamphetamine," and inserting "5 grams or more of methamphetamine,"; and

(B) striking "100 grams or more of a mixture or substance containing a detectable amount of methamphetamine" and inserting "50 grams or more of a mixture or substance containing a detectable amount of methamphetamine".

SEC. 602. REDUCTION OF SENTENCE FOR PROVIDING USEFUL INVESTIGATIVE INFORMATION.

Section 3553(e) of title 18, United States Code, section 994(n) of title 28, United State Code, and Rule 35(b) of the Federal Rules of Criminal Procedure are each amended by striking "substantial assistance in the investigation or prosecution of another person who has committed an offense" and inserting "substantial assistance in an investigation of any offense or substantial assistance in an investigation or prosecution of another person who has committed an offense".

SEC. 603. IMPLEMENTATION OF A SENTENCE OF DEATH.

(a) IN GENERAL.—Section 3596(a) of title 18, United States Code, is amended—

Agenda Item IV B

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-504.3, as follows:

Rule 2-504.3. COMPUTER-GENERATED EVIDENCE AND MATERIAL

(a) Definitions

(1) Computer-Generated Evidence

"Computer-generated evidence" means computer-generated data, a computer-generated illustration, a computer simulation, and electronically-imaged documentary evidence, as those terms are defined in this subsection.

Committee note: The definition of "computer-generated evidence" does not encompass routine videotapes or audiotapes. However, "computer-generated evidence" purposefully has been defined broadly to allow for future technological changes.

(A) "Computer-generated data" means any evidence, other than a computer-generated illustration, a computer simulation, or electronically-imaged documentary evidence, that is:

(i) prepared in anticipation of litigation or for trial;

(ii) intended to be used as substantive evidence or as a basis for expert opinion testimony; and

(iii) stored electronically or generated from information that is stored electronically.

(B) "Computer-generated illustration" means a computer-generated aural, visual, or other sensory aid, including a computer-generated depiction or animation of an event or thing,

that is used to assist a witness by illustrating the witness's testimony and is not offered as substantive evidence.

(C) "Computer simulation" means a mathematical program or model that, when provided with a set of assumptions and parameters, will formulate a conclusion in numeric, graphic, or some other form and that is intended to be used as substantive evidence or as a basis for expert opinion testimony in accordance with Rule 5-703.

(D) "Electronically-imaged documentary evidence" means the image of any document that has been electronically imaged for purposes of presentation at trial as substantive evidence or as a basis for expert opinion testimony in accordance with Rule 5-703, but does not include computer-generated data, a computer-generated illustration, or a computer simulation.

Cross reference: For the meaning of "document," see Rule 2-422 (a).

(2) Computer-Generated Material

As used in section (f) of this Rule and Rule 4-322 (b), "computer-generated material" means a computer-generated presentation, including a depiction or animation, used solely for argument.

(b) Notice

(1) Subject to subsection (b)(2) of this Rule, any party who intends to offer computer-generated evidence at trial for any purpose shall file a written notice that:

(A) contains a descriptive summary of the computer-generated evidence the party intends to use, including (i)

reference by rule number to the definitional subcategory of computer-generated evidence intended to be used, (ii) a description of the subject matter of the computer-generated evidence, and (iii) a statement of what the computer-generated evidence purports to prove or illustrate;

(B) is accompanied by a written undertaking that the party will take all steps necessary to (i) preserve the computer-generated evidence and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (ii) comply with any request by an appellate court for presentation of the computer-generated evidence to that court; and

(C) is filed within the time provided in the scheduling order or no later than 90 days before trial if there is no scheduling order.

(2) Any party who intends to offer computer-generated evidence at trial for purposes of impeachment or rebuttal shall file, whenever practicable, the notice required by subsection (b)(1) of this Rule.

(c) Required Disclosure; Additional Discovery

Within five days after service of the notice required by section (b) of this Rule, the proponent shall make the computer-generated evidence available to any party. Notwithstanding any provision of the scheduling order to the contrary, the filing of a notice of intention to use computer-generated evidence entitles any other party to a reasonable period of time to discover any relevant information needed to oppose the use of the computer-

generated evidence before the court holds the hearing provided for in section (e) of this Rule.

(d) Objection

Not later than 60 days after service of the notice required by section (b) of this Rule, a party may file any then-available objection that the party has to the use at trial of the computer-generated evidence and shall file any objection that is based upon an assertion that the computer-generated evidence does not meet the requirements of Rule 5-901 (b)(9). The mandatory objection based on the alleged failure to meet the requirements of Rule 5-901 (b)(9) is waived if not so filed, unless the court for good cause orders otherwise.

(e) Hearing and Order

If an objection is filed in accordance with section (d) of this Rule, the court shall hold a pretrial hearing to rule on the objection. If the hearing is an evidentiary hearing, the court may appoint an expert or other person that the court deems necessary to enable it to rule on the objection, and the court may assess against one or more parties the reasonable fees and expenses of the person appointed. In ruling on the objection, the court may require modification of the computer-generated evidence and may impose conditions relating to its use at trial. The court's ruling on the objection shall control the subsequent course of the action. If the court rules that the computer-generated evidence may be used at trial, when it is used, (1) the proponent may, but need not, present any evidence that was presented at the hearing on the objection, and (2) the party

objecting to the evidence is not required to re-state an objection made in writing or at the hearing in order to preserve that objection for appeal. If the court excludes or restricts the use of computer-generated evidence, the proponent need not make a subsequent offer of proof in order to preserve that ruling for appeal.

(f) Preservation of Computer-Generated Evidence and Material

The party offering computer-generated evidence or using computer-generated material at any proceeding shall (1) preserve the computer-generated evidence or computer-generated material and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (2) present the computer-generated evidence or computer-generated material to an appellate court upon request.

Committee note: This section requires the proponent of computer-generated evidence or computer-generated material to reduce the computer-generated evidence or material to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence or material and the technology available for preservation of that computer-generated evidence or material. No special arrangements are needed for preservation of computer-generated evidence or material that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer-generated evidence or material. However, when the computer-generated evidence or material involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence or material must make other arrangements for preservation of the computer-generated evidence or material and any subsequent presentation of it that may be required by an appellate court.

Cross reference: For the shortening or extension of time periods set forth in this Rule, see Rule 1-204.

Source: This Rule is new.

REPORTER'S NOTE

Proposed new Rule 2-504.3 reflects several policy determinations by the Rules Committee. The Committee believes that "computer-generated evidence" ("CGE") as that term has been defined in this Rule can be powerful and outcome-determinative. Pretrial disclosure of CGE, early judicial intervention with respect to a determination of objections to the CGE (particularly any objection alleging that the CGE does not meet the requirements of Rule 5-901 (b)(9)), and appropriate preparations for the preservation of CGE for appellate review are essential features of this Rule.

The Visual and Electronic Evidence Subcommittee debated at length the issue of what CGE should comprise. Under section (a), CGE means "computer-generated data, a computer-generated illustration, a computer simulation, and electronically-imaged documentary evidence," as those terms are defined in subsections (a)(1)(A), (B), (C), and (D), respectively. If a party intends to offer any of the four types of CGE at trial, the notice requirement of section (b), the disclosure requirement of section (c), and the evidence preservation requirement of section (f) are triggered. In order to trigger the evidence preservation requirement of section (f) -- but not to trigger the notice and disclosure requirements of sections (b) and (c) -- a definition of "computer-generated material" ("CGM") has been added to the Rule. As defined in subsection (a)(2), CGM means, with respect to evidence preservation requirements, a computer-generated presentation, including a depiction or animation, used solely for argument.

Under section (b), a party intending to offer CGE at trial must file a written notice of that intention within the time allowed under subsection (b)(1)(C). With respect to CGE that a party intends to offer solely for impeachment or rebuttal, the mandatory nature of the notice is tempered by the addition of the phrase "whenever practicable." The notice must state by rule number the definitional subcategory of CGE. This requirement, together with the disclosure requirement set forth in section (c), assists other parties in making informed decisions with respect to the extent of discovery needed and whether to file an objection. For example, CGE that is a computer simulation will often be more closely examined than CGE that cannot be used as substantive evidence or CGE that is merely an unmodified electronic image of other clearly-admissible evidence. Subsection (b)(1)(A) also requires that the notice contain descriptive information concerning the CGE -- its subject matter and a statement of what it purports to prove or illustrate. Subsection (b)(1)(B) requires that a written undertaking be filed with the notice, stating that the party will take all necessary steps to preserve the CGE for appeal and, upon request, present it to an appellate court. The undertaking requirement highlights, at an early stage in the proceedings, the obligation

of the proponent of CGE to preserve and present it in accordance with section (f).

Under section (c), after a party files a notice of intention to offer CGE, the proponent must make the CGE available to other parties, and the other parties have a reasonable period of time to conduct discovery of any relevant information needed to oppose the CGE.

Under section (d), any objection to CGE on the ground that the CGE does not meet the requirements of Rule 5-901 (b)(9) must be filed no later than 60 days after service of the notice required by section (b). Objections on this ground are waived unless timely made in accordance with this Rule. Objections on other grounds also may be made at this time. The Committee recognizes that some objections, such as certain objections based on relevancy, may not be capable of pretrial determination within the time frame set forth in this Rule and, therefore, may be made at any appropriate time, including with a motion in limine or during the trial.

The filing of an objection pursuant to section (d) triggers a pretrial hearing under section (e). If the court conducts an evidentiary hearing, it may appoint an expert or other person to assist the court with the assessment of the CGE. Because the Committee was concerned that disparate resources of the parties could lead to the use of CGE that does not meet even minimum standards of authenticity under Rule 5-901 (b)(9), a provision is included in section (e) that allows the court to assess among the parties the reasonable fees and expenses of persons so appointed. Section (e) also includes provisions that allow the court the option of ordering modification of the CGE or imposition of conditions to the use of the CGE, rather than outright rejection of CGE. Although the Rule allows a judge to order curative measures with respect to the CGE, there is no requirement or duty imposed on the judge to do so. Section (e), using language borrowed from Rule 2-504.2 (c), states that the court's ruling on the objection controls the subsequent course of the action. At trial, the parties are not required to repeat a foundation laid or to restate and relitigate objections raised at the pretrial stage, but neither are they precluded from introducing evidence relevant to the CGE's authenticity or the weight to be given to the CGE. Also, in order to preserve for appeal a pretrial ruling that excludes or restricts the use of CGE, it is not necessary for the proponent of the CGE to make an offer of proof at trial.

Section (f) requires the party offering CGE or using CGM at any pretrial or trial proceeding to preserve and furnish the CGE or CGM to the clerk in a manner suitable for transmittal as a part of the record on appeal and to comply with any request by an appellate court to have the CGE or CGM presented to the appellate court. A Committee note describes acceptable methods of preservation. The Committee believes that the preservation issue

will become less of a problem after this Rule is adopted because vendors of CGE and CGM will include preservation of the CGE and CGM as part of the package they sell. The Committee intentionally omitted from the Rule any mention of sanctions if a party fails to properly preserve CGE or CGM for appeal. If the failure becomes apparent at the trial court level, the implicit sanction is that the trial judge will prohibit use of the CGE or CGM. If the failure becomes apparent at the appellate level, the appellate court can order appropriate discretionary consequences in accordance with Rule 1-201 (a).

A cross reference to Rule 1-204 (Motion to Shorten or Extend Time Requirements) follows the Rule. The Committee believes that the complex technical issues that arise with respect to some CGE may preclude adherence to strict timetables in some cases.

Because this is a Title 2 Rule, it is applicable only to civil cases, in a circuit court. The Subcommittee considered, and rejected, a comparable Title 4 Rule applicable to criminal proceedings. The Subcommittee believes that such a rule is not feasible because of (1) the time constraints that exist in criminal proceedings as a result of the defendant's Constitutional right to a speedy trial and Rule 4-271 (a), (2) the Constitutional issues surrounding mandatory disclosures from a criminal defendant, and (3) a process of discovery in criminal proceedings that does not contemplate a procedure as detailed as the approach set forth in proposed new Rule 2-504.3. However, the Subcommittee does recommend amendments to Rule 4-263 with respect to disclosure of CGE and amendments to Rule 4-322 with respect to preservation of CGE and CGM.

No changes are recommended to the Title 3 Rules. The use of CGE and CGM in the District Court, at this time, is not a common occurrence, although the Committee recognizes that with advances in technology, CGE and CGM in the form of affordable "canned" programs depicting automobile accidents, bodily injuries, etc. could become more prevalent in the District Court. However, given the limited jurisdiction of the District Court, the volume of cases heard, the time constraints on trials, the absence of jury trials, and the limited discovery available, amendments to the Title 3 Rules with respect to CGE and CGM are not recommended at this time.

The Committee also considered the evidentiary issues raised in a Memorandum from Professor Lynn McLain dated June 6, 1996 (included in the materials for the September 6, 1996 meeting of the Rules Committee). The Committee believes that the Title 5 Rules in their current form are sufficient to handle CGE issues. The Subcommittee suggests that CGE evidentiary issues, such as foundation requirements and hidden hearsay problems, should be the subject of legal and judicial educational programs.

The Subcommittee has considered recommendations as to jury instructions pertaining to CGE and whether Rules 2-521 and 4-326 should be amended to specify the circumstances under which CGE may be taken to the jury room. A memorandum concerning those topics was included in the materials for the November 15, 1996 meeting of the Rules Committee. However, jury instructions are not within the bailiwick of the Rules Committee and the Committee is not recommending any amendment to Rules 2-521 and 4-326 at this time.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 to add a certain provision concerning computer-generated evidence to the required contents of a scheduling order, as follows:

Rule 2-504. SCHEDULING ORDER

. . .

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule 16-202;

(B) one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402 (e)(1)(A);

(C) one or more dates by which each party shall file the notice required by Rule 2-504.3 (b) concerning computer-generated evidence;

[(C)] (D) a date by which all discovery must be completed;

[(D)] (E) a date by which all dispositive motions must be filed; and

[(E)] (F) any other matter resolved at a scheduling

conference held pursuant to Rule 2-504.1.

. . .

REPORTER'S NOTE

This amendment to Rule 2-504 is proposed in light of proposed new Rule 2-504.3 (b), which specifies that the notice of a party's intention to use computer-generated evidence must be filed "within the time provided in the scheduling order or no later than 90 days prior to trial if there is no scheduling order."

MARYLAND RULES OF PROCEDURE

TITLE 2 — CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 — TRIAL

AMEND Rule 2-504.1 to require a scheduling conference in any action in which an objection to the use of computer-generated evidence is filed in accordance with Rule 2-504.3 (d), as follows:

Rule 2-504.1. SCHEDULING CONFERENCE

(a) When Required

The court shall issue an order requiring the parties to attend a scheduling conference:

(1) in any action placed or likely to be placed in a scheduling category for which the case management plan adopted pursuant to Rule 16-202 b requires a scheduling conference; [or]

(2) in any action in which an objection to computer-generated evidence is filed in accordance with Rule 2-504.3 (d); or

[(2)] (3) in any action, upon request of a party stating that, despite a good faith effort, the parties have been unable to reach an agreement (i) on a plan for the scheduling and completion of discovery, (ii) on the proposal of any party to pursue an available and appropriate form of alternative dispute resolution, or (iii) on any other matter eligible for inclusion in a scheduling order under Rule 2-504.

. . .

REPORTER'S NOTE

This amendment to Rule 2-504.1 is proposed because the Committee believes that if an objection to the use of computer-generated evidence is filed in a case in accordance with Rule 2-504.3, the case is probably somewhat complex and a required scheduling conference would be helpful in the management of the case.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to add certain disclosure requirements concerning computer simulations and other computer-generated evidence, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

. . .

(b) Disclosure Upon Request

Upon request of the defendant, the State's Attorney shall:

. . .

(4) Reports or Statements of Experts

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, [or] comparison, or computer simulation, and furnish the defendant with the substance of any such oral report and conclusion;

Cross reference: For the definition of "computer simulation," see Rule 2-504.3 (a).

(5) Evidence for Use at Trial

Produce and permit the defendant to inspect, copy, and photograph any documents (including any computer-generated

evidence that is a document under Rule 2-422 (a)), recordings, photographs, or other tangible things that the State intends to use at the hearing or trial;

Cross reference: For the definition of "computer-generated evidence," see Rule 2-504.3 (a).

. . .

(d) Discovery by the State

Upon the request of the State, the defendant shall:

. . .

(2) Reports of Experts

Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, [or] comparison, or computer simulation, and furnish the State with the substance of any such oral report and conclusion;

Cross reference: For the definition of "computer simulation," see Rule 2-504.3 (a).

. . .

REPORTER'S NOTE

The proposed amendment to Rule 4-263 adds disclosure requirements concerning computer simulations to subsections (b)(4) and (d)(2). The amendment also specifically includes computer-generated evidence that is a "document," within the meaning of that term set forth in Rule 2-422 (a), as a "document" that must be disclosed in accordance with subsection (b)(5).

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-322 to add certain provisions concerning the preservation of computer-generated evidence and computer-generated material, as follows:

Rule 4-322. EXHIBITS

(a) Generally

All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall form part of the record and, unless the court orders otherwise, shall remain in the custody of the clerk. With leave of court, a party may substitute a photograph or copy of any exhibit.

Cross reference: Rule 16-306.

(b) Preservation of Computer-Generated Evidence and Material

The party offering computer-generated evidence or using computer-generated material at any proceeding shall (1) preserve the computer-generated evidence or computer-generated material and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (2) present the computer-generated evidence or computer-generated material to an appellate court upon request.

Cross reference: For the definitions of "computer-generated evidence" and "computer-generated material," see Rule 2-504.3.

Committee note: This section requires the proponent of computer-generated evidence or computer-generated material to reduce the computer-generated evidence or material to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence or material and the technology available for preservation of that computer-generated evidence or material. No special arrangements are needed for preservation of computer-generated evidence or material that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer generated evidence or material. However, when the computer-generated evidence or material involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence or material must make other arrangements for preservation of the computer-generated evidence or material and any subsequent presentation of it that may be required by an appellate court.

. . .

REPORTER'S NOTE

The proposed amendment to Rule 4-322 adds a new section (b) concerning the preservation of computer-generated evidence and computer-generated material. The new section and Committee note are taken verbatim from section (f) of proposed new Rule 2-504.3. A cross reference to that Rule is also proposed.

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Agenda Item IV C

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: "O.J." Hearsay Exception
Date: February 17, 1997

Before I was appointed Reporter, the Committee discussed the advisability of amending the Federal Rules to include what was referred to in the minutes as the "O.J." exception. This memorandum is to inform you that the Uniform Rules Committee is considering a proposal along those lines. The memorandum sets forth and comments upon the Uniform Rules proposal; sets forth and comments upon the California rule adopted in response to the Simpson case; and finally describes current law on this subject under the Federal Rules.

Uniform Rules Proposal

The Uniform Rules Proposal would add the following exception as a new Rule 803(3), moving the old state of mind exception to another number. Here is the text of the proposal:

> ***Statement of declarant implicating defendant.*** *A statement made by the declarant which implicates the defendant in criminal behavior harmful to the declarant or in which the declarant apprehends such behavior by the defendant.*

This exception was recommended by one of the Uniform Rules Commissioners, largely in response to the perceived consternation felt by laypersons over the trial court's rulings in the Simpson criminal case.

Comment on Uniform Rules Proposal

Under current law, a victim's statements such as those in *Simpson* are not admissible unless the victim's conduct is somehow in dispute, and the statements are probative of conduct that would be undertaken by the victim subsequent to the statement. (See the excerpt on current law at the end of this memorandum). In the Simpson case, Nicole's conduct at the time of the crime was not in dispute. On the other hand, if O.J. had defended on the ground that Nicole was tragically killed while playing mumbly-peg in the driveway with him, Nicole's statements of fear would have been admissible to show the unlikelihood that she would be playing knife games with someone who she feared.

It should be noted that the proposal being considered by the Uniform Rules Committee would even reverse the result in the famous case of *Sheperd v. United States*. In that case, the victim's statement that the defendant had poisoned her was held inadmissible under the state of mind exception, because it "looked backward" toward a past event, and was offered for the truth that the event occurred. The Uniform Rule proposal makes no distinction between statements looking forward and statements looking backward. Mrs. Sheperd's statement would have been admissible for its truth under this exception, because it was one in which the victim implicated the defendant in criminal behavior harmful to the declarant. The breadth of this proposed exception thus runs in direct conflict with the exclusionary clause of Rule 803(3), which codifies the result in *Sheperd*.

The California Exception

The California exception appears to be much more limited than the Uniform Rules proposal. The California rule reads as follows:

> *1370. (a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:*
>
> *(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.*
> *(2) The declarant is unavailable as a witness pursuant to Section 240.*
> *(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.*
> *(4) The statement was made under circumstances that would indicate its trustworthiness.*
> *(5) The statement was made in writing, was electronically recorded, or made to a law enforcement official.*
>
> *(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:*
>
> *(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.*
> *(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.*
> *(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.*
>
> *(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.*

Comment on California Exception

It can be argued that even if an "O.J." exception is a good idea, there is no reason to amend the Federal Rules to add an exception like that of California. This is because the requirements set forth in the California statute are analagous to, if not identical to, those provided in the Federal residual exception. Put another way, anything admissible under the California O.J. exception would almost certainly be admissible under the Federal Rules residual exception.

Current Law under the Federal Rules

This memorandum closes with an excerpt from a forthcoming treatise which I co-authored on New York Evidence. While the text is geared toward New York Law, the principles are derived from and apply to Federal Rule 803(3) as well.

> While a state of mind statement cannot be offered to prove that a past event occurred, it can be offered in some cases to prove the occurrence of an event subsequent to the statement. The leading case on this proposition is *Mutual Life Insurance Co. v. Hillmon*. [1] In that case, Mrs. Hillmon sought to collect life insurance proceeds, alleging that Mr. Hillmon had been killed in a fire in Colorado. The insurance company asserted that the body claimed to be Mr. Hillmon was in fact that of Walters. As proof on this point, the insurance company offered letters of Walters under the state of mind exception. The letters expressed an intention to go to Colorado with Mr. Hillmon. The Supreme Court held that Walters' statements could be admitted as statements of present intent, probative to show that Walters acted in accordance with his intent.
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> Many New York cases have applied the *Hillmon* doctrine, to admit statements of the declarant's state of mind when offered to show subsequent conduct consistent with that state of mind.[2]
>
> An example illustrates what is included within the exception and what is not. If a declarant states, "I am going to New York tomorrow," and subsequently disappears, the statement may be introduced to prove that that the declarant probably did go to New York because he had expressed an intent to do so. If, on the other hand, the declarant states "Two years ago I went to New York," the statement may be said to reflect the state of mind called "memory," but it is not covered by the state of mind exception when offered to prove that the declarant had actually been in New York. If the declarant says, "I am going to New York tomorrow because Joe stole my money and I have to get it back from him," the statement cannot be used to prove that Joe stole money from the declarant, because that would be using the state of mind statement to prove the truth of a past fact, which is prohibited by *Shepard*. But it could be used to prove that the declarant went to New York, because that is permitted by *Hillmon*.The question then is whether the probative value of the statement is outweighed by the prejudice that will result when the jury hears the statement about Joe stealing money from the declarant.

This last example shows the limits of the *Hillmon* doctrine. Where the state of mind statement is offered to prove subsequent conduct, the hearsay rule poses no bar, but the declarant's statement must be scrutinized to make sure that the probative value as to the declarant's state of mind and subsequent conduct is not outweighed by the risk that the statement will be misused for the truth of the facts related. Exclusion should occur under any of the following circumstances: 1) if the declarant's state of mind is irrelevant to the case;[3] 2) if the inference from the declarant's state of mind to relevant subsequent action by the declarant is weak;[4] 3) if there is no dispute about the declarant's subsequent conduct;[5] or 4) if the risk of misuse of the statement outweighs the probative value of the statement for proving the declarant's future course of action.[6]

People v. Slaughter[7] is illustrative of the limiting principles that the probative value/prejudicial effect balance have on the *Hillmon* doctrine. The defendant was charged with murdering Eric Walker, by shooting him after an argument. The People relied mainly on purported eyewitness testimony from an admitted crack user. The defendant denied shooting Walker. At trial, Walker's ex-wife testified that Walker had told her he thought the defendant was going to kill him, and that he owed the defendant money from a drug transaction. The court held that admission of Walker's hearsay statements was reversible error. This was surely the correct result, since the statements could not properly have been offered for the proposition that Walker had a fearful state of mind and acted in accordance with that fear. Walker's conduct was not in dispute in the case, so there was no probative value in proving what his state of mind was. The *Hillmon* doctrine cannot apply where the declarant's subsequent conduct is not at issue. The only reason for offering Walker's statement was to show that Walker had good reason to fear the defendant. But the reasonableness of Walker's belief would have to be based on the actual occurrence of some past fact (such as a threat or a beating), and the *Shepard* exclusion prohibits the use of the state of mind exception to prove the truth of a past fact.[8]

Undoubtedly, the result in *Slaughter* would have been different if the defendant had claimed that he and Walker were cleaning their guns together when Slaughter's gun actually and tragically went off and Walker was killed. Under these circumstances, Walker's statement of fear of the defendant would have had substantial probative value, since a person who fears someone is unlikely to be cleaning guns with him. This is how the court put the matter in *People v. Asmar*:[9]

> The threshold requirement of admissibility of such hearsay statements of fear of defendant in homicide cases is some substantial degree of relevance to a material issue in the case. While there are undoubtedly a number of possible situations in which such statements may be relevant, the courts have developed three rather well-defined categories in which the need for such statements overcomes almost any possible prejudice. The most common of these involves the defendant's claim of self-defense as justification for the killing. When such a defense is asserted, a defendant's assertion that the deceased first attacked him may be rebutted by the extrajudicial declarations of the victim that he feared the defendant, thus rendering it unlikely that the deceased was in fact the aggressor in the first instance. Second, where defendant seeks to defend on the ground that the deceased committed suicide, evidence that the victim had made statements inconsistent with a suicidal bent are highly relevant. A third situation involves a claim of accidental death, where, for example, defendant's version of the facts is that the victim picked up defendant's gun and was accidentally killed while toying with it. In such cases the deceased's statements of fear as to guns or of defendant himself (showing he would never go near defendant under any circumstances) are relevant in that they tend to rebut his defense. Of course, even in these cases, where the evidence is of a highly prejudicial nature, it has been held that it must be excluded in spite of a significant degree of relevance.

While the above quoted passage addresses the admissibility of a victim's statement of fear in a homicide case, the analysis is applicable to any case in which a declarant's statement of a state of mind is offered to prove the declarant's subsequent conduct. The limits of *Hillmon* are grounded in a sound balancing of probative value and prejudicial effect. [10]

1.145 U.S. 285 (1892).

2.*See, e.g.*, People v. Conklin, 175 N.Y. 333, 67 N.E. 624 (1903) (in a murder trial, a statement of the victim that she intended to commit suicide was admissible to prove that she actually did); Landon v. Preferred Accident Insurance Co., 43 App. Div. 487, 60 N.Y.S. 188 (2d Dept. 1899), *aff'd*, 167 N.Y. 577, 60 N.E. 1114 (1901) (deceased's statement of intent to go to Staten Island

could be admitted under state of mind exception to explain the presence of his body off the shore of Staten Island).

3. People v. Seit, 86 N.Y.2d 92, 629 N.Y.S.2d 998, 653 N.E.2d 1168 (1995) (declarant's 911 call, describing an argument, held inadmissible under the state of mind exception since the declarant was simply a bystander to the argument, whose state of mind was irrelevant to the case).

4. See People v. Asmar, -- Misc.2d --, 639 N.Y.S.2d 907 (Co.Ct., Nassau Co. 1996) (noting that to be admissible to prove the declarant's subsequent conduct, "the extrajudicial statement must be probative on that question of the [declarant's] state of mind").

5. *See, e.g.*, People v. Slaughter, 189 A.D.2d 157, 596 N.Y.S.2d 22 (1st Dept. 1993) (statement of victim indicating fear of defendant held not admissible to prove victim's subsequent conduct, since the victim's conduct was never disputed in the case).

6. See generally the discussion in United States v. Brown, 490 F.2d 758 (D.C.Cir. 1973) (principal danger, when state of mind statements are offered to prove subsequent conduct, is that the jury will consider the declarant's statement for the truth of an out-of-court event, such as a prior threat by the defendant; such inferences are improper, and the risk of prejudice from them must be weighed against the probative value of the declarant's statement as tending to prove the declarant's subsequent course of action). The *Brown* case, dealing extensively with victims' expression of fear of the defendant, is discussed in detail and relied upon in People v. Asmar, -- Misc.2d --, 639 N.Y.S.2d 907 (Co.Ct., Nassau Co. 1996) (in a rape prosecution, the victim's statements of fear of the defendant were admissible to rebut the defendant's defense of consent).

7.189 A.D.2d 157, 596 N.Y.S.2d 22 (1st Dept. 1993).

8. See United States v. Fontenot, 14 F.3d 1364, 1371 (9th Cir. 1994) ("The state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed would have induced the state of mind. If the [memory or belief] reservation in the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition--'I'm scared'--and not belief--'I'm scared because [someone] threatened me.'").

9. -- Misc.2d --, 639 N.Y.S.2d 907, 911 (Co.Ct., Nassau Co. 1996), quoting United States v. Brown, 490 F.2d 758 (D.C.Cir. 1973).

10. See People v. Lauro, 91 Misc.2d 706, 398 N.Y.S.2d 503 (Sup.Ct. Westchester Co. 1977) (wife's statement, that she was going to give her husband, the defendant, an "ultimatum" financial offer, was inadmissible under the *Hillmon* doctrine; the chain of inferences, from intent to actually making the offer, to the defendant's rejection of the offer, to murder, was too remote).