# ADVISORY COMMITTEE
# ON
# EVIDENCE RULES

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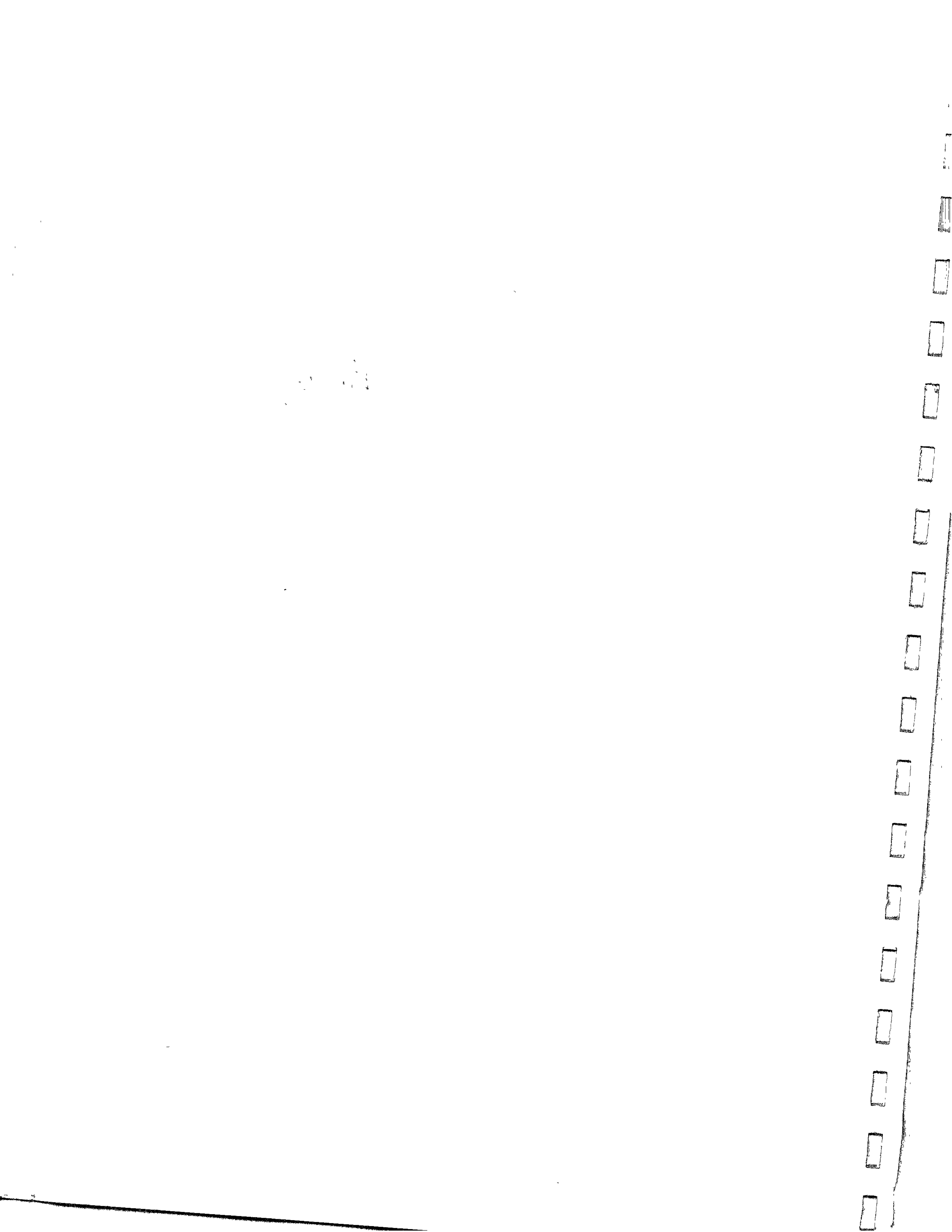
**Washington, D.C.**
**October 22-23, 1998**



# ADVISORY COMMITTEE ON EVIDENCE RULES

## Agenda for Committee Meeting
## Washington, D.C.
## October 22nd and 23rd, 1998

**I. Opening Remarks of the Chair.**

Including approval of the minutes of the April meeting, and a report on the last meeting of the Standing Committee. The Draft Minutes of the April meeting, this Committee's report to the Standing Committee, and the minutes of the Standing Committee meeting, are all included in the agenda book.

**II. Public Hearing on Proposed Amendments Released for Public Comment**

**III. Consideration of Public Comments on Proposed Amendments.**

A. *Rule 103*. A memorandum discussing a public commentary on the proposed amendment is included in the agenda book.

B. *Rule 404(a)*. A memorandum discussing a public commentary on the proposed amendment is included in the agenda book.

C. *Rule 701*. A memorandum discussing comments received on the proposed amendment, together with a supporting attachment, is included in the agenda book.

D. *Rule 702*. A memorandum discussing comments received on the proposed amendment, together with supporting attachments, is included in the agenda book.

E. *Rule 703*. A memorandum discussing comments received on the proposed amendment, together with a supporting attachment, is included in the agenda book.

F. *Rules 803(6) and 902*. A memorandum discussing some possible changes that might be made to the proposed amendment to Rule 902 is included in the agenda book.

## IV. Consideration of Other Evidence Rules

A. *Rule 1101*. A memorandum discussing the scope of Rule 1101, and some possible problems in its application, is included in the agenda book, together with supporting attachments.

*B. Rule 609*. A memorandum concerning a comment received from a member of the public suggesting an amendment to Rule 609 is included in the agenda book, together with a supporting attachment.

## V. Recent Developments.

A. *Uniform Rules*. Update report by Professor Whinery.

## VI. New Matters

## VII. Next Meeting

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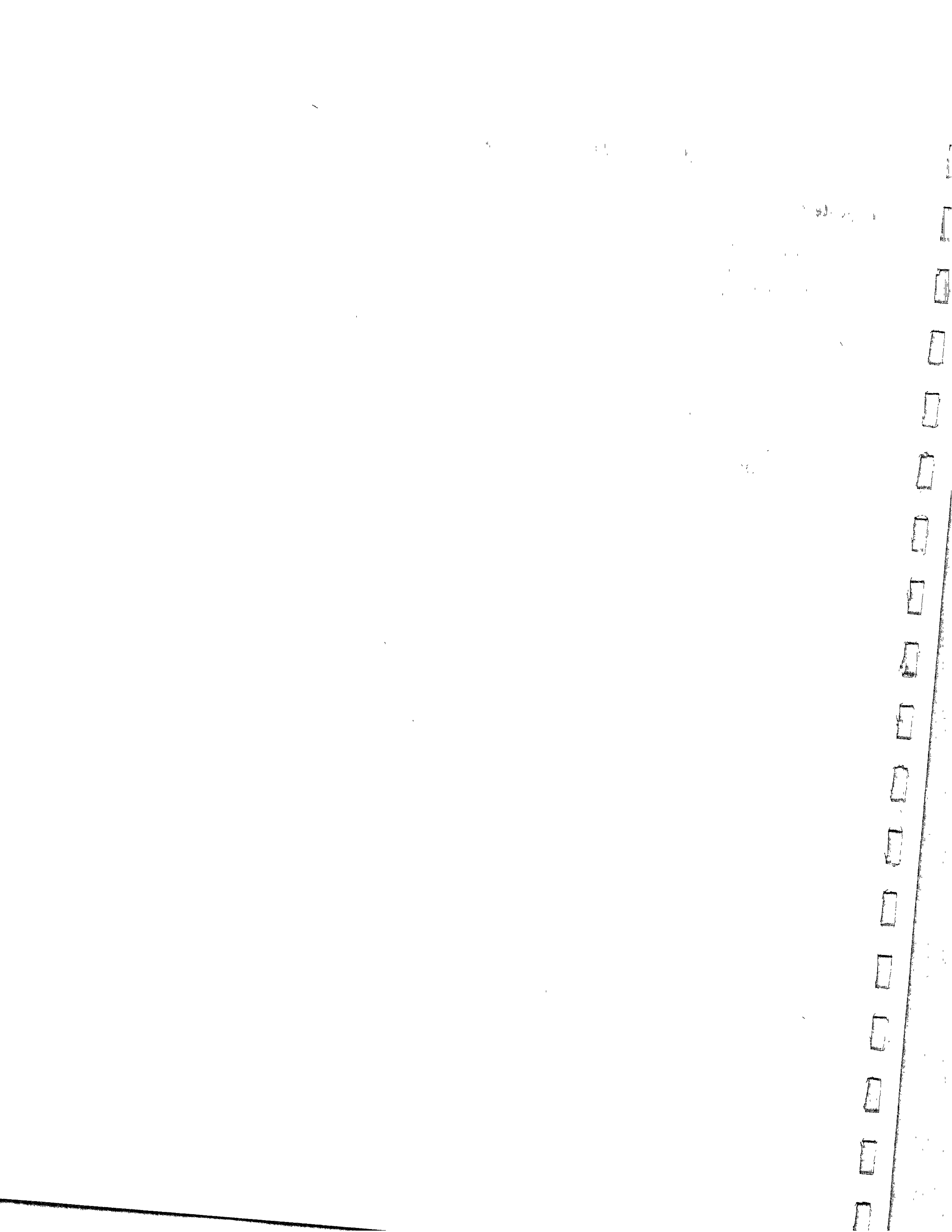

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Item I-II

# Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 6-7, 1998

New York, N.Y.

The Advisory Committee on the Federal Rules of Evidence met on April 6th and 7th at Fordham Law School in New York City.

*The following members of the Committee were present:*

Hon. Fern M. Smith, Chair
Hon. David C. Norton
Hon. Milton I. Shadur
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Mary F. Harkenrider, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
Dean James K. Robinson
Professor Daniel J. Capra, Reporter

*Also present were:*

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. David S. Doty, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Roger Pauley, Esq., Justice Department
Sol Schreiber, Esq. Member, Standing Committee on Rules of Practice and Procedure
Peter G. McCabe, Esq. Secretary, Standing Committee on Rules of Practice and Procedure

John K. Rabiej, Esq., Chief, Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center
Al Cortese, Esq., Product Liability Advisory Council

## Opening Business

The Chair opened the meeting by asking for approval of the minutes of the October, 1997 meeting. These minutes were unanimously approved. The Chair noted with regret that Judge Shadur and Dean Robinson will be leaving the Committee. She thanked them for all their excellent service, and expressed her wish that they would attend the October, 1998 meeting.

The Chair then reported on actions taken at the January, 1998 Standing Committee meeting. The Standing Committee approved all of the Evidence Rules Committee's proposed amendments to be released for public comment. The proposed amendments are to Rules 103, 404(a), 803(6), and 902. The proposed amendments will be released for public comment on or about August 15, 1998.

## Rule 702

Judge Shadur presented the report of the *Daubert* subcommittee, which was charged with the task of drafting proposed amendments to the rules on experts in light of the Supreme Court's decision in *Daubert*. Judge Shadur noted the basic premises from which the subcommittee began:

1. Any change in the rules should constitute a minimal departure from the existing language in the rules. Otherwise courts and litigants might think there is more change in the rule than there really is, and important precedent construing well-established language might be lost.

2. The trial court's gatekeeping function should apply to all expert testimony, not only scientific expert testimony.

3. Testimony that is functionally expert testimony should not be admitted under the more permissive standards of lay testimony under Rule 701.

4. Rule 703, which permits an expert to rely on inadmissible information, should not be used as a "backdoor" means of admitting otherwise inadmissible evidence.

Judge Shadur reviewed the subcommittee proposal for Rule 702. The proposal requires a determination of reliability at three distinct points. First, the opinion must be based on sufficient

and reliable information. Second, the expert must employ reliable principles and methodology. Third, the expert must apply the principles and methodology reliably to the facts of the case.

Substantial discussion ensued on a number of possible modifications to the proposal. Among the possibilities discussed were:

1. Collapsing the three separate reliability requirements into one or two standards.

2. Changing the reference in the rule from "methodology" to "methods" and clarifying that the Rule is to apply to all expert testimony, including that of law enforcement agents in criminal cases.

3. Changing the reference from "principles and methodology" to "principles or methodology."

The Committee also considered the suggestions of the style subcommittee of the Standing Committee. The style subcommittee version collapsed the three separate reliability requirements into two, and the discussion among Committee members was that it was better to emphasize the three separate requirements of basis, principles/methodology, and application. Also, the style subcommittee version rewrote the entire rule, and the Committee was of the opinion that the existing language of the rule should be maintained to the extent possible.

Finally, the Committee reconsidered whether Rule 702 needed to be amended at all, and whether the subcommittee's version was an improvement on the existing rule. There was general agreement that Rule 702 needs to be amended, in light of the conflict in the courts over the meaning and application of *Daubert*, and particularly in light of congressional attempts to amend Rule 702 with problematic language.

A motion was made to adopt the subcommittee's proposed amendment of Rule 702, as amended in the course of Committee discussion, and to recommend to the Standing Committee that the proposal be issued for public comment. This motion was approved with nine in favor and one dissent.

The Committee then turned to the draft Advisory Committee Note to Rule 702. Several stylistic suggestions were made and adopted, and language was included to clarify that the phrase "principles and methods" was not intended to preclude the testimony of law enforcement agents in criminal cases. Further language was added to clarify that the reference in the rule to "facts or data" is intended to permit an expert to rely on opinions of other experts.

A motion was made to adopt the Advisory Committee Note to Rule 702 as amended. This motion was unanimously approved.

A copy of the proposed amendment to Rule 702, and the proposed Advisory Committee Note to Rule 702, is attached to these minutes.

## Rule 701

Judge Shadur presented the proposal of the *Daubert* subcommittee, which would preclude the use of Rule 701 if the witness' testimony relies on "scientific, technical or other specialized knowledge". The proposed language is intended to track that of Rule 702. The goal of the amendment is to channel all expert testimony into Rule 702, thus preventing a party from evading the expert witness disclosure and reliability requirements through the artifice of proffering an expert as a lay witness.

Members of the Justice Department opposed the proposal. They suggested that the term "specialized knowledge" is vague, and that many reversals will occur when trial courts characterize testimony as not based on specialized knowledge when in fact it is. They also questioned whether Rule 702 should apply when the witness, who is testifying to what a lay witness could testify to, is in fact an expert. For example, what if a family friend, who gives an opinion on the competence of an individual, happens to be a psychiatrist?

Several members of the Committee responded to these concerns. They observed that the proposal does not distinguish between types of witnesses but rather between types of testimony. Thus, a family friend who is a psychiatrist need not be qualified as an expert in giving lay opinion testimony as to the competence of a friend. If, however, the proponent emphasizes the witness' specialized training or expertise, then it is only fair that the proponent should qualify the witness as an expert. Committee members pointed out that the proposed amendment will not have a substantial effect on trial practice. A proponent who wants to rely on a witness' expertise would need to establish a foundation even if Rule 701 were not amended.

Concern was also expressed that under the amendment, witnesses would often be precluded from testifying because of a party's failure to comply with the disclosure obligations of Civil Rule 26. The response was that if a witness is not specially retained as an expert, Rule 26 poses no extra discovery obligations; and if the witness *is* specially retained to give what is tantamount to expert testimony, then it is inappropriate to evade the Rule 26 disclosure requirements by proffering the witness under Rule 701. It was also observed that the rule change would actually benefit lawyers, by requiring them to determine in advance whether a witness would qualify as an expert.

One member suggested, as an alternative, that a gatekeeping function, similar to that of Rule 702, be placed in Rule 701. But it was observed that this would not be an improvement on the proposal. A gatekeeping function could not apply readily to most witness testimony that is truly lay testimony--e.g., "the car was speeding." This means that a distinction would have to be made between prototypical lay witness testimony and testimony based on scientific, technical or other specialized knowledge. Thus the same problem of distinguishing between lay and expert testimony will arise if a gatekeeping function were placed in Rule 701. Moreover, the subcommittee's proposed amendment to Rule 701 has two purposes--to assure that all witness testimony based on specialized knowledge is reliable, and to assure that all such testimony is

subject to the disclosure obligations applicable to experts under Civil Rule 26 and Criminal Rule 16. Importing a gatekeeping function into Rule 701 might effectuate the former goal, but it would do nothing to effectuate the latter, because the disclosure rules cover only testimony that is offered under Evidence Rule 702.

The Committee considered the proposal of the Standing Committee's Subcommitee on Style. This proposal approved the language added by the *Daubert* Subcommittee, but restructured the existing rule. Committee members generally agreed that it would be better to preserve the existing language, and substantial precedent thereunder, to the extent possible.

A motion was made to adopt the *Daubert* Subcommittee proposal to amend Rule 701, and to recommend to the Standing Committee that the proposal be issued for public comment. Eight members voted in favor, one against, and one abstained.

The Committee moved on to the proposed Advisory Committee Note to an amended Rule 701. The Note emphasizes that the amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. It specifies that any part of a witness' testimony based on scientific, technical or specialized knowledge is subject to the reliability requirements of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules. At the suggestion of some Committee members, a paragraph was added to the Note to indicate that the term "specialized knowledge" is taken from and intended to have the same meaning as the identical phrase in Rule 702. The added language also clarifies that the amendment is not intended to effect prototypical lay witness testimony, such as opinions concerning sound, size, distance, etc.

A motion was made to adopt the Advisory Committee Note to Rule 701, as amended. Eight members voted in favor, one against, and one abstained.

A copy of the proposed amendment to Rule 701, and the proposed Advisory Committee Note, is attached to these minutes.

## Rule 703

Judge Shadur presented the proposal of the subcommittee to amend Rule 703. The amendment would, in certain circumstances, prevent the disclosure to the jury of inadmissible information relied on by an expert in reaching an opinion. Judge Shadur observed that the goal of the proposed amendment is to prevent the use of Rule 703 as a backdoor means of admitting otherwise inadmissible evidence. However, Judge Shadur and many other members expressed concern with the subcommittee's invocation of Rule 403 as the means to keep out otherwise inadmissible evidence. There was general agreement that the Rule 403 test, which presumes admissibility, would not be protective enough. Therefore, Committee members suggested that the

subcommittee's proposal be changed to provide that otherwise inadmissible information relied upon by an expert can only be disclosed to the jury if the probative value of the information substantially outweighed its prejudicial effect.

Concern was expressed that a simple reference to probative value and prejudicial effect would be too vague, and that the rule should specify how the otherwise inadmissible information could be probative and how it could be prejudicial. Several Committee members responded to this criticism by noting that there is no such specification in any other Evidence Rule that provides for a balancing of probative value and prejudicial effect. Moreover, the Committee Note sets out the relevant factors.

One Committee member suggested that it might be problematic to refer specifically to the jury in the Rule, because the Evidence Rules are generally applicable to both judge and jury trials. Other Committee members responded, however, that Rule 403 itself specifically mentions the risk of misleading the jury, and that the very point of the amendment to Rule 703 is to prevent a proponent from using the Rule as a backdoor means of getting otherwise inadmissible information before the jury. No such concern arises in a bench trial.

The Committee considered whether the proposed language, as amended, would be better placed in Rule 705, which specifically deals with disclosure of an expert's basis of information. But it was generally agreed that the problem of disclosure of otherwise *inadmissible* information to the jury has been treated under Rule 703, and therefore that amending Rule 705 rather than Rule 703 would cause confusion.

Committee members generally agreed that the Rule should make clear that the limitation on admitting evidence under Rule 703 should apply only to the proponent of the expert. The adversary should be free to permit the jury to consider any aspect of an expert's basis. The subcommittee proposal was therefore modified to clarify that the limitations in the Rule applied only when the proponent of the expert offered otherwise inadmissible information relied upon by that expert.

Finally, the Committee considered the suggestions of the Standing Committee's Subcommittee on Style. The Committee again decided against any attempt to change or restructure the existing language in the rule.

A motion was made to adopt the *Daubert* Subcommittee's proposal to amend Rule 703, as modified, and to recommend to the Standing Committee that the Rule be issued for public comment. Eight members voted in favor and two dissented.

The Committee then discussed the proposed Advisory Committee Note to Rule 703. It was suggested that a paragraph be added to the Note to clarify that the reference in the Rule to the "proponent" would apply in multiparty cases to all parties similarly situated to the party who actually calls the expert. A motion was made to adopt the Committee Note, as modified. The motion was unanimously approved.

## Attorney Conduct Rules

The Chair noted that the Civil Rules Committee at its recent meeting recommended that an ad hoc committee, made up of two representatives from each of the advisory committees, be formed to consider the proposed Federal Rules of Attorney Conduct. The Evidence Rules Committee unanimously agreed with the recommendation of the Civil Rules Committee. The Chair appointed Judge Jerry Smith and the Reporter to serve as representatives to the ad hoc committee.

A short discussion ensued on some of the issues that the ad hoc committee would have to work through. Several Committee members expressed concern about the current version of proposed Rule 10, which permits the government to contact represented parties in certain circumstances. These members were of the opinion that the current version of Rule 10 was too permissive and would permit government overreaching. Professor Coquillette, the Reporter to the Standing Committee, noted that the Attorney Conduct Rules are still a work in progress, and whether or not Rule 10 is adopted, the rulemaking project will have a salutary effect in that it will bring some type of uniformity (whether horizontal or vertical) to the rules of professional responsibility in the federal courts. Professor Coquillette expressed support for an ad hoc committee, noting that significant thought must given to whether the proposed Rules should be adopted and whether they need modification. This work is better done by an ad hoc committee than by each of the Advisory Committees as a whole. Professor Coquillette noted that the Criminal Rules Committee has also agreed with the ad hoc committee approach.

Professor Coquillette expressed his thanks to the Evidence Rules Committee for the substantial work that it has already done on the Attorney Conduct Rules. The Evidence Rules Committee has provided a detailed list of suggestions as to how the proposed Attorney Conduct Rules and commentary can be improved, and these suggestions have been incorporated into the latest working draft of the Rules.

## Uniform Rules

Professor Whinery, the Reporter for the Uniform Rules of Evidence Drafting Committee, reported on developments in the Uniform Rules project. The first reading of the working draft will be made this summer at the national meeting of the Uniform Laws Commissioners. The Uniform Rules Committee has generally followed the Federal Rules of Evidence, but Professor Whinery noted that there are some marked differences. For example, Proposed Uniform Rule 702 establishes a presumption of admissibility for expert testimony that passes the *Frye* test, and a presumption of inadmissibility for expert testimony that does not. Then the Rule provides a number of factors that would be relevant to overcoming the presumption one way or another. Also, the Uniform Rules have been amended throughout to update language that might not accommodate the presentation of evidence in electronic form.

## Parent-Child Privileges

The Committee reviewed two bills pending in Congress concerning parent-child privileges. The Senate Bill would direct the Judicial Conference to advise Congress on whether the Federal Rules of Evidence should be amended to include some kind of parent-child privilege. The House Bill would directly amend Evidence Rule 501 to provide a partial privilege for confidential communications between parent and child, and to provide a privilege for a witness to refuse to give testimony against a parent or child.

The Chair expressed concern over what seems to be a piecemeal approach to privileges on the part of Congress. Instead of systematically reviewing the law of privileges, proposals to legislate new privileges seem to proceed on an ad hoc basis in response to newsworthy events. One Committee member noted that some prosecutions tried before him could not have been brought if a parent-child privilege had been in existence.

The Committee approved language that might be used in a letter to Congress in opposition to any kind of parent-child privilege. This language will be referred to the Chair of the Standing Committee, should it be considered appropriate to respond to either of these bills.

## Rule 801(d)(1)(B)

The Committee considered a proposal by Judge Bullock, the liaison to the Standing Committee, to amend Evidence Rule 801(d)(1)(B). In response to Judge Bullock's suggestion, the Reporter prepared a proposed amendment to the Rule that would provide a hearsay exemption for any prior consistent statement that would otherwise be admissible to rehabilitate a witness' credibility. In support of the proposal, Judge Bullock noted that the distinction between substantive and rehabilitative use of prior consistent statements is less than clear and is usually not grasped by jurors. Jurors can, however, assess credibility, so it arguably makes no sense to instruct the jury that a prior consistent statement can be used for credibility but not for its truth.

Committee members generally agreed with the proposal on the merits, but resolved unanimously not to propose an amendment at this time. The Supreme Court, in *Tome v. United States,* recently construed Rule 801(d)(1)(B), and members wished to avoid the perception that the proposed amendment was designed to overrule *Tome*. The Chair observed that the Uniform Rules draft codifies *Tome*, thus bringing the Uniform Rules in line with current federal law. Such salutary uniformity should not be disturbed unless the current rule has created substantial problems for courts and litigants. Under the current Rule, the worst thing that happens is that the jury receives an instruction that has little effect. The Reporter noted that the current Rule is not creating substantial problems in the federal courts. The Committee resolved to table the proposal, and directed the Reporter to monitor the post-*Tome* case law.

## Computerized Evidence

At the October, 1997 Evidence Rules Committee meeting, the Reporter was directed to report at the next meeting on whether the Evidence Rules need to be amended to accommodate technological advances in the presentation of evidence. For the April, 1998 meeting the Reporter provided the Committee a memorandum, noting that more than twenty Evidence Rules have language that refer to "paper-oriented" evidence, e.g., "record", "memorandum", etc. Arguably, these Rules might be problematic for a proponent who wishes to proffer computerized evidence. The Reporter reviewed the case law, however, and concluded that the courts are handling computerized evidence quite well under the broad and flexible Evidence Rules. Committee members expressed the view that tinkering with language may create rather than solve problems, especially since the current rules seem to be working well. One Committee member noted that the same concerns about technology might have been raised years ago with videotaped presentations; yet the federal courts have had no problem in handling videotaped evidence under the current rules.

It was also observed that any attempt to amend the rules to accommodate electronic evidence would have to proceed along one of three paths, each of which is problematic. One possibility is that each of the problematic rules could be amended directly; but this would mean that more than twenty rules amendments would have to be proposed. Alternatively, the definitions section of Evidence Rule 1001 could be modernized to apply to all the other Rules. The problem with this solution would be that the definitions section would be in the Best Evidence Rule--not the first place a lawyer would look for it. A third possibility would be to add an independent definitions section to the Evidence Rules. But to do that just for computerized evidence would be odd; on the other hand, it would certainly not seem worth the effort to promulgate an all-encompassing definitions section, after 25 years of litigation under the Evidence Rules without such a section.

The Committee unanimously agreed that it would not at this time recommend any amendment to the Evidence Rules with respect to computerized evidence. The Reporter agreed to monitor developments in the case law concerning computerized evidence.

## E-mail Comments

The Committee addressed a proposal by the Standing Committee Subcommittee on Technology, for a two-year trial period in which comments on the Rules could be made by e-mail. During this two-year period, Reporters would not be required to summarize individual comments; the Rules Support Office would acknowledge each comment by e-mail, and would post a generic explanation of action of the Advisory Committees in response to comments received. Committee members expressed some concern as to how an e-mail comment system would work. Concern was also expressed that comments made by e-mail may not be as careful and considered as

comments by mail. On the other hand, the Committee noted that substantial benefits could accrue from greater public input into the Rules process, and that in the long run it might be easier to respond to e-mail comments than to written comments. The Committee unanimously resolved to support the proposal of the Technology Subcommittee for a trial period for e-mail comments.

## Civil Rule 44

At the October, 1997 meeting, the Reporter was directed to consider whether Civil Rule 44 should be abrogated in light of its overlap with certain Evidence Rules providing for authentication of official records--especially Evidence Rule 902. The Reporter conferred with the Reporter to the Civil Rules Committee, researched the relevant case law, and analyzed Civil Rule 44 and its relationship to the Evidence Rules in substantial detail. The Reporter provided the Committee with a memorandum on the subject for the April meeting. That memorandum came to the following basic conclusions: 1. Courts and litigants have not had a problem with the overlap between Civil Rule 44 and the Evidence Rules. 2. In some cases, especially in deportation proceedings, Civil Rule 44 is relied upon as a means of authenticating official records, without reference to the Evidence Rules; while this may not be necessary, any repeal of Civil Rule 44 would upset settled expectations in these areas. 3. There are a few situations in which authentication might be permitted under Civil Rule 44 and not under the Evidence Rules. 4. Abrogation of Civil Rule 44 would also affect the Bankruptcy Rules and the Criminal Rules, both of which refer to Rule 44.

After considering the Reporter's memorandum, and the fact that no problems have been created by the coexistence of Civil Rule 44 and the Evidence Rules, the Committee decided unanimously not to proceed with any effort to abrogate Civil Rule 44.

## Shortening the Rulemaking Process

At the request of the Standing Committee, the Evidence Rules Committee considered how and whether the rulemaking process could be shortened. There was general concern that the process is too long, and that the length of the process encourages Congress to intervene with legislation rather than wait for the rulemaking process to grind to its conclusion. While it is often proclaimed that the process needs to be as long as it is to assure careful deliberation, the fact is that much of the time in the process is simply waiting time in which no cognitive thought is given to the rules. For example, the Evidence Rules Committee's proposals to amend Rules 103, 404, 803(6) and 902 were approved in January by the Standing Committee to be issued for public comment--yet the public comment period does not begin until August 15th.

John Rabiej noted that much of the problem with the length of the process is due to legislation specifying that the Supreme Court has until May 1 to transmit the rules to Congress,

and that the Judicial Conference meetings are to be held in March and September. This adds a number of months to the process because the Judicial Conference can only propose rules changes after its September meeting--proposing rules changes after the March Judicial Conference meeting would not give the Supreme Court enough time to consider the changes.

One possibility considered by the Committee is to shorten the six month public comment period. This solution might be especially fruitful with respect to technical or non-controversial changes. Many members believed that a two-tier structure might work: a six month comment period for substantial or controversial rules changes, and a much shorter period for technical or non-controversial changes.

The Reporter noted that the rules process can actually take longer than three years. He pointed out that the Evidence Rules Committee's proposal to amend Evidence Rule 103 was delayed for an entire year because the Standing Committee sent it back to the Evidence Rules Committee for redrafting. The Standing Committee had no apparent substantive concerns with the proposal. It was suggested that if the Standing Committee's only objections to an Advisory Committee proposal are on stylistic or drafting grounds, then the proposal should be issued for public comment. Any drafting problems can be corrected in the public comment process, thus shaving a year off what would otherwise be a four-year rulemaking process. The Committee was in unanimous agreement that drafting objections should not delay the release for public comment of a proposed rule. The Committee was also favorably disposed to two alternative proposals: 1. A policy permitting the Advisory Committee to respond to Standing Committee objections within 30 days of the Standing Committee meeting.2. A policy permitting Advisory Committees to publish their proposals for public comment without the necessity for approval by the Standing Committee.

The Evidence Rules Committee generally agrees with the self-study report that the current rulemaking process is too long, and the Committee expressed its interest and willingness to participate in any suggestions or efforts to shorten the process.

## New Matters

A Committee member suggested that the Committee might consider how the scope provisions of Rule 1101 are operating. In particular, the Committee might look at whether the exclusions provided in Rule 1101 are necessary, or whether it might now be appropriate to extend the applicability of the Federal Rules to certain other proceedings. The Reporter agreed to investigate the subject and report to the Committee at the next meeting.

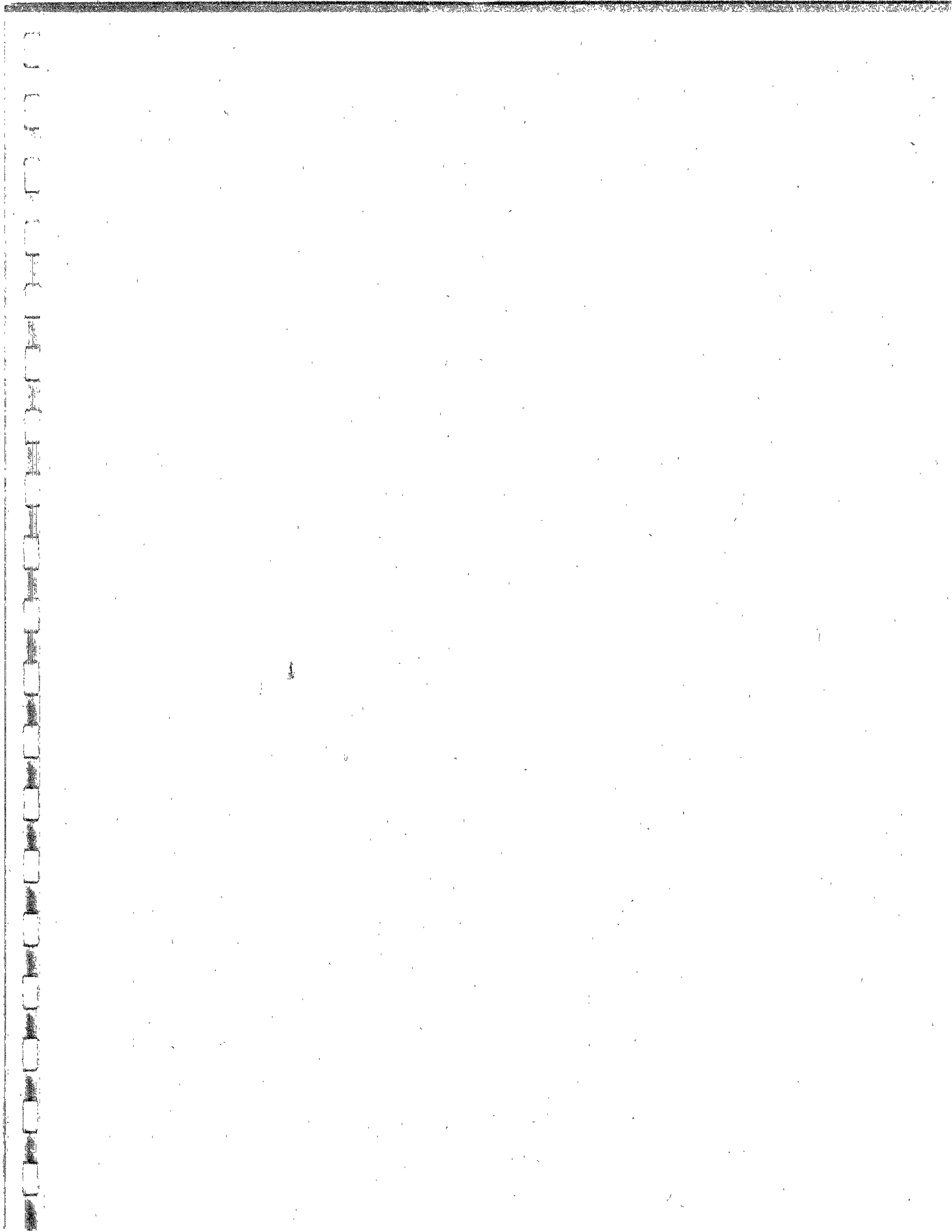
## Next Meeting

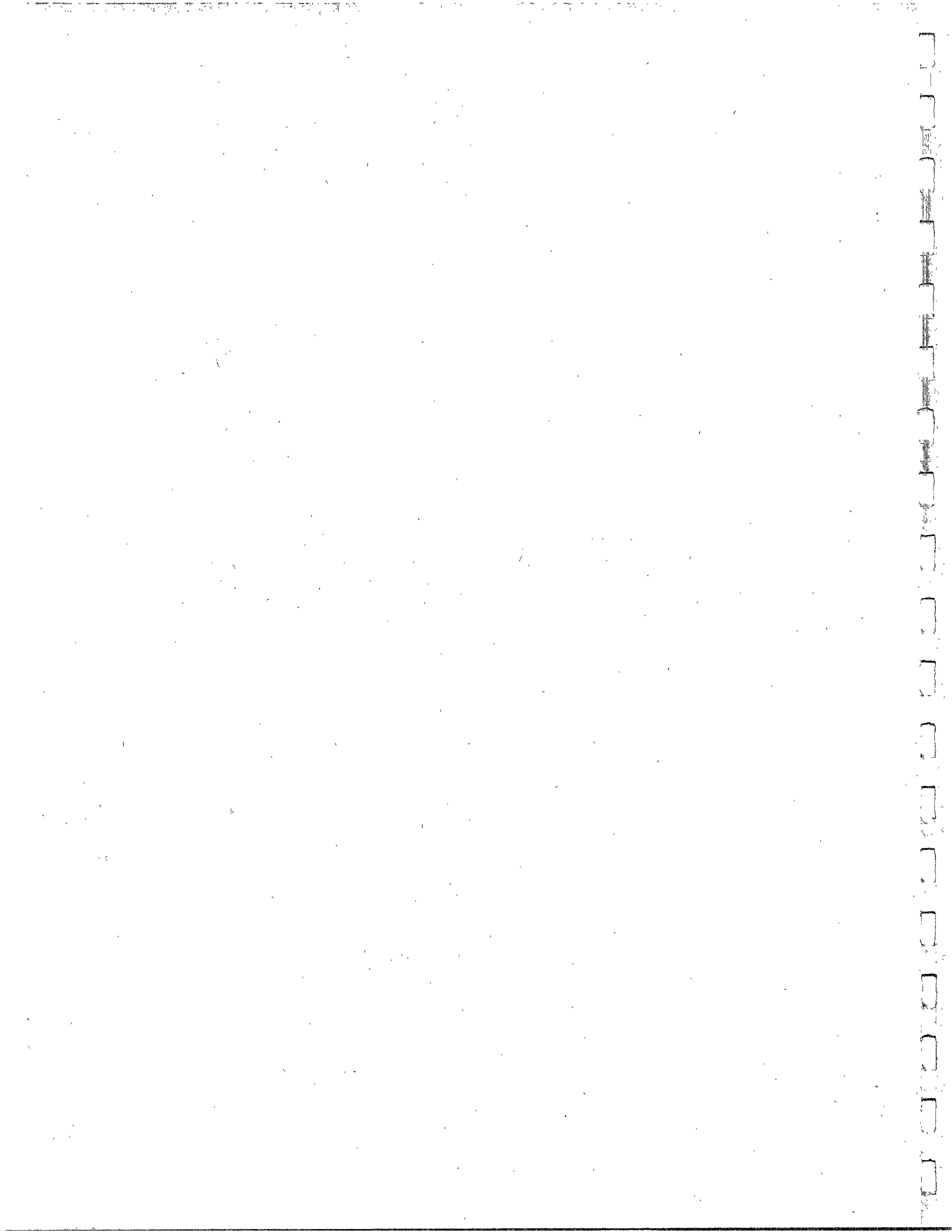
The next meeting of the Evidence Rules Committee is scheduled for October 22nd and 23rd in Washington, D.C. The Committee agreed that if its proposals to amend Rules 701-703 are issued for public comment, the first day of the meeting will be a public hearing on these Rules.

The meeting was adjourned at 10:45 a.m., Tuesday, April 7th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law





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

**FROM:** **Honorable Fern M. Smith, Chair**
**Advisory Committee on Evidence Rules**

**DATE:** **May 1, 1998**

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

# I. Introduction

The Advisory Committee on Evidence Rules met on April 6th and 7th in New York City. At the meeting, the Committee approved three proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them for public comment.

The Evidence Rules Committee also discussed several proposals for amending other Evidence Rules. Specifically, the Committee considered: 1) whether the Evidence Rules should be revised to accommodate technological advances in the presentation of evidence; and 2) whether Evidence Rule 801(d)(1)(B) should be amended to provide a more expansive hearsay exception. The Committee also analyzed whether Civil Rule 44 should be abrogated in light of its apparent overlap with some of the Evidence Rules, and whether the Evidence Rules should be amended to include parent-child privileges. The Committee decided not to propose amendments on either of these subjects at this time.

The Committee considered three matters that do not relate directly to the Evidence Rules, but rather more broadly to the rulemaking process. These matters are: 1) whether comments on

the Rules should be received by e-mail; and 2) whether the rulemaking process should be shortened and, if so, how. Finally, the Evidence Rules Committee discussed and voted upon a suggested course for proceeding with the review of the proposed Rules of Attorney Conduct for the federal courts.

The discussion of these and other matters is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the April meeting, which are attached to this Report.

## II. Action Items

### A. Rule 702.

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, and it attempts to address the conflict in the courts about the meaning of *Daubert*. The proposal is also a response to bills pending in Congress that purport to "codify" *Daubert*, but that, in the Committee's view, raise more problems than they solve. The proposed amendment specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony; requires a showing of reliable methodology and sufficient basis; and provides that the expert's methodology must be applied properly to the facts of the case. The Committee prepared an extensive Advisory Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible. Both the proposed amendment to Evidence Rule 702 and the Advisory Committee Note to the amendment are attached to this Report.

**Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702 be approved for public comment.**

### B. Rule 701

The proposal to amend Evidence Rule 701 seeks to prevent the practice of proffering an expert as a lay witness and thereby end-running both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony. Under the amendment, testimony cannot be admitted under Rule 701 if it is based on scientific, technical or other specialized knowledge. The language of the amendment intentionally tracks the language defining expert testimony in Rule 702. Both the proposed amendment to Evidence Rule 701 and the Advisory

Committee Note to the amendment are attached to this Report. The proposed amendment does not prohibit lay witness testimony on matters of common knowledge that have traditionally been the subject of lay opinions.

**Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701 be approved for public comment.**

### C. Rule 703.

The proposal to amend Evidence Rule 703 would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion. Under current law, litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitations imposed by the proposed amendment relate to the disclosure of this inadmissible information to the jury. Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in assisting the jury to weigh the expert's opinion substantially outweighs the risk of prejudice resulting from the jury's possible misuse of the evidence. Both the proposed amendment to Evidence Rule 703 and the Advisory Committee Note to the amendment are attached to this Report.

**Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703 be approved for public comment.**

## III. Information Items

### A. Issues the Committee Has Decided Not to Pursue

After discussion at the April meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

*1. **Technological Advances in Presenting Evidence.*** The Evidence Rules Committee discussed whether the Evidence Rules must be amended to accommodate technological innovations in the presentation of evidence. The Committee studied the case law and determined that the Federal Rules are currently flexible enough to accommodate electronic evidence, and that courts and litigants have had little problem in applying the current rules to such evidence. For example, no case could be found in which computerized evidence was found inadmissible, where comparable non-computerized evidence would have been admitted, due to a limitation in the Rules. The Committee also found that any option for amending the Rules to more specifically cover computerized evidence would be problematic. Direct amendment of all the rules that refer to "paper"-type evidence would require the amendment of almost thirty rules--a prospect that should not be undertaken unless absolutely necessary. Indirect amendment of these rules--either by way of a freestanding definitions section, or by expanding the definitions section of the best evidence rule--presents substantial conceptual and practical problems as well. The Evidence Rules Committee resolved to continue to monitor case law and technological developments, and to reconsider the question of whether to amend the Rules should compelling circumstances dictate.

*2. **Rule 801(d)(1)(B):*** The Evidence Rules Committee considered a proposal to amend Evidence Rule 801(d)(1)(B) to provide a hearsay exemption for any prior consistent statement that would be otherwise admissible to rehabilitate a witness' credibility. Committee members generally agreed with the proposal on the merits, but resolved unanimously not to propose an amendment at this time. The Supreme Court, in *Tome v. United States*, recently construed Rule 801(d)(1)(B), and members wished to avoid the perception that the proposed amendment was designed to overrule *Tome*. Moreover, the Committee determined that the current Rule is not creating substantial problems in the federal courts. The Committee resolved to table the proposal, and will continue to monitor the post-*Tome* case law.

*3. **Civil Rule 44:*** The Evidence Rules Committee considered whether it should recommend that Civil Rule 44 be abrogated in light of its overlap with certain Evidence Rules. After substantial research and discussion, the Committee decided against such a recommendation. Civil Rule 44 does not completely overlap the Evidence Rules, and parties in certain types of cases rely on Civil Rule 44 as the sole means of authenticating official records. Since there is no indication of a problem in the cases, the Evidence Rules Committee found it inadvisable to propose any change in this area.

**B. Parent-Child Privilege**

Two bills are pending in Congress with respect to the possible amendment of the Evidence Rules to include some form of parent-child privilege. The Senate Bill would require the Judicial

Conference to report on the advisability of amending the Evidence Rules to include such a privilege. The House Bill would directly amend Evidence Rule 501 to provide a privilege for a witness to refuse to give adverse testimony, or relate confidential communications, concerning the witness' parent or child. The Evidence Rules Committee is unanimously opposed to amending the Evidence Rules to include any kind of parent-child privilege. If such a privilege were adopted, it would be the only codified privilege in the Federal Rules of Evidence--directly contrary to the common-law development of privileges that is the goal of Evidence Rule 501. Moreover, the Committee is convinced (along with the many federal courts that have considered the question) that children and parents do not rely on a confidentiality-based evidentiary privilege when communicating with each other. Nor has the case been made that the benefits of an adverse testimonial privilege outweigh the substantial cost to the search for truth that such a privilege would entail. The Evidence Rules Committee has prepared a draft statement in opposition to the House Bill, as well as a draft statement in response to the Senate Bill. Both of these statements recommend against an amendment of the Evidence Rules that would add a parent-child privilege. These draft statements are attached to this Report.

### C. Proposed Rules of Attorney Conduct

The Evidence Rules Committee was directed, along with the other Advisory Committees, to consider and recommend an appropriate course of action with respect to the proposed Rules of Attorney Conduct. At its meeting, the Evidence Rules Committee noted that the Civil Rules Committee has resolved to recommend that an ad hoc committee, made up of representatives from the advisory committees, be formed to review the proposed Rules of Attorney Conduct. This review will consider the following questions:

1) Whether a "core" set of attorney conduct rules should be adopted for the federal courts, or whether the federal rule should be limited to a single choice of law provision.

2) Assuming that a core set of rules should be adopted, whether the rules as currently proposed fall within the core concern of the federal courts.

3) Whether the proposed rules or notes should be amended in any respect.

4) Whether the Attorney Conduct Rules should be established as a freestanding set of rules, or instead should be placed as an appendix to an existing body of Rules.

The Evidence Rules Committee strongly supports the proposal to establish an ad hoc committee to deal with these complex questions. The Evidence Rules Committee has already provided the Standing Committee's Reporter with extensive commentary and suggestions concerning each of the above issues, and hopes to continue its service by contributing to the work of the ad hoc committee.

**D. E-mail Comments**

The Standing Committee's Subcommittee on Technology has proposed a two-year trial period in which comments on the Rules could be made by e-mail. During this two-year period, Reporters would not be required to summarize individual comments; the Rules Support Office would acknowledge each comment by e-mail, and would post a generic explanation of action of the Advisory Committees in response to comments received. At its April meeting, the Evidence Rules Committee discussed the advisability of allowing e-mail comments, and unanimously resolved to support the proposal of the Technology Subcommittee.

**E. Shortening the Rulemaking Process**

At the request of the Standing Committee, the Evidence Rules Committee considered how and whether the rulemaking process could be shortened. The Committee unanimously agreed that the current process is too long, and that the length of the process encourages Congress to intervene with legislation rather than wait for the rulemaking process to come to its conclusion. The Committee recognized that much of the delay in the process is due to legislation specifying that the Supreme Court has until May 1 to transmit the rules to Congress, and that the Judicial Conference meetings are to be held in March and September. Yet even within those perameters, the Evidence Rules Committee thought it possible that changes could be adopted to shorten the process, without affecting the studied deliberation that is the hallmark of the rulemaking process. The Committee suggests that the Standing Committee might consider the following possibilities:

1. Shorten the six-month public comment period, at least with respect to changes that can reasonably be considered to be minimal or non-controversial.

2. Permit an Advisory Committee's proposal to be issued for public comment if the Standing Committee's only objections are on stylistic or drafting grounds. Any drafting problems could be corrected in the public comment process, thus shaving a year off what would be a four-year rulemaking process if the proposal were to be sent back to the Advisory Committee for redrafting. An alternative could be the approval of a policy permitting the Advisory Committee to respond to Standing Committee objections within 30 days of the Standing Committee meeting.

3. Permit the Advisory Committees to publish their proposals for public comment without the necessity of initial approval by the Standing Committee--while of course preserving the Standing Committee's ultimate authority to approve or disapprove a proposed rule after the public comment period has concluded.

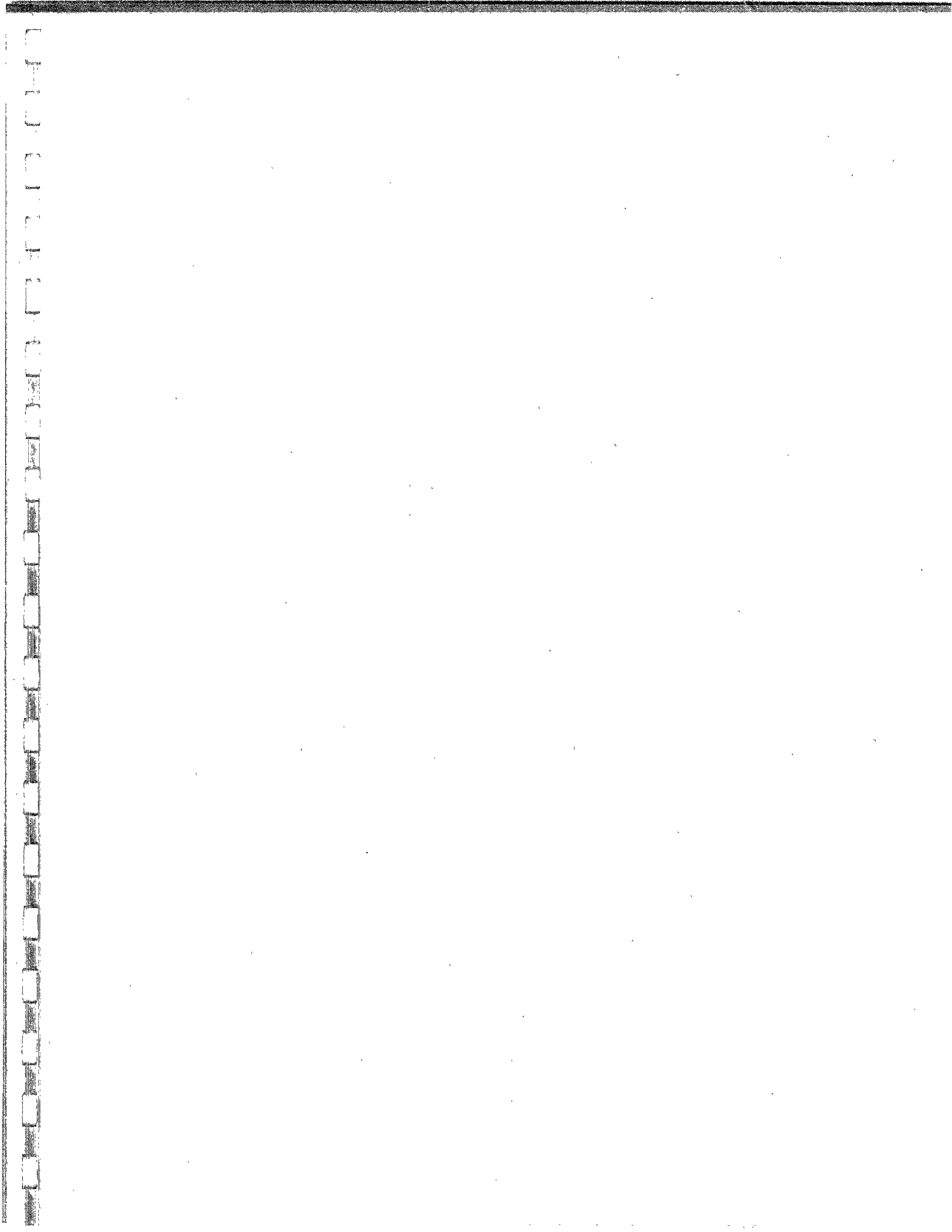
The Evidence Rules Committee agrees with the Standing Committee's self-study report that the current rulemaking process is too long, and the Committee is willing to participate in any suggestions or efforts to shorten the process.

## IV. Minutes of the April, 1998 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 1998 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Rules and Committee Notes
Draft Statements Concerning Parent-Child Privileges
Draft Minutes



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 18-19, 1998
Santa Fe, New Mexico

**DRAFT MINUTES**

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Fe, New Mexico, on Thursday and Friday, June 18-19, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Alan C. Sundberg, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Deputy Attorney General Eric H. Holder, Jr. represented the Department of Justice and attended part of the meeting. He was accompanied by Deborah Smolover and Stefan Cassella of the Department. Judge John W. Lungstrum articipated as a liaison from the Court Administration and Case Management Committee.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mark D. Shapiro, deputy chief of that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Professor Richard L. Marcus, special reporter to the Advisory Committee on Civil Rules, participated in the meeting and shared in the presentation of the advisory committee's report.

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, project director of the local rules project; Thomas E. Willging and Marie Leary of the Research Division of the Federal Judicial Center; and Jean Ann Quinn, law clerk to Judge Stotler.

## INTRODUCTORY REMARKS

### *Changes in Committee Membership*

Judge Stotler introduced Mr. McCartan and welcomed him to his first meeting as a committee member. She reported that her own term on the committee and that of Mr. Sundberg were due to expire on October 1, 1998. She expressed great satisfaction that the Chief Justice had just named Judge Anthony J. Scirica to succeed her as committee chair on October 1, 1998. She also congratulated Chief Justice Veasey on his imminent succession to the presidency of the Conference of Chief Justices. Following committee tradition, all the members, participants, and observers introduced themselves in turn and made brief remarks.

### *March 1998 Judicial Conference Action*

Judge Stotler reported that the Judicial Conference at its March 1998 meeting had adopted the recommendation of the Advisory Committee on Criminal Rules that the Conference oppose pending legislation that would reduce the size of the grand jury. She added that the Director of the Administrative Office had sent a letter on behalf of the Conference to Representative Goodlatte, sponsor of the legislation, stating the reasons for opposition.

Judge Stotler stated that the Conference had discussed proposals to remove the current prohibition in 18 U.S.C. § 3060 and FED. R. CRIM. P. 5(c) preventing a magistrate judge from granting a continuance of a preliminary examination in the absence of consent by the defendant.

Although the Magistrate Judges Committee had recommended that the Conference seek an amendment to the statute, it was suggested during Conference deliberations that the better course would be to follow the rulemaking process and amend Rule 5(c). Judge Stotler emphasized that this procedural matter had demonstrated the need for close coordination with other committees of the Judicial Conference on legislative proposals.

Judge Stotler reported that she had written a letter to Mr. Mecham, Director of the Administrative Office, expressing concern over a growing tendency in the Congress to pursue legislation that would amend the federal rules directly or otherwise circumvent the Rules Enabling Act. She noted, for example, that several provisions in the pending, comprehensive bankruptcy legislation — especially sections dealing with bankruptcy forms — reflected unfamiliarity with the rulemaking process established by the Act.

Judge Stotler said that she had acknowledged to Mr. Mecham the success of the Administrative Office's legislative efforts to protect the rulemaking process and deflect harmful statutory proposals. She had also urged greater interchange and dialog between the Legislative Affairs Office of the Administrative Office and the advisory committees, as well as additional dialog with both members and staff of the Congress.

Judge Stotler noted that Judge Niemeyer would represent the rules committees at the June 29, 1998 meeting of the long range planning committee liaisons of the Judicial Conference. She emphasized that defending the Rules Enabling Act process was a priority goal of the committee's long range planning process. Other long range planning priorities of the committee included restyling the federal rules and addressing the impact of technology on the rules.

Judge Sear reported that he had appeared at Judge Stotler's request on behalf of the committee before the ad hoc committee of the Judicial Conference studying: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training; and (2) the advisability of creating a special mechanism to resolve disputes between the two organizations. He stated that the ad hoc committee had emphasized that the Judicial Conference is the policy-making body for the judiciary, and that the Federal Judicial Center is the judiciary's primary educational body, but that the Administrative Office needs to maintain its own educational programs. He added that an interagency coordinating committee of senior managers of the two agencies had been formed to resolve disputes, but it was not expected that there would be a need for the committee to meet.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee voted without objection to approve the minutes of the last meeting, held on January 8-9, 1998.**

## REPORT OF THE ADMINISTRATIVE OFFICE

### *Legislative Report*

Mr. Rabiej reported that 28 bills and three joint resolutions were pending in the Congress that would affect the rules process. Summaries of each of the provisions, he noted, were set forth in the agenda report of the Administrative Office. (Agenda Item 3A) He added that 11 letters had been sent to the Congress on these legislative provisions expressing the views and concerns of the rules committees, and in some cases those of the Judicial Conference.

Mr. Rabiej stated that Judge Davis, chair of the Advisory Committee on Criminal Rules, had testified before the House Judiciary Subcommittee on Crime on proposed legislation that would amend FED. R. CRIM. P. 46 to authorize forfeiture of a bail bond only if the defendant fials to appear as ordered by the court.

He reported that the House had passed H.R. 1252. Section 3 of that legislation, now pending in a separate bill in the Senate, would authorize an interlocutory appeal of a decision to grant or deny certification of a class action. He pointed out that Judge Niemeyer had written to Senators Hatch and Leahy urging that they oppose section 3 on the grounds that: (1) it would achieve substantially the same results as new Rule 23(f) approved by the Supreme Court and due to take effect on December 1, 1998; and (2) it suffered from drafting problems that would introduce confusion and generate satellite litigation. He expressed confidence that if the legislation proceeded further, section 3 would either be eliminated or converted to a provision accelerating the effective date of new Rule 23(f).

Mr. Rabiej noted that S. 1352, introduced by Senator Grassley, would undo the 1993 amendments to FED. R. CIV. P. 30(b) and take away from parties the flexibility to use the most economical method of reporting depositions.

He pointed out that Judge Niemeyer had informed Representative Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, that the Advisory Committee on Civil Rules was planning to publish a proposed abrogation of the copyright rules for comment. At Mr. Coble's request, though, the committee had decided to defer the matter for another year.

Mr. Rabiej reported that the committee had notified Senator Kohl that the advisory committee had completed its discussion of protective orders and had decided to oppose his legislation that would require a judge to make particularized findings of fact before issuing a protective order under FED. R. CIV. P. 26(c). Mr. Rabiej also reported that the Administrative Office was continuing to monitor a bill that would federalize most class actions.

*Administrative Actions*

Mr. Rabiej reported that the Administrative Office was ready to place proposed amendments to the federal rules on the Internet for public comment. Some members suggested that the bar should be informed through notices in legal journals and newspapers about the opportunity to send comments electronically regarding the amendments on the Administrative Office's home page.

## REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that the Center had conducted nearly 1,500 educational programs in 1997 that had reached 41,000 participants. The number of people reached, she said, will increase as a result of the new programs being developed for the Federal Judiciary Television Network.

She mentioned that the Center had more than 40 research programs pending and referred specifically to two of them: (1) a study of mass torts, focusing on policy and case management issues in the settlement of mass torts; and (2) a study on the use of expert testimony, specialized decision makers, and case management innovations in the National Vaccine Injury Compensation Program.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had approved several proposed amendments at its April 1998 meeting. But the committee had decided not to seek authority to publish the proposals for comment. Rather, it would hold them for publication in 1999 or 2000.

Judge Garwood said that a great deal of praise was due to Judge Logan for his prodigious and very successful efforts in achieving a complete restyling of the appellate rules. He noted that the restyled rules had recently been approved by the Supreme Court and would take effect on December 1, 1998.

Professor Schiltz reported that the advisory committee was considering a number of other potential changes in the appellate rules, but it wanted the bar to become familiar with the new, restyled appellate rules before requesting authority to publish any further proposed

amendments. He added that several of the most recent changes approved by the advisory committee were intended to address complaints by the bar about the proliferation of local court rules. The advisory committee had decided to approve certain national provisions in order to promote national uniformity.

He pointed out that the advisory committee was very supportive of the concept of establishing a uniform effective date for all local rules. He added that it had approved a proposed amendment to FED. R. APP. P. 47(a)(1) that would establish an effective date of December 1 for all revisions to local court rules. The amendment would allow a court to establish a different effective date for a specific rule only if there were an "immediate need" for the rule. It would also provide that a local rule may not take effect until it is received in the Administrative Office. He noted, however, that the Administrative Office wanted an opportunity to study the likely administrative and logistical consequences flowing from the proposal.

Professor Schiltz reported that the advisory committee had announced at the last Standing Committee meeting that its priority long-term project was to consider promulgating uniform national rules on unpublished opinions in the courts of appeals. But, he said, that after careful consideration, the matter was removed from the committee's agenda.

Professor Schiltz also reported that the advisory committee at its last meeting had discussed the desirability of: (1) shortening the length of the Rules Enabling Act process; and (2) permitting public comments on proposed rules amendments to be submitted to the Administrative Office electronically through the Internet. He said that the consensus of the Advisory Committee on Appellate Rules was that the Rules Enabling Act process is too long, but it did not have specific recommendations to shorten it. With regard to Internet comments, the advisory committee favored the proposal.

He said that the advisory committee had also addressed whether there was a need for national rules governing attorney conduct. He noted that a national standard of conduct was set forth in FED. R. APP. P. 46, that the rule had worked well, and that the advisory committee was not aware of serious problems with attorney conduct in the courts of appeals. He added that the advisory committee would be pleased to appoint members to serve on an ad hoc committee to consider attorney conduct, but the committee had no special expertise in this area. He also pointed out that some members of the advisory committee had expressed reservations regarding the proposed draft national rules on attorney conduct. He noted that they were broad in scope, and some of them went beyond conduct related to federal court proceedings. They governed, for example, conduct in a law office, such as confidentiality of client matters. Members of the advisory committee had also expressed concern as to possible limits on the authority of the rules committee to promulgate rules in this area.

Judge Stotler asked Judge Garwood and Professor Schiltz to share these comments and any other reservations of the advisory committee with the reporters of the other rules committees.

Professor Coquillette noted for the record that he personally did not advocate adoption of the 10 illustrative federal attorney conduct rules. He noted that he had been asked as reporter to prepare them only as a model of what national rules might encompass. He said that any set of national rules that the Standing Committee might adopt could be narrower than the 10 draft rules. He added that there was substantial support for a single national rule or a very small number of national rules.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 1998. (Agenda Item 6)

### *Rules Amendments for Judicial Conference Approval*

Judge Duplantier reported that the advisory committee was recommending that the Judicial Conference approve proposed amendments to 16 rules. The proposals had been published in August 1997. The advisory committee had considered the comments at its March 1998 meeting and was now seeking final approval of the amendments.

Professor Resnick stated that seven of the 16 amendments dealt with the issue of an automatic 10-day stay of certain bankruptcy court orders which, if not stayed, could effectively moot any appeal by the losing party. Three of the amendments dealt with narrowing certain notice requirements. Several of the remaining amendments, he said, involved technical matters.

### *10-Day Stay Provision*

FED. R. BANKR. P. 7062 and 9014

Professor Resnick explained that FED. R. BANKR. P. 7062, which applies to all adversary proceedings, incorporates FED. R. CIV. P. 62 by reference and imposes a 10-day stay on the enforcement of all judgments. The advisory committee would not change this provision.

Bankruptcy Rule 9014 governs contested matters, which are initiated by motion. It specifies that Rule 7062 (and Civil Rule 62) apply to contested matters, unless the court directs otherwise. But Rule 7062 — the adversary proceeding rule — sets forth a laundry list

of specific categories of matters, added piece by piece over the years, that are excepted from the 10-day stay provision, all of them contested matters.

Professor Resnick said that the current structure and interaction of these rules was awkward, and it had caused problems in application. As a result, the advisory committee had appointed an ad hoc subcommittee to take a fresh look at the operation and effect of the 10-day stay on all types of contested matters.

After considerable study, the subcommittee and the full advisory committee concluded that it was appropriate to restructure the rules and separate the procedures for adversary proceedings from those for contested matters. First, it had decided to eliminate from Rule 9014 the reference to FED. R. BANKR. P. 7062 (and Civil Rule 62). Second, it would remove the list of excepted contested matters from Rule 7062. As a result, the rules would provide that orders in contested matters — unlike orders in adversary proceedings — would become effective upon issuance, and there would be no 10-day stay.

The committee decided, however, that there were a few types of contested matters to which the 10-day stay should apply as a matter of policy. Professor Resnick explained that the committee had concluded that it was best to relocate the stay provisions for these matters to the specific rules governing these contested matters.

FED. R. BANKR. P. 3020

Professor Resnick noted that Rule 3020 governs confirmation of a plan. He explained that the law today is ambiguous as to whether the court's confirmation order is stayed automatically. The advisory committee would amend the rule to make it clear that an order confirming a plan is stayed for 10 days after the entry of the order to allow a party to file an appeal. He added, though, that a bankruptcy judge would have discretion not to apply the 10-day stay in an individual case, or to shorten the length of the stay.

FED. R. BANKR. P. 3021

Professor Resnick stated that the proposed change in Rule 3021 was a technical amendment conforming to amended Rule 3020 and the 10-day stay of an order confirming a plan.

FED. R. BANKR. P. 4001

Professor Resnick stated that the proposed amendment to Rule 4001, dealing with relief from the automatic stay under section 362 of the Bankruptcy Code, was the most controversial proposal contained in the package of published amendments. He explained that, under the proposed revision, the parties would have 10 days to file an appeal from a judge's

order granting a motion for relief from the automatic stay unless the judge ordered immediate enforcement.

He noted that the advisory committee had received 13 letters during the public comment period addressing this provision, the majority of which had expressed opposition to the amendment. Several commentators were concerned that it would not be fair to give a debtor — whose request to life the automatic stay under section 362 of the Bankruptcy Code is denied by the court — an additional automatic 10 days enjoyment of the premises or automobile that is the subject of the lift-stay motion. Professor Resnick said that the advisory committee had debated the merits of the matter carefully and had voted to proceed with the amendment on the merits. He added that the moving party may always ask for immediate enforcement of an order lifting the stay, and the court has authority to include a provision for immediate enforcement in its order.

FED. R. BANKR. P. 6004

Professor Resnick explained that Rule 6004 governs court orders authorizing the use, sale, or lease of property. He said that the most common use of the rule involves application by the debtor to sell assets out of the ordinary course of business. He reported that the advisory committee concluded that this was the type of order that should be stayed for 10 days to allow the losing party to file an appeal. The 10-day stay was necessary because otherwise the holder of the property could sell it immediately to a good faith purchaser and effectively moot any appeal.

FED. R. BANKR. P. 6006

Professor Resnick said that the advisory committee proposed a similar provision in Rule 6006. He explained that the assignment of an executory contract was akin to a sale of property under Rule 6004, and an order authorizing the assignment should be stayed for 10 days to allow an appeal before the assignment is consummated.

Professor Resnick said that the proposed amendments to rules 3020, 3021, 4001, 6004, and 6006 were based on considerations of fundamental fairness. The advisory committee was aware of the need for finality of judgments but, on balance, it believed that it was necessary to establish a presumption of a 10-day stay in these discrete categories of contested matters in order to prevent a party's right of appeal from being mooted.

Some of the members expressed concern over the proposed amendments on the ground that they would delay time-sensitive matters and shift the burden from the losing party to the successful moving party. They stated that in ordinary civil litigation, there are not the same time-sensitive considerations as in bankruptcy.

Professor Resnick explained that ordinarily in civil cases there is a 10-day stay of all judgments. The proposed amendments to the bankruptcy rules, however, would provide a general rule that there is no 10-day stay in contested matters. But the above amendments to Rules 3020, 3021, 4001, 6004, and 6006 were designed as specific exceptions to the general rule. Moreover, the moving party can always ask the judge to waive the 10-day stay on the grounds that there is time sensitivity in a given case. In other words, in the specified excepted categories of contested matters the proposed amendments give the losing party 10 days to appeal the judgment, as under FED. R. CIV. P. 62.

**The committee approved the proposed amendments to Rules 3020, 3021, 4001, 6004, and 6006 by a vote of 8 to 4. It approved all the other proposed amendments without objection.**

*B. Other Proposed Amendments*

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017 currently provides that when a motion to dismiss is made — either for failure of the debtor to file schedules or for failure to pay the filing fee — the clerk must send notice of the motion to all creditors. He explained that the advisory committee had been asked by the Administrative Office to save money by considering limits on the amount of noticing to be performed by the clerk. The proposed amendment would have the clerk serve notice of the motion only on the debtor, the trustee, and such other entities as the court may direct.

A new subdivision 1017(c) would be added to specify the parties who are entitled to receive notice of the motion to dismiss. Professor Resnick explained that without the new subdivision there would be a gap in the rules, in that there would be no way to ascertain who must receive notice of the motion.

Professor Resnick pointed out, however, that in the new "litigation package" of amendments recommended by the advisory committee for publication, the substance of Rule 1017(c) would be moved to Rule 9014 as part of a general restructuring of the rules dealing with litigation and motion practice. Accordingly, if the litigation package were to become law on schedule, the new subdivision 1017(c) would remain in effect for only one year.

The advisory committee, he said, was very sensitive to the general policy of avoiding frequent changes in the rules, especially when changes are proposed in the same rule. Nevertheless, if the litigation package were not to become law, the change in Rule 1017(c) would be needed permanently.

FED. R. BANKR. P. 1019

Professor Resnick stated that Rule 1019 governs conversion of a case from chapter 11, 12, or 13 to chapter 7. He noted that there is uncertainty in practice as to what document should be filed by one seeking to recover preconversion administrative expenses. Therefore, the advisory committee would amend subdivision (6) to specify that a holder of an administrative expense claim incurred after commencement of the case but before conversion must file a request for payment under section 503 of the Code, rather than a proof of claim. Notice of the conversion would be given to the administrative expense creditors.

He noted that the advisory committee had made a change in the rule following the public comment period by deleting a deadline for filing requests for payment of preconversion administrative expenses that would be applicable in all cases. Instead, the rule would have the court fix the deadline.

FED. R. BANKR. P. 2002

Professor Resnick reported that the proposed change in Rule 2002(a)(4) conformed the rule to the changes proposed in Rule 1017.

FED. R. BANKR. P. 2003

Professor Resnick stated that Rule 2003(d) deals with disputed elections of chapter 7 trustees. He explained that Rule 2007.1 — which governs disputed elections of chapter 11 trustees — was better written and clearer. Accordingly, the advisory committee had chosen to conform the language of Rule 2003 to that of Rule 2007.1.

FED. R. BANKR. P. 4004

Professor Resnick reported that the language of Rule 4004(a) would be amended to clarify that a complaint objecting to discharge must be filed within 60 days after the first date set for the meeting of creditors, whether or not the hearing is held on that date. Rule 4004(b) would be amended to specify that a motion to extend the time for filing a complaint objecting to discharge must be "filed," rather than "made."

FED. R. BANKR. P. 4007

Professor Resnick explained that Rule 4004 governs denial of a discharge, while Rule 4007 governs the dischargeability of a particular debt. He said that the proposed changes in Rule 4007 were parallel to those proposed in Rule 4004.

FED. R. BANKR. P. 7001

Professor Resnick pointed out that under the present rule, a request for injunctive relief requires the filing of an adversary proceeding. But in practice an injunction is often embodied in a chapter 11 plan, and adversary proceedings are not in fact commenced. The advisory committee proposed conforming the rule to the practice and provide explicitly that an adversary proceeding is not necessary to obtain injunctive or other equitable relief, if that relief is specified in a chapter 9, 11, 12, or 13 plan.

Professor Resnick stated that Department of Justice representatives had expressed reservations to the advisory committee that the proposed amendment did not provide adequate procedural protections to all parties that might be affected by injunctive relief. They suggested, for example, that injunctive relief provisions might be embedded in plans that parties would likely not see or recognize in the absence of an adversary proceeding.

Deputy Attorney General Holder and Professor Resnick added that the Department had been discussing the matter with the advisory committee. As a result, its initial objections had now been withdrawn with the understanding that Mr. Kohn of the Department would be presenting the advisory committee at its October 1998 meeting with proposed procedural protections for inclusion in other bankruptcy rules.

FED. R. BANKR. P. 7004

Professor Resnick stated that the proposed change in Rule 7004(e) would provide that the 10-day limit for service of a summons does not apply to service made in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick reported that the proposed change in Rule 9006(b), governing time, was a purely technical amendment that had not been published for public comment. He explained that the rule currently provides that a court may not enlarge the time specified in Rule 1017(b)(3). But since the advisory committee would abrogate Rule 1017(b)(3), the cross-reference in Rule 9006 would need to be eliminated.

**The committee approved the proposed amendments without objection. It further voted to approve the amendment to Rule 9006 without publication.**

*Amendments for Publication*

*A. Litigation Package*

Judge Duplantier reported that the Federal Judicial Center, at the request of the advisory committee, had conducted an extensive survey of the bench and bar in 1995 inquiring as to the effectiveness of the Federal Rules of Bankruptcy Procedure. The survey results had indicated general satisfaction with the rules, but had identified motion practice and litigation in connection with "contested matters" as areas of significant dissatisfaction that needed improvement.

He added that the bar had complained that the national rules had left too many procedures for handling contested matters to local variation. Some of the local rules, moreover, are inconsistent with the national rules. Many local rules, for example, require a response to a motion, even though the national rules do not require a response. In addition, the national rules specify that a motion must be served five days before a hearing on a motion. Local rules, however, often specify different time frames.

The advisory committee, accordingly, undertook to address in a comprehensive manner the problems of litigation and motion practice. Judge Duplantier stated that the project had proven to be very complex and controversial. The committee had appointed a special subcommittee, which worked for two years to produce a package of proposed amendments. In turn, the full advisory committee addressed the proposals at four meetings, and it had approved a package of amendments that it believed would provide substantially better guidance and national uniformity for the bar. He added, however, that two members of the advisory committee had dissented on the proposals, largely on the grounds that they believed that litigation and motion practice should be left to local practice.

Professor Resnick added that the terminology currently used in the Federal Rules of Bankruptcy Procedure is confusing. He pointed out that the proposed amendments would not affect "adversary proceedings," which are akin to civil law suits in the district courts and are governed largely by the Federal Rules of Civil Procedures. Rather, they would govern the handling of proceedings that are presently called "contested matters."

"Contested matters," generally, are proceedings commenced by motion that initiate litigation unrelated to other litigation that may be pending in a bankruptcy case. But they are not akin to the kinds of motions filed in the district courts, which typically involve matters within a pending civil action. Rather, they embrace such subjects as the rejection of an executory contract, relief from the automatic stay, requests to obtain financing, and the appointment of a trustee in a chapter 11 case.

Professor Resnick said that the purpose of the proposed amendments is to provide greater guidance and uniformity in handling these important matters. At the same time, the amendments would allow more routine, non-contested matters to be resolved quickly, and normally without a hearing. The advisory committee's general restructuring would, thus, create three principal categories of bankruptcy proceedings: (1) adversary proceedings, governed by Part VII of the rules; (2) motions, governed by amended Rule 9014; and (3) applications, governed by amended Rule 9013.

The proposed amendments to Rules 9013 and 9014, he said, constituted the heart of the proposed package of amendments.

FED. R. BANKR. P. 9013

The amended Rule 9013 would establish a new category of proceedings called "applications," consisting of the 14 specific categories of matters set forth in subdivision 9013(a). These proceedings are normally non-controversial and unopposed, and the rule would allow them to be handled quickly and inexpensively. Included, for example, are such matters as motions to jointly administer a case and motions for routine extensions of time.

Rule 9014 would be the default rule. Accordingly, if a matter were not specifically listed as an application in subdivision (a), it would be governed by Rule 9014 or another rule expressed designated in Rule 9014(a).

Subdivision 9013(b) sets forth the requirements for requesting relief by application, and subdivision (c) specifies the manner of service. An application need not be served in advance and may be served at the same time that it is presented to the court. Service may be made in any manner by which a motion may be served under the bankruptcy rules, including service by electronic means, if authorized by local rule. Professor Resnick pointed out that the provision for electronic service represented an advance over FED. R. BANKR. P. 5005, which authorizes electronic means only for the filing of papers with the court.

A member of the committee asked why the advisory committee had chosen the term "application," rather than "motion." He pointed out that FED. R. CIV. P. 7 states explicitly that "an application for an order shall be by motion." Professor Resnick responded that the civil rules and the bankruptcy rules simply do not use the same terminology. He noted that a difference is made in bankruptcy between applications and motions. An application, in effect, is something less significant than a motion.

FED. R. BANKR. P. 9014

Professor Resnick explained that Rule 9014, as amended, would create a new category of proceedings called "administrative proceedings." They include more complex matters than applications and are more likely to be contested. Yet they do not require all the procedures of adversary proceedings under Part VII of the bankruptcy rules.

Subdivision 9014(a) carves out certain proceedings from the scope of Rule 9014, including involuntary bankruptcy petitions, petitions to commence an ancillary proceeding under section 304 of the Bankruptcy Code, bankruptcy appeals, adversary proceedings, and motions within adversary proceedings.

Professor Resnick stated that Rule 9014(b) provides that a request for relief in an administrative proceeding must be made by written motion entitled an "administrative motion." Unless made by a consumer debtor, the motion must be accompanied by supporting affidavits.

Rule 9014(c) governs service and provides that a copy of an administrative motion must be served at least 20 days before the hearing date on the motion. A response to the motion must be filed at least five days before the hearing. These dates currently are governed by local rules, which vary substantially from district to district. The proposed amendment to Rule 9014(c) also specifies the entities that must receive notice of the motion. Service may be made by any means by which a summons may be served or by electronic means if authorized by local rule. If the respondent fails to respond to the motion, the court may issue an order without a hearing.

Professor Resnick said that subdivision 9014(h) provides that the discovery provisions of the Federal Rules of Civil Procedure would be made applicable in administrative proceedings, with two exceptions: (1) the initial disclosure provisions of FED. R. CIV. P. 26(a); and (2) the requirement of a meeting of the parties under FED. R. CIV. P. 26(f). In addition, the 30-day time periods specified in the civil discovery rules, *i.e.,* FED. R. CIV. P. 30(e), 33(b)(3), 34(b), and 36(a), would be reduced to 10 days in order to expedite the processing of administrative proceedings.

Under subdivision 9014(i), witnesses would not be brought to an initial hearing. Professor Resnick explained that local rules of court currently contain great variations on this point. Under the proposed national rule, the court would conduct a hearing on the specified hearing date to determine whether there is a material issue of fact or law. The judge at that time would determine whether there is a need for an evidentiary hearing.

The amended rule provides that no testimony may be given at the initial hearing unless the parties consent or there is advance notice. If the court finds that there is an issue of fact,

the hearing becomes a status conference. The evidentiary hearing would be held at a later date. The rule, however, provides exceptions for certain time-sensitive matters, such as relief from the automatic stay and preliminary hearings on the use of cash collateral or obtaining credit.

Professor Resnick pointed out that the proposed new subdivision 9014(j) would make FED. R. CIV. P. 43 inapplicable at an evidentiary hearing on an administrative motion. The advisory committee, he said, had decided as a matter of policy that live testimony, rather than affidavits, should be required at the hearing. He added that new subdivision 9014(l) specifies several of the Part VII adversary proceeding rules that would apply to administrative proceedings.

Finally, subdivision 9014(o) would operate as a safety valve and would authorize the court, for cause, to change any procedural requirements of the rule. But it requires the court to give the parties notice of any proposed changes in the requirements.

OTHER RULES

Professor Resnick reported that the advisory committee had determined that a few proceedings in the bankruptcy courts simply did not fit well into one of the three major categories of adversary proceedings, administrative motions, and applications. Therefore, it had excluded these proceedings from Rule 9014(a) and would have them governed by other specific rules. He offered as examples FED. R. BANKR. P. 2014, which would prescribe special procedures for the employment of an attorney, and FED. R. BANKR. P. 3020, which would govern the confirmation of a chapter 11 plan.

Professor Resnick explained that most of the remaining amendments in the litigation package were conforming changes to accommodate the provisions of Rules 9013 and 9014.

Judge Duplantier asked the Standing Committee to approve:

(1) publishing the proposed litigation package, consisting of amendments to FED. R. BANKR. P. 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034 ;
(2) publishing the accompanying commentary to the amendments, entitled, *Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice,* as a guide to bench and bar; and
(3) providing a five-month public comment period from August 1, 1998, to January 1, 1999.

Professor Resnick noted that the litigation package included amendments to 27 different rules. He said that the volume of the changes made it difficult to follow without an explanation focusing on the heart of the changes, set forth in Rules 9013 and 9014. Therefore, the advisory committee's accompanying commentary had been prepared to assist the Standing Committee and the public during the publication period. It was not intended to become a permanent committee note.

**The committee approved the litigation package and the accompanying commentary for publication without objection. It also approved the proposed five-month public comment period without objection.**

*Other Rules Amendments*

Judge Duplantier reported that the advisory committee recommended publication of changes in several other rules, three of which deal with providing notice to government entities.

*Government Notice Provisions*

FED. R. BANKR. P. 1007

Professor Resnick stated that Rule 1007 requires the debtor to file schedules and statements. The proposed amendments to Rule 1007(m) would provide that if the debtor lists a governmental unit as a creditor in a schedule or statement, it must identify the specific department, agency, or instrumentality of the governmental unit through which it is indebted. Failure to comply with the requirement, however, would not affect the debtor's legal rights.

FED. R. BANKR. P. 2002

Professor Resnick stated that when the government is a creditor, the debtor must mail notices both to the pertinent government department and the United States attorney. He noted that the Department of Justice had complained that the United States attorney normally receives notices, but frequently does not know which government agency is involved. Accordingly, the proposed amendment to Rule 2002(j)(5) would require that the appropriate governmental department, agency, or instrumentality be identified in the address of any notice mailed to the United States attorney.

FED. R. BANKR. P. 5003

The proposed amendments to Rule 5003, dealing with records kept by the clerk, would require the bankruptcy clerk to maintain a register of the mailing addresses of federal and state governmental units within the state where the court sits.

Professor Resnick stated that concern had been expressed that if updates to the register were too frequent, lawyers might not have the latest edition at hand. Pending legislation in the House of Representatives would require the clerks to maintain a register and update it quarterly. The advisory committee, however, had decided that annual updates were sufficient.

The proposed amendment would not require the clerk to list more than one mailing address for any agency. But the clerk may do so and include information that would enable a user of the register to determine which address is applicable.

The mailing address listed on the register would be presumed conclusively to be the correct agency address. But failure by the debtor to check the register and use the proper address would not invalidate a notice if the agency in fact received the notice. Thus, the register would serve as a "safe harbor." A debtor who used it would be protected, and a debtor who did not would act at its own peril.

*Other Provisions*

FED. R. BANKR. P. 1017

The proposed amendment to Rule 1017, dealing with dismissal or conversion of a case, would authorize the court to rule on a timely-filed request for an extension of time to file a motion to dismiss a case for substantial abuse, whether or not it ruled on the request before or after expiration of the 60-day deadline specified in the rule.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6), dealing with notices, would provide an adjustment for inflation. Under the current rule, notice of a hearing on a request for compensation or expenses must be given if the request exceeds $500. The rule has remained unchanged since 1987. The advisory committee would raise the threshold amount to $1,000.

FED. R. BANKR. P. 4003

Professor Resnick said that the proposed amendment to Rule 4003, dealing with exemptions, was very similar to that proposed in Rule 1017. A party currently has 30 days to object to the list of property claimed as exempt by the debtor unless the court extends the time period. Case law has held that the court must actually rule on the extension request within the 30-day period. The amendment would permit the court to grant a timely request for an extension of time to file objections to the list, as long as the request is made within the 30-day period.

FED. R. BANKR. P. 4004

Professor Resnick explained that the proposed change to Rule 4004, dealing with the grant or denial of discharge, is a technical one, designed to conform to the proposed change in Rule 1017(e). It would provide that a discharge will not be granted if a motion is pending requesting an extension of time to file a motion to dismiss the case for substantial abuse.

**The committee voted to approve the above amendments for publication without objection.**

*Proposed Amendments to the Official Forms*

OFFICIAL FORMS 1 AND 7

Professor Resnick stated that the reasons for the proposed changes to the Official Forms were set forth at Tab 6D of the agenda book.

**The committee voted to authorize publication of the amendments to the Official Forms without objection.**

*National Bankruptcy Review Commission Recommendations*

Professor Resnick reported that the advisory committee was studying the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations, some of which called specifically for changes in the Federal Rules of Bankruptcy Procedure and were addressed to the advisory committee.

Judge Duplantier noted that the Committee on the Administration of the Bankruptcy System was taking the lead for the Judicial Conference in preparing and coordinating responses to the Commission's various recommendations. It had referred a number of recommendations to the Advisory Committee on Bankruptcy Rules, which in turn had decided that it would not take a position on any Commission recommendations that called for substantive changes in the Bankruptcy Code as a precedent to rules amendments. Several of the recommendations, however, called on the advisory committee to make changes in the rules and forms independent of legislative action. The advisory committee concluded that the appropriate response was to recommend that the provisions of the Rules Enabling Act be followed with regard to such rules-related recommendations.

Professor Resnick also pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code. In addition, he said, comprehensive bankruptcy legislation is pending in the Congress that would change many of the substantive

provisions of the Code. He said that legislative enactment of these provisions would require the advisory committee to draft amendments to the bankruptcy rules to implement the statutory changes.

Judge Sear moved to adopt the recommendations of the advisory committee regarding the report of the National Bankruptcy Review Commission. **The committee voted to approve the recommendations without objection.**

*Informational Items*

Judge Duplantier reported that the advisory committee had considered the issue of establishing a uniform effective date for local rules. It concluded that the issue was not very important, but that if a single date were chosen, it should be December 1 of each year. It also concluded that a safety valve should be provided in the rule to take care of emergencies and newly-enacted legislation.

Professor Resnick reported that the advisory committee had considered the proposal to permit the public to comment on proposed rule amendments by e-mail. It favored implementing the proposal for a trial period, but was of the view that e-mail comments should be treated the same as written comments.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of May 18, 1998. (Agenda Item 7)

*Amendments for Judicial Conference Approval*

FED. R. CIV. P. 6

Professor Cooper reported that the proposed change to Rule 6, dealing with computing time, was purely technical. He explained that a conforming amendment was needed in Rule 6(b) to reflect the abrogation of Rule 74(a) in 1997. The rule would be amended to delete its reference to Rule 74(a). He added that since the change was technical, there was no need to publish it for public comment.

FORM 2

Professor Cooper reported that paragraph (a) of Form 2 sets forth an allegation of jurisdiction founded on diversity of citizenship. It asserts that the matter in controversy exceeds $50,000. But the governing statute, 28 U.S.C. § 1332, had been amended to raise the

diversity jurisdiction threshold amount to its current level of $75,000. The advisory committee recommended that the language of Form 2 be amended to refer to the statute itself, rather than to any specific dollar amount.

Professor Cooper added that the advisory committee was of the view that this, too, was a technical change that did not require publication.

**The committee approved the amendments to Rule 6 and Form 2 without objection and voted to forward them to the Judicial Conference without publication.**

*Amendments for Publication*

*Discovery Package*

Judge Niemeyer reported that the advisory committee had been debating discovery issues for several years. Among other things, it had considered proposed amendments to FED. R. CIV. P. 26(c) as an alternative to pending legislation that would narrow or restrict the use of protective orders. More importantly, the committee had to address the impact on the district courts of the expiration of the Civil Justice Reform Act of 1990. Specifically, it had to decide whether the 1993 amendments to the civil rules — largely inspired by the Act and authorizing local variations in pretrial procedures — should be continued permanently or amended in certain respects.

The advisory committee had appointed a special discovery subcommittee — chaired by Judge David F. Levi and staffed by Professor Richard L. Marcus as special reporter — to study these issues and to take a comprehensive look at the architecture of discovery itself. Judge Niemeyer said that the subcommittee had been asked to address such matters as whether discovery is too expensive in light of its contribution to the litigation process. And, if it is too expensive, are there changes that could be made that would preserve the existing system, which promotes disclosure of information, yet produce cost savings? He added that the subcommittee had also been asked to consider restoring greater national uniformity to the rules by eliminating or reducing local "opt out" provisions authorized by the 1993 amendments.

Judge Niemeyer reported that the advisory committee had conducted an important conference at Boston College Law School with leading members of all segments of the bar, interested organizations, the bench, and academia. It had also asked the Federal Judicial Center to conduct a survey of lawyers on discovery matters. The data from that survey showed that about 50% of the cost of litigation is attributable to discovery, and that in the most complex cases that percentage rises to about 90%. The lawyers responded that discovery was very expensive, and 83% of them stated that they favored certain changes in the discovery

rules. In particular, they expressed support for providing: (1) greater access to judges on discovery matters; and (2) national uniformity in procedures.

Judge Niemeyer reported that there had been a consensus among the participants at the Boston College conference that:

1. Full disclosure of relevant information is an important element of the American discovery system that should be preserved.

2. Discovery works very well in a majority of cases.

3. In those cases when discovery is actively used, both plaintiffs and defendants believe that it is unnecessarily expensive. Plaintiffs complain that depositions are too numerous and expensive, and defendants complain most about the costs of document production, including the costs of selection, review to avoid waiver of privileges, and reproduction.

4. Where initial mandatory disclosure is being used, it is generally liked and is generally seen as reducing the cost of litigation.

5. National uniformity is strongly supported, and the local rule options authorized by FED. R. CIV. P. 26 should be eliminated.

6. The cost of discovery disputes could be reduced by greater judicial involvement.

7. The costs of document production are attributable in large part to the review of documents necessary to avoid waiver of the attorney-client privilege. Costs could be reduced if there could be a relaxation of the waiver rules for discovery purposes. (The advisory committee, however, was initially of the view that because privileges are generally governed by state law, it might be difficult to address this matter through the federal civil rules.)

8. Discovery costs could be reduced by imposing presumed limits on the length of depositions and the scope of discovery, particularly with regard to the production of documents.

9. An early discovery cutoff date and a firm trial date are the most effective ways of reducing costs. (The advisory committee concluded, however, that this matter could best be addressed by the Court Administration and Case Management Committee and by education of judges, rather than by rule amendments.)

Judge Niemeyer stated that the special discovery subcommittee had considered a wide variety of ideas and had presented the advisory committee with several different options. The central goal was to reduce the costs of discovery without undercutting the basic principles of open disclosure of relevant information. The advisory committee considered all the alternatives and concluded that any package of amendments that it would propose should be designed to enjoy general support from both plaintiffs and defendants.

He added that the political aspects of changes in the discovery rules were very important. Plaintiffs and defendants simply do not agree on some procedural matters. Nevertheless, the advisory committee was of the view that the package it had selected was very well balanced and fairly addressed the concerns of both sides. Judge Niemeyer reported that the advisory committee had chosen to proceed with proposals on which the vote was unanimous or represented a strong majority. On close votes, the committee either dropped the proposal or modified it to satisfy a significant majority.

Judge Niemeyer explained that the package adopted by the advisory committee did not reduce discovery. Rather, it would narrow attorney-managed discovery and make some of it court-managed discovery. The committee's proposal would limit attorney-managed discovery under FED. R. CIV. P. 26(b) to any matter, not privileged, that is relevant to a claim or defense of a party. Broader discovery of matters relevant to "the subject matter involved in the pending action" would still be available to the parties, but only on application to the court.

A proposed amendment to FED. R. CIV. P. 34(b) would authorize the court to limit discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party. Judge Niemeyer reported that the special discovery subcommittee had recommended placing that provision in Rule 26, but the full advisory committee decided to retain it as an amendment to Rule 34. It also decided to include a note on the matter in the publication and invite public comment on the proper placement of the provision.

One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said that they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions. He also strongly objected to the amendment to Rule 34 authorizing the court to order cost sharing, which he described as "cost shifting." He predicted that defense lawyers would routinely challenge discovery requests by plaintiffs and seek to shift the costs of discovery to the plaintiffs.

Professor Cooper stated that the discovery subcommittee had not been discharged. It would continue to consider other matters, including the advisability of providing limited initial

disclosure of documents without waiving attorney-client privileges in order to reduce the burdens of document production and a presumptive age limit on the production of documents. It would also explore whether it would be practicable to develop discovery protocols or guidelines for various kinds of civil cases.

Professor Cooper also reported that the advisory committee had decided not to proceed further with proposals to amend the protective order provision of FED. R. CIV. P. 26(c).

Several members of the committee complimented the advisory committee and its discovery subcommittee on producing a well-researched, carefully-crafted, and objective package of amendments that, they said, managed to accommodate many difficult and competing considerations and achieve national uniformity. They said that although they might have reservations about individual provisions in the proposed discovery package, they favored publication of all the proposed amendments.

Judge Niemeyer asked Professor Marcus to describe the proposed amendments to each of the rules.

FED. R. CIV. P. 5

Professor Marcus stated that the proposed amendment to Rule 5(d) would provide that discovery materials need not be filed until they are used in a proceeding or the court orders that they be filed. He explained that the rule had been amended in 1980 to authorize a court to order that discovery materials not be filed with the clerk of court. Before that time, they had been filed routinely with the courts.

He reported that by the late 1980's about two thirds of the district courts had promulgated local rules prohibiting the filing of discovery materials generally. The Standing Committee's Local Rules Project had concluded that these rules were inconsistent with the national rules but had suggested consideration of amendment of the national rule. He added that the Judicial Council of the Ninth Circuit had recently recommended that Rule 5(d) be amended to authorize local rules to prohibit the filing of discovery materials, but the advisory committee had decided not to pursue that course of action.

Instead, the advisory committee had decided to propose a national rule that would excuse the filing of discovery materials and supersede existing local rules. The proposed Rule 5(d), which includes disclosures under Rule 26(a)(1) or (2) as well as discovery information, would provide that these materials "need not be filed." The committee note makes it clear that deposition notices and discovery objections would be covered by the rule. But medical examinations under Rule 35 would be unaffected by the amendment. Professor Cooper added that although discovery responses need not be filed under the proposed amendment, they could be filed if a party wished to file them.

Some members of the committee stated that clerks of court were experiencing serious space problems and that the filing of discovery materials would create burdens and costs for the courts. They suggested that the national rule be amended to prohibit the filing of all discovery materials except with court permission. Professor Marcus responded that public access to discovery materials was a controversial matter. Moreover, some lawyers wanted to reserve the opportunity to file certain materials with the clerk.

Judge Niemeyer noted that when Rule 5(d) had been amended in 1980, the press had expressed opposition on the grounds that the amendment would restrict its access to "court records." He added that the advisory committee had been concerned that a national rule banning the filing of discovery materials might provoke similar controversy and impede eventual passage of the amendment. Accordingly, it had decided to make only a modest change that would allow, but not require, parties to file materials.

Several members of the committee stated, however, that there was no requirement that discovery materials be made public, since they are not part of the public record unless actually used in a case. Justice Veasey moved to substitute the words "must not be filed" for the words "need not be filed" in line 7 of the proposed amendment to Rule 5(d). **The committee voted to approve the substitution without objection.**

Two of the members suggested that the proposed amendment include a provision placing an explicit responsibility on attorneys to preserve discovery materials. Other members stated, however, that local rules and case law adequately cover this matter.

**The committee approved the proposed amendment for publication with one objection.**

FED. R. CIV. P. 26

Professor Marcus reported the advisory committee had decided as a matter of policy to seek national uniformity in the rules regarding initial disclosures under Rule 26(a). He pointed out that mandatory disclosure was a controversial matter among the bench and bar, with strong views expressed both for and against it. He said that the advisory committee had considered three options: (1) to make the current Rule 26(a)(1) mandatory in all districts; (2) to abrogate Rule 26(a)(1) and preclude initial disclosure everywhere; or (3) to fashion a form of disclosure that would be nationally acceptable.

The advisory committee chose the third course. To that end, the proposed amendments to Rule 26(a)(1) would limit a party's disclosure obligation to materials "supporting its claims or defenses." Professor Marcus emphasized that the revised rule would promote national uniformity by eliminating the explicit authority of a court under the current rule to opt out of the disclosure requirements by local rule.

Two members questioned whether the phrase "supporting its claims or defenses" was broad enough to cover information that controverted an opponent's claims or defenses. They noted that this issue had been addressed in the committee note, but suggested that more comprehensive language might be incorporated in the rule itself. Professor Cooper responded that the advisory committee had deliberately chosen the language to be consistent with language already used elsewhere in the discovery rules. He pointed out, for example, that FED. R. CIV. P. 26(b), which defines the scope of discovery, refers only to "claims and defenses." He added that claims and defenses includes denials, but not impeaching materials.

One of the members suggested publishing alternative language on the scope of disclosure and soliciting public comment on the two versions. Judge Niemeyer responded that the advisory committee was of the view that only one version should be published for comment.

Professor Marcus stated that subparagraph 26(a)(1)(E) sets forth a list of 10 categories of civil actions that would be exempt from the initial disclosure requirements of the rule. He explained that discovery would be an unnecessary burden in these types of cases. He also pointed out that, after consulting with the chair and reporter of the Advisory Committee on Bankruptcy Rules, the two bankruptcy exceptions set forth as items (i) and (ii) in the subparagraph were unnecessary. Accordingly, Judge Niemeyer, Professor Cooper, and Professor Marcus suggested eliminating them from the proposed amendment.

Some of the members asked whether the list of exemptions in Rule 26(a)(1)(E) was accurate and complete. Professors Marcus and Cooper responded that the advisory committee expected to use the public comment process to refine the list further. They noted that the publication would flag the issue and ask for public comment on whether the types of civil cases listed were proper for exclusion, whether they were properly characterized, and whether other categories of cases should also be excluded.

Professor Marcus pointed out that the parties would be given 14 days, rather than 10 days, following the conference of attorneys under Rule 26(f) to make the required disclosures. Later-added parties would have to make their disclosures within 30 days, unless a different time were set by stipulation. And minor changes would be made in paragraphs 26(a)(3) and (4) to conform with the proposed changes in Rule 5(d) on the filing of disclosure materials.

Professor Marcus said that the proposed amendments to Rule 26(b)(1) would limit attorney-controlled discovery. But the court would have authority to permit discovery beyond matters related to the claims or defenses of a party. The language would be amended to make it clear that evidence sought through discovery must be relevant, whether or not admissible at trial. He pointed out that a new sentence had been added at the conclusion of paragraph (b)(1) to call attention to the limitations on excessive or burdensome discovery imposed by subdivision 26(b)(2)(i), (ii), and (iii).

Professor Marcus pointed out that the amendments to Rules 26(d) and 26(f), dealing with the timing and sequence of discovery and the conference of the parties, were linked. The language of both provisions would be amended to exclude "low end" cases, *i.e.*, the categories of cases exempted from initial disclosure requirements under Rule 26(a)(1)(E). He added that the amended rule would require that the conference of the parties under Rule 26(f) be held seven days earlier than currently in order to give the court more time to consider the report and plan arising from the conference. The amended rule would no longer require a face-to-face meeting of parties or attorneys, but a court could by local rule or order require in-person participation.

**The committee approved the proposed amendments, with the change to Rule 26(a)(1)(E) described above, for publication with one objection.**

FED. R. CIV. P. 30

Professor Marcus stated that Rule 30(d)(2) would be amended to limit the duration of depositions. Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition would be limited to one day of seven hours. The rule would also be amended to include non-party conduct within the rule's prohibition against individuals impeding or delaying the examination.

Some of the members expressed doubts that a uniform limit on the length of depositions would be effective in practice, especially in multi-party cases. They noted that many variables had to be considered, and attorneys often do not have control over the course of their own depositions. They suggested that time limits on depositions would be difficult to regulate by rule and would best be left to the attorneys and discovery plans. Professor Marcus responded that there had been a strong majority on the advisory committee for making the change. Many attorneys have complained that overlong depositions result in undue costs and delays. Professor Cooper added that Rule 26(b)(2) currently authorizes a court to impose limits on the number and length of depositions. Moreover, a court would retain the power to extend a deposition on a party's request.

One member recommended that the amended rule require that the party taking the deposition notify the deponent 10 days in advance which documents owuld be the sugject of interrogation, that the moving party send the deponent pertinent documents in advance, and that the deponent be required to read the documents before taking the deposition. Some of the members agreed with the substance of the recommendation, but they suggested that the matter was one that should be left to good practice and trial strategy, rather than national rule. Judge Niemeyer added that the member's point was well taken, but that lawyers had told the advisory committee that the problem of unprepared witnesses rarely arose with experienced attorneys. In addition, there was a concern that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use. Therefore, the

advisory committee had decided not to include in the amendments an express requirement that the deponent read certain documents in advance.

**The committee approved the proposed amendments for publication by a vote of 6 to 4.**

FED. R. CIV. P. 34

Professor Marcus stated that the proposed amendment to Rule 34(b) would provide that when a discovery request exceeds the limitations of Rule 26(b)(2), the court could limit the discovery or require that the requesting party pay part or all of the reasonable expenses of producing it.

One of the members strongly objected to this provision, stating that it would be used routinely by defense counsel to shift costs to plaintiffs, thereby driving many poor or economically-limited litigants out of the court system. He said that it would alter the entire philosophy of federal practice and should be rejected. He added that the courts already had the power to limit discovery and should not be given the authority to impose costs on the parties requesting discovery, except in very large cases.

But another member disagreed, countering that the "discovery" problem was real and needed to be addressed. He said that the proposed advisory committee amendment was neutral and applied equally to defendants and plaintiffs. He added that it was inappropriate to characterize it as an attempt to drive poor litigants out of the court system.

One member observed that the proposed amendments to Rules 26(b) and 34(b) would establish two different regimes of discovery, which might be denominated as "regular discovery" and "supplemental discovery." The former would be self-executing and without cost to the requesting party. The latter, though, would require court approval and could entail the payment of costs by the requesting party. Judge Niemeyer agreed with this characterization.

Judge Niemeyer added that the advisory committee would invite public comment on whether the cost-bearing provision was properly placed as an amendment to Rule 34(b) or should be added to Rule 26(b)(2), dealing with discovery scope and limits.

**The committee approved the proposed amendments for publication by a vote of 7 to 3.**

FED. R. CIV. P. 37

Professor Marcus pointed out that the proposed change in Rule 37, dealing with sanctions, would add a cross-reference to Rule 26(e)(2). This would close a gap left by the 1993 amendments to the rules and authorize sanction power for failure to supplement discovery responses.

**The committee approved the proposed amendment for publication without objection.**

*Service on the United States*

Judge Niemeyer reported that the advisory committee had received a request from the Department of Justice to allow additional time for the government to respond in cases when an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with the performance of official duties. The committee agreed with the Department's position and recommended publishing proposed amendments to Rules 4 and 12.

FED. R. CIV. P. 4

Professor Cooper stated that when an officer of the United States is sued in an individual capacity, the proposed rule would give the officer 60 days in which to answer. Subparagraph 4(i)(2)(A) would govern service in cases when an officer of the United States is sued in an official capacity. Subparagraph 4(i)(2)(B) would govern service of an officer sued in an individual capacity for acts or omissions incurring "in connection with the performance of duties on behalf of the United States." Professor Cooper pointed out that the quoted language had been crafted carefully with the assistance of the Department of Justice and was designed to avoid using existing terms such as "color of office" or "scope of employment" or "arising out of the employment," because these terms had developed particular meanings over time.

Under subparagraph 4(i)(2)(B), when a federal officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States, service must be effected on both the officer or employee and the United States. The advantage of requiring service on the United States is that under Department of Justice regulations, the Department ordinarily defends officers sued individually if their acts were committed in the course of business.

Professor Cooper explained that new subparagraph 4(i)(3)(B) would allow a reasonable time to correct a service defect. Thus, if a plaintiff served only the affected officer

or employee, additional time would be provided to correct the defect and effect service on the United States.

Deputy Attorney General Holder stated that the rule was beneficial and would provide a single set of clear and understandable rules to govern all suits against the United States.

FED. R. CIV. P. 12

Professor Cooper stated that the proposed changes to Rule 12, dealing with defenses and objections, would provide that a response is due by the United States or an officer or employee sued in an individual capacity within 60 days after service. He added that the Department of Justice needed 60 days to determine whether to provide representation to the defendant officer or employee. Thus, the response time would be the same, whether the officer or employee were sued in an individual capacity or an official capacity.

**The committee approved the amendments to Rules 4 and 12 for publication without objection.**

*Informational Items*

Judge Niemeyer provided the committee with a status report on the work of the Working Group on Mass Torts. He said that the issues raised in mass tort litigation were very complex and controversial, and the working group had conducted meetings with some of the most experienced judges, lawyers, and academics in the country. He added that the group was planning on producing a report that would describe mass-tort litigation and identify problems that may deserve legislative and rulemaking attention. He expressed the hope that the report could also present a preliminary blueprint for action by identifying the legislative and rulemaking steps that might be taken to reduce the problems. He expected that the working group force would file a draft report in time for consideration by the Standing Committee at its January 1999 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1998. (Agenda Item 8)

*Rules Amendments for Judicial Conference Approval*

Judge Davis reported that the Standing Committee had approved publication of proposed amendments to eight rules and the addition of one new rule at its June 1997 meeting. The advisory committee had considered the public comments at its April 1998 meeting and

had conducted a public hearing addressing the proposed amendments on Rule 11 pleas and criminal forfeiture.

FED. R. CRIM. P. 6

Judge Davis stated that there were two amendments proposed in Rule 6, dealing with grand juries. The first, in subdivision 6(d), would authorize the presence of interpreters during deliberations to assist grand jurors who are hearing or speech impaired. He explained that under the current rule, no person other than the grand jurors themselves may be present during deliberations.

As authorized for publication by the Standing Committee, the rule had been broader in scope and would have allowed all types of interpreters to be present with the grand jury. But comments were received that it would not be legal to have interpreters assist jurors who do not speak English, since 28 U.S.C. § 1865 requires that all grand jurors and petit jurors speak English. Accordingly, the advisory committee modified the amendment to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

The second amendment would modify subdivision 6(f) to permit the grand jury foreperson to return the indictment in open court. The present rule requires that the whole grand jury be present for the return.

**The committee approved the proposed amendments without objection.**

FED. R. CRIM. P. 11

Judge Davis and Professor Schlueter pointed out that three changes were proposed in Rule 11, governing pleas. The first would make a technical change in subdivision 11(a) to conform the definition of an organizational defendant to that in 18 U.S.C. § 18.

The second change would amend Rule 11(e)(1) to reflect the impact of the Sentencing Guidelines on guilty pleas. It would recognize that a plea agreement may specifically address a particular sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. The proposed change would distinguish clearly between a plea agreement under subparagraph 11(e)(1)(B), which is not binding on the court, and one under subparagraph 11(e)(1)(C), which is binding once it is accepted by the court.

Some members of the committee expressed concern that the proposal would remove the court further from the sentencing process and give greater authority to the United States attorney and defense counsel. They pointed out, for example, that a judge might accept a plea initially, but later be required to reject it when the facts become known. The case, then, would

have to be tried after considerable delay. Professor Schlueter responded that the advisory committee wanted only to address the reality of the current practice, under which the parties reach an agreement with regard to specific guidelines or factors. He added that a judge may always accept or reject such a plea agreement.

Judge Davis stated that the third proposed change, to Rule 11(c)(6), was also controversial, particularly with defense counsel. It would reflect the increasing practice of including provisions in plea agreements requiring the defendant to waive the right to appeal or to collaterally attack the sentence. The amendment would require the court to determine whether the defendant understands any provision in the plea agreement waiving such rights. A majority of the public comments had opposed the amendment, largely on the grounds that it would be seen as an endorsement of the practice of waiving appellate rights.

Judge Davis pointed out that most courts had upheld the kinds of waivers contemplated in the amendment, and the Criminal Law Committee of the Judicial Conference had recommended the provision to the advisory committee. The advisory committee, however, decided to add a sentence to the committee note stating that: "Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers."

**The committee approved the proposed amendment to Rule 11(e) by a vote of 11 to 1. It approved the other amendments to Rule 11 without objection.**

FED. R. CRIM. P. 24

Judge Davis reported that the proposed change to Rule 24(c), dealing with trial jurors, would give a trial judge discretion to retain alternate jurors if a juror becomes incapacitated during the deliberations. The current rule explicitly requires the court to discharge all alternate jurors when the jury retires to deliberate.

One member pointed out that the committee note set forth certain procedural protections to insulate the alternate jurors during the deliberative process. It stated that if alternates are in fact used, the jurors must be instructed that they must begin their deliberations anew. He recommended that the latter provision be placed in the language of the rule itself.

Judge Davis agreed to insert additional language in the rule. Accordingly, Judge Stotler asked him and Professor Schlueter to draft appropriate text and present it to the committee later in the meeting.

After consultation with the Style Subcommittee and further committee deliberations, Judge Davis and Professor Schlueter suggested adding the following language at the end of

paragraph 24(c)(3): "If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew."

**The committee voted without objection to approve the proposed amendment.**

FED. R. CRIM. P. 32.2

Judge Davis reported that the proposed new Rule 32.2 was the heart of a major revamping and reorganization of the criminal forfeiture rules. He noted that the government proceeds in criminal forfeiture on an *in personam* theory. There must be a finding of guilt in order to forfeit property.

He explained that new Rule 32.2 states that no judgment of forfeiture may be made unless the government alleges in the indictment or information that the defendant has an interest in property that is subject to forfeiture in accordance with an applicable statute. Accordingly, a conforming change would be made in Rule 7(c)(2), prescribing the nature and contents of the indictment or information, to make it clear to the defendant that the government is seeking to seize his or her property.

Judge Davis pointed out that paragraph (b)(1) contained the principal change in the criminal forfeiture amendments and had attracted the most comments from the public. The new rule would eliminate any right of the defendant to a jury trial on the forfeiture count. The provision flowed from the decision of the Supreme Court in *Libretti v. United States,* 516 U.S. 29 (1995), where the Court held that criminal forfeiture is a part of sentencing. A defendant, accordingly, is not entitled to a jury trial on the forfeiture count.

The judge would have to make a decision on the nexus of the property to the offense "as soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere." This language would replace current Rule 32.1(e). Under the current rule, after returning a guilty verdict, the jury is required to hear evidence and enter a special verdict on the forfeiture count. Under the proposed rule, however, the jury would be excused once it has returned a guilty verdict, and the court would proceed right away on its own to decide upon forfeiture of the applicable property. The judge may use the evidence accumulated during the course of the trial or in the plea agreement, and it may take additional evidence at a post-trial hearing.

One of the members expressed concern as to whether the new rule afforded the defendant the opportunity to contest an allegation by the government that the property in question had been purchased with drug proceeds. Judge Davis responded that the court has considerable discretion to take evidence at a hearing and allow both sides to present additional evidence. The judge would not be required to hold a hearing, but would surely do so if a party asked for one. And the judge would have to hold a hearing if there were a dispute as to the

facts. A hearing would be held, for example, if the defendant were to claim that he or she had purchased the property legitimately, without using drug proceeds. Professor Schlueter added that the rule was designed to give the trial judge maximum discretion and therefore did not specify all the steps that the judge must follow.

Judge Davis said that if a third party comes forward to assert an interest in the forfeited property, the court must conduct an ancillary proceeding. It would have discretion to allow the parties to conduct appropriate discovery. At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture. It would amend the preliminary order of forfeiture, if necessary, to account for disposition of the third-party petition.

Judge Davis stated that proposed Rule 32.2(b) contained two principal provisions. First, the court, rather than the jury, would determine whether there is a nexus between the offense and the property. Second, the court would defer until a later time the question of the defendant's interest in the property. Since *Libretti v. United States* had made it clear that criminal forfeiture is a part of sentencing, it makes sense for the judge, rather than the jury, to decide the ownership questions. He added that in most cases defense counsel currently waives a jury trial on forfeiture issues.

He added that subsection (b)(2) covers the situation when the court decides that the nexus between the property and the offense has been established, but no third party appears to file a claim to the property. In that case, the court may enter a final order forfeiting the property in its entirety. He said that the advisory committee had added a proviso after publication that the court must determine, consistent with the *in personam* theory of criminal forfeiture, that the defendant had an interest in the property.

Subsection (b)(3) states that the government may seize the property, and the court may impose reasonable conditions to protect the value of the property pending appeal.

Subdivision 32(c) would require an ancillary proceeding if a third party appears to claim an interest in the property. Paragraph (c)(4) was added following publication to make it clear that the ancillary proceeding is not a part of sentencing. Therefore, the rules of evidence would be applicable. Although the ancillary proceeding was designed to protect the rights of third parties, the defendant would have a right to participate in it. At the conclusion of the proceeding, the court would be required to file a final order of forfeiture of the property.

Subdivision (d) would authorize the court to issue a stay or impose appropriate conditions on appeal. Subdivision (e) would govern subsequently located property. The court would retain jurisdiction to amend a forfeiture order if property were located later. It also could enter an order to include substitute property.

In conclusion, Judge Davis summarized the sequence of events under the new Rule 32.2 as follows: the jury's verdict, a preliminary order of forfeiture by the court, a third party's petition, an ancillary proceeding, and a final order of forfeiture.

Some members pointed out that a defendant has the right to a jury trial in a civil forfeiture proceeding. They expressed concern about taking away the defendant's right to jury trial in criminal forfeiture proceedings, even though that right might not be constitutionally required under *Libretti v. United States.* One member added that he would vote against the proposal, as written, but would be inclined to support it if it retained the right to a jury trial on the single issue of the nexus of the property to the offense.

**The committee rejected the proposed amendment by a vote of 7 to 4.**

FED. R. CRIM. P. 7, 31, 32, and 38

Judge Davis said that the advisory committee would withdraw the amendments to these rules because they were part of the proposed criminal forfeiture package and were designed to conform to the proposed new Rule 32.2.

FED. R. CRIM. P. 54

Judge Davis stated that the change in Rule 54, dealing with application of the criminal rules, was purely technical. It would eliminate the current rule's reference to the Canal Zone, which no longer exists.

**The committee approved the proposed amendment without objection.**

*Informational Items*

Judge Davis stated that the advisory committee had discussed the draft attorney conduct rules at its April 1998 meeting. Some of the lawyer members on the committee, he said, had expressed opposition to the concept of having another set of conduct rules. The advisory committee agreed to appoint two of its members to serve on the ad hoc attorney conduct committee.

FED. R. CRIM. P. 5

Judge Davis reported that the advisory committee had approved a proposed amendment to Rule 5(c) that would authorize a magistrate judge to grant a continuance of a preliminary examination without the consent of the defendant. But, he added, the advisory committee had voted not to seek publication of the amendment until a later date.

He explained that the proposed amendment would conflict with 18 U.S.C. § 3060(c). Therefore, the advisory committee had recommended at its April 1997 meeting that the Judicial Conference seek a change in the statute. The Standing Committee, however, at its June 1997 meeting decided that it would be more appropriate to propose a change to Rule 5(c) through the Rules Enabling Act process. Accordingly, it remanded the matter back to the advisory committee for further action.

At its October 1997 meeting, the advisory committee considered the issue again. It decided not to pursue an amendment to Rule 5(c) and so advised the Standing Committee. The Magistrate Judges Committee, however, presented the issue to the Judicial Conference at its March 1998 session with a request for a change in the statute.

Judge Davis added that the Judicial Conference had considered the matter, and following the Conference session, the chair of the Executive Committee had asked the advisory committee to consider publishing a proposed amendment to Rule 5(c). As a result, the advisory committee approved an amendment at its April 1998 meeting. But it decided not to seek publication on the grounds that: (1) the proposed amendment itself was not crucial, and (2) the committee had begun restyling the body of criminal rules and wished to avoid making piecemeal amendments in the rules until that process had been completed.

Judge Stotler said that the larger issue debated by the Judicial Conference at its March 1998 session was how best to coordinate proposed rules changes with proposed legislative changes. She emphasized that the debate had underscored the need for the rules committees to work closely with other committees of the Conference in coordinating changes that affect both rules and statutes. She added that the Executive Committee had acquiesced in the advisory committee's decision to defer publication of the proposed amendment to Rule 5(c).

FED. R. CRIM. P. 30

Professor Schlueter reported that the advisory committee had published a proposed amendment to Rule 30 that would permit the court to require the parties to submit pretrial requests for instructions. But, he noted, the Advisory Committee on Civil Rules was considering similar changes to FED. R. CIV. P. 51. Therefore the criminal advisory committee had decided to defer presenting the matter to the Standing Committee until further action is taken with regard to proposed amendments to the civil rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1998. (Agenda Item 9)

*Amendments for Publication*

Judge Smith reported that at the January 1998 meeting, the Standing Committee had authorized the advisory committee to publish proposed amendments to FED. R. EVID. 103, 404, 803, and 902. It was understood that these amendments would be included in the same publication as any additional amendments approved at the June 1998 meeting. She added that the advisory committee was sensitive to the need to limit the number and frequency of changes in the rules. Therefore, it did not expect to recommend further amendments for some time, unless required by legislative developments.

Judge Smith said that the decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), had generated a great deal of controversy regarding testimony by expert witnesses. The advisory committee had decided as a matter of policy to delay acting on potential changes in the rules in order to allow sufficient time for case law to develop at both the trial and appellate levels on the impact of the decision. The committee, however, believed that the time was now appropriate to proceed. Accordingly, it voted to seek authority to publish amendments to three rules dealing with testimony of witnesses. She added that all the amendments had been designed to clarify *Daubert*, yet the advisory committee wished to make as few changes as possible in the existing rules of evidence.

FED. R. EVID. 702

Judge Smith stated that Rule 702, governing expert testimony, was the focal point of the *Daubert* decision. The advisory committee simply would add language at the end of the existing rule reaffirming the role of the district court as gatekeeper and providing guidance in assessing the reliability and helpfulness of proffered expert testimony. The amendment would make it clear that expert testimony of all types — scientific, technical, and specialized — are subject to the court's gatekeeping role.

Judge Smith pointed out that the *Daubert* decision had set forth a non-exclusive checklist of factors for the trial courts to consider in assessing the reliability of scientific testimony. The advisory committee had made no attempt to codify these factors, as *Daubert* itself made clear that they were not exclusive. Moreover, case law has added numerous other factors to be considered in individual cases in determining whether expert testimony is sufficiently reliable.

Judge Smith said that the *Daubert* decision also addressed the issue of methodology. It requires a judge to review both the methodology used by the expert and how it has been applied to the facts. She added that application of these factors to expert testimony will necessarily vary from one kind of expertise to another. She emphasized that the trial courts had demonstrated considerable ingenuity and wisdom in applying *Daubert*. The advisory

committee, thus, determined that it was not necessary to set forth any specific procedural requirements in the rule for the trial courts to follow.

Some members expressed concern about the meaning of the terminology "sufficiently based upon," as used in the phrase "the testimony is sufficiently based upon reliable facts or data." Professor Capra explained that the opinion of an expert might be based on reliable information, but it must also be based on sufficient facts or data. The phrase, thus, refers to the quantity, rather than the quality, of the information.

One member questioned whether there was a need to change the rule at all at this point. Professor Capra responded that the advisory committee had been unanimous in favoring amendments to the rule. He noted that the developing case law was inconsistent as to whether *Daubert* applies to all kinds of experts. Moreover, he said, legislation had been introduced in the Congress to modify the rule through legislation. Judge Smith affirmed the need to amend the rule at this point, and she emphasized again that the advisory committee had attempted to change the current rule as little as possible.

FED. R. EVID. 701

Judge Smith reported that the advisory committee would add a clause to the end of Rule 701, which deals with testimony by lay witnesses. The addition would clarify and emphasize the opening clause of the rule, which limits application of the rule to a witness who is not testifying as an expert. The rule then proceeds to state the limits on the testimony of a lay witness. Therefore, the amendment makes it clear that a lay witness may not provide testimony based on scientific, technical, or other specialized knowledge. She added that the advisory committee had been concerned over a growing tendency among attorneys to attempt to evade the expert witness rule by using experts as lay witnesses.

Judge Smith pointed out that representatives from the Department of Justice disagreed with the proposed amendment. They had said that the amendment would conflict with FED. R. CIV. P. 26 and require additional efforts by United States attorneys in providing reports of experts. Ms. Smolover of the Department stated that the agency believed that the amendment would effect a significant change in the law. She added that it attempted to draw a bright line between specialized knowledge and non-specialized knowledge in an area that was especially murky. She proceeded to provide two examples of factual situations where it would be difficult to distinguish specialized knowledge from non-specialized knowledge.

Professor Capra responded that three states currently have evidence rules in place that are similar to the proposed amendment and distinguish sharply between expert and lay testimony. He said that the courts in those states had experienced no difficulties in applying the rules. And, he said, the courts — federal and state — make these kinds of distinctions every day.

Judge Smith added that there may be close calls in some factual situations, but the courts normally handle these distinctions very well. She said that the potential harm that may be caused by attempts to evade Rule 702 greatly outweigh any problems of potential uncertainty in distinguishing between specialized knowledge and non-specialized knowledge in certain cases. Several members of the committee expressed their agreement with Judge Smith on this point.

Judge Stotler asked the trial judges attending the meeting whether they had encountered problems in distinguishing expert testimony from lay testimony. Several of the judges responded that they already applied the law in the manner specified in the proposed amendment, and they had experienced no difficulty in doing so. They expressed strong support for the proposed amendment and stated that it would provide the bar with additional, necessary guidance on distinguishing among categories of proposed testimony and complying with the requirements of FED. R. CIV. P. 26 for an advance written report of expert testimony.

The members proceeded to discuss how the proposed amendment would be applied to a number of hypothetical situations. They generally anticipated few practical problems, but some noted that problems arise with regard to treating physicians. It was pointed out that the committee note to FED. R. CIV. P. 26 states explicitly that a written report of expert testimony is not needed from a treating physician. It was reported by several, though, that some attorneys call treating physicians as observing witnesses under Rule 701, but then attempt to use them as expert witnesses under Rule 702. Professor Capra emphasized that although there are "mixed" witnesses, the committee note accompanying the proposed amendment makes it clear that the rule distinguishes between expert and lay *testimony,* rather than between expert and lay *witnesses.*

FED. R. EVID. 703

Judge Smith reported that the advisory committee had been concerned about a growing tendency to attempt to present hearsay evidence to the jury in the guise of materials supporting expert testimony. Accordingly, the proposed amendment to Rule 703, dealing with bases of opinion testimony by experts, would provide that when an expert relies on underlying information that is inadmissible, only the expert's conclusion — and not the underlying information — would ordinarily be admitted. The trial court must balance the probative value of the underlying information against the safeguards of the hearsay rule, with the presumption that the facts or data upon which an expert bases an opinion or inference will not be admitted.

**The committee approved proposed amendments to FED. R. EVID. 701, 702, and 703 for publication without objection.**

*Informational Items*

Professor Capra reported that the advisory committee had approved the suggestion that the use of electronic mail be authorized for transmitting public comments on proposed amendments to the secretary.

He stated that the advisory committee was continuing to consider the impact of computerized evidence on the Federal Rules of Evidence, and it had produced a detailed report on the matter for the chairman of the Technology Subcommittee. The advisory committee had concluded that the courts were simply not having problems in applying the evidence rules to computerized records. Moreover, the committee had determined that it would be very difficult to amend the rules expressly to take account of computerized evidence. It would require changes in many of the rules or the drafting of new and difficult definitional provisions.

Professor Capra noted that Judge Stotler had asked the advisory committee to consider whether FED. R. CIV. P. 44 should be abrogated in light of its overlap with certain of the evidence rules. He explained that the committee had researched the matter in detail, had consulted with the Advisory Committee on Civil Rules, and had concluded that there was not a complete overlap between Rule 44 and the evidence rules. Moreover, there was no indication of any problems in the case law. Therefore, the committee decided not to pursue abrogating the rule.

Professor Capra reported that legislation had been introduced in the Congress to provide for a parent-child evidentiary privilege. The House bill would directly amend FED. R. EVID. 501 to include such a privilege, and the Senate bill would require the Judicial Conference to report on the advisability of amending the Federal Rules of Evidence to include a parent-child privilege. The advisory committee had considered the matter and concluded that the evidence rules should not be amended to include any kind of parent-child privilege.

Professor Capra stated that the proposed privilege would be contrary to both state and federal common law. Moreover, it would not be appropriate to create it by amending the Federal Rules of Evidence, since the Congress had rejected a detailed list of privileges in favor of a common law, case-by-case approach. Professor Capra added that the advisory committee had prepared a proposed response to the Congress to that effect.

Judge Smith said that the Congress had expressed a good deal of interest in privileges in recent years, including a possible rape counselor privilege, a tax preparer privilege, and now a parent-child privilege. She said that she had written to Congress stating that a piecemeal, patchwork approach to privileges would be a mistake. FED. R. EVID. 501 had worked well in practice, and if the Congress were to act at all, it should consider making a comprehensive review of all privileges.

Professor Capra noted that the advisory committee had completed a two-year project to notify the public that certain advisory committee notes to the Federal Rules of Evidence may be misleading. He stated that the report identified inaccuracies and inconsistencies created because several of the rules adopted by the Congress in 1975 differed materially from the version approved by the advisory committee. He stated that the committee's report would be printed by the Federal Judicial Center and would appear in Federal Rules Decisions.

## ATTORNEY CONDUCT

Professor Coquillette summarized his May 18, 1998, Status Report on Proposed Rules Governing Attorney Conduct, set forth as Agenda Item 10. He recommended the appointment of an ad hoc committee to work on attorney conduct matters consisting of two members from each of the advisory committees, Chief Justice Veasey, Professor Hazard, and representatives from the Department of Justice.

He stated that the debate, essentially, had come down to two options. The first would be to have a single dynamic conformity rule that would eliminate all local rules and leave attorney conduct matters up to the states. The second would be to adopt a very narrow core of specific federal rules on attorney conduct. He said that there were serious differences of opinion on these options, and the ad hoc committee would seek to reach a consensus on the matter.

Professor Coquillette pointed out that misleading articles had appeared stating that the committee was proposing enactment of the 10 draft attorney conduct rules. He noted that the rules had been drafted only for internal debate and added that American Bar Association officials had been informed that the committee was not making any proposals at this point.

He stated that another misconception had been that the committee was proposing to increase the amount of federal rulemaking regarding attorney conduct. In fact, he said, the committee was trying to accomplish just the opposite. The thrust of the committee's discussions to date had been to reduce the number of local federal court rules and turn attorney conduct matters over generally to the states.

Finally, Professor Coquillette said that the study of attorney conduct would not be completed quickly. Time would be needed to coordinate efforts with the American Bar Association, the American Law Institute, and other bar groups. Time would also be needed to study attorney conduct issues in a bankruptcy context. Accordingly, the only action needed was for the Standing Committee to affirm the appointment of the ad hoc committee.

**The committee voted without objection to appoint an ad hoc committee to study attorney conduct matters.**

Professor Coquillette noted that the Court Administration and Case Management Committee had provided the committee with a set of principles to govern conduct in alternate dispute resolution proceedings. He said that no action was required on the part of the committee, but pointed out that there is likely to be more activity in this area at the local and national levels.

Professor Coquillette reported that two bills had been introduced in the Congress to govern attorney conduct. He said that the committee should respond to Congressional inquiries by referring to the ongoing attorney conduct project.

## LOCAL RULES AND UNIFORM NUMBERING

Professor Squiers reported that about 70% of the district courts had renumbered their local rules, as required by the Judicial Conference. One member suggested that the circuit councils should be asked to assist the remaining courts in complying with the renumbering requirement.

Professor Squiers reported that the Civil Justice Reform Act of 1990 had expired and that many of the provisions contained in the district courts' individual civil justice expense and delay reduction plans had now been incorporated into local rules. The status and legality of other procedural requirements contained in local plans, however, was uncertain.

Judge Stotler praised the efforts of the Local Rules Project and pointed out that it had identified many good local rules that have now been adopted as national rules. She asked whether it would be helpful for the committee to commission a new national survey of local rules in light of the renumbering project, the 1993 amendments to the civil rules, and the expiration of the Civil Justice Reform Act. She suggested that Professor Squiers might consider preparing a specific proposal for committee consideration, including a provision for obtaining appropriate funding for a survey.

## REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the Supreme Court had approved the restyled body of appellate rules with one minor amendment. He said that the restyling project had been successful because of the leadership shown by Judges Stotler and Logan and the hard work and expertise of Professor Mooney and Mr. Garner. Judge Stotler added that a great debt was also due to Judge Robert Keeton, who had initiated the project, and to Professor Charles Alan Wright, Judge George Pratt, and Judge James Parker.

Judge Parker said that the next project would be to restyle the body of criminal rules. He noted that a first draft had been prepared and would be considered by the Style Subcommittee. A final draft would likely be submitted to the Advisory Committee on Criminal Rules by December 1, 1998.

## REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte referred to the docket sheet of technology issues set forth in the agenda book. He pointed out that electronic filing of court papers was the most significant technological development that would affect the federal rules. He noted that Mr. McCabe and his staff had prepared a paper summarizing the rules-related issues that had been raised in the 10 electronic filing pilot courts. He added that the paper would be circulated to the reporters and considered by the advisory committees.

## PROPOSALS TO SHORTEN THE RULEMAKING PROCESS

Judge Stotler stated that the Executive Committee of the Judicial Conference had asked the committee to consider ways to reduce the length of the rulemaking process. Each of the advisory committees had discussed the matter and had concurred in principle that there should be some shortening of the process. No specific proposals, however, had been forwarded.

At Judge Stotler's request, Mr. Rabiej distributed and explained a chart setting forth the time requirements for the rules process and setting forth various ways in which the times might be reduced. He noted that some of the suggestions made for shortening the process are controversial. He proceeded to explain each of the proposed scenarios.

Mr. Rabiej stated that proposed amendments are normally presented to the Supreme Court following the September meeting of the Judicial Conference each year. He explained that, except in emergency situations, the Conference does not send proposals to the Court following the March Conference meetings because the justices do not have sufficient time to act on them before the May 1 period specified in the Rules Enabling Act.

One member questioned the need to shorten the process and asked the chair whether a policy decision had been made to shorten the process. She replied that no decision of the kind had been made, but that the Executive Committee had asked the rules committees to consider the issue. She added that the amount of time needed to consider a rule depends largely on the nature of the particular rule.

Another member suggested that it would be better to leave the existing, deliberative process in place, but to consider developing an emergency process that could be used to address special circumstances requiring prompt committee action. Several other members concurred in this judgment and suggested the need to develop a fast track procedure.

Several members noted that the need for accelerated treatment of an amendment usually arises because the Congress or the Department of Justice decides to act on a matter through legislation. They observed that the Congress in several instances has decided not to wait for the orderly and deliberative promulgation of a rule because the process was seen as taking too long. The chair replied that the advisory committees might consider certifying a particular rule for fast track consideration.

One of the participants suggested that consideration be given to eliminating one or more of the six entities that participate in considering an amendment, *i.e.,* advisory committee, public, standing committee, Judicial Conference, Supreme Court, and Congress. Others responded, however, that each entity plays an important part in the process. Therefore, it would be unwise, both substantively and politically, to consider elimination of any of them. Members pointed to the important role played by the standing committee in assuring quality and consistency in the rules and that of the Supreme Court in giving the rules great prestige and credibility.

One member recommended that the committees adopt a fixed schedule for submitting proposed amendments to the rules as packages, such as once every five years. The advisory committees could stagger their changes so that civil rules, for example, might be considered in one year and criminal rules in the next. He advised the committee to accept the inevitability that: (1) emergencies will arise on occasion; and (2) the Congress or the Department of Justice will continue to press for action outside the Rules Enabling Act when they feel the political need to do so. He concluded, therefore, that the committees should establish a firm schedule for publishing and approving rules amendments in multi-year batches, but also take due account of emergencies, political initiatives, and statutory changes.

Judge Stotler suggested that further thought be given to the issue of shortening the length of the rulemaking process and that additional discussion take place at the next committee meeting. She also suggested that further thought be given to the issue of making the chairs of the advisory committees voting members of the Standing Committee.

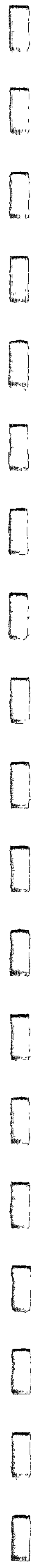
## NEXT COMMITTEE MEETINGS

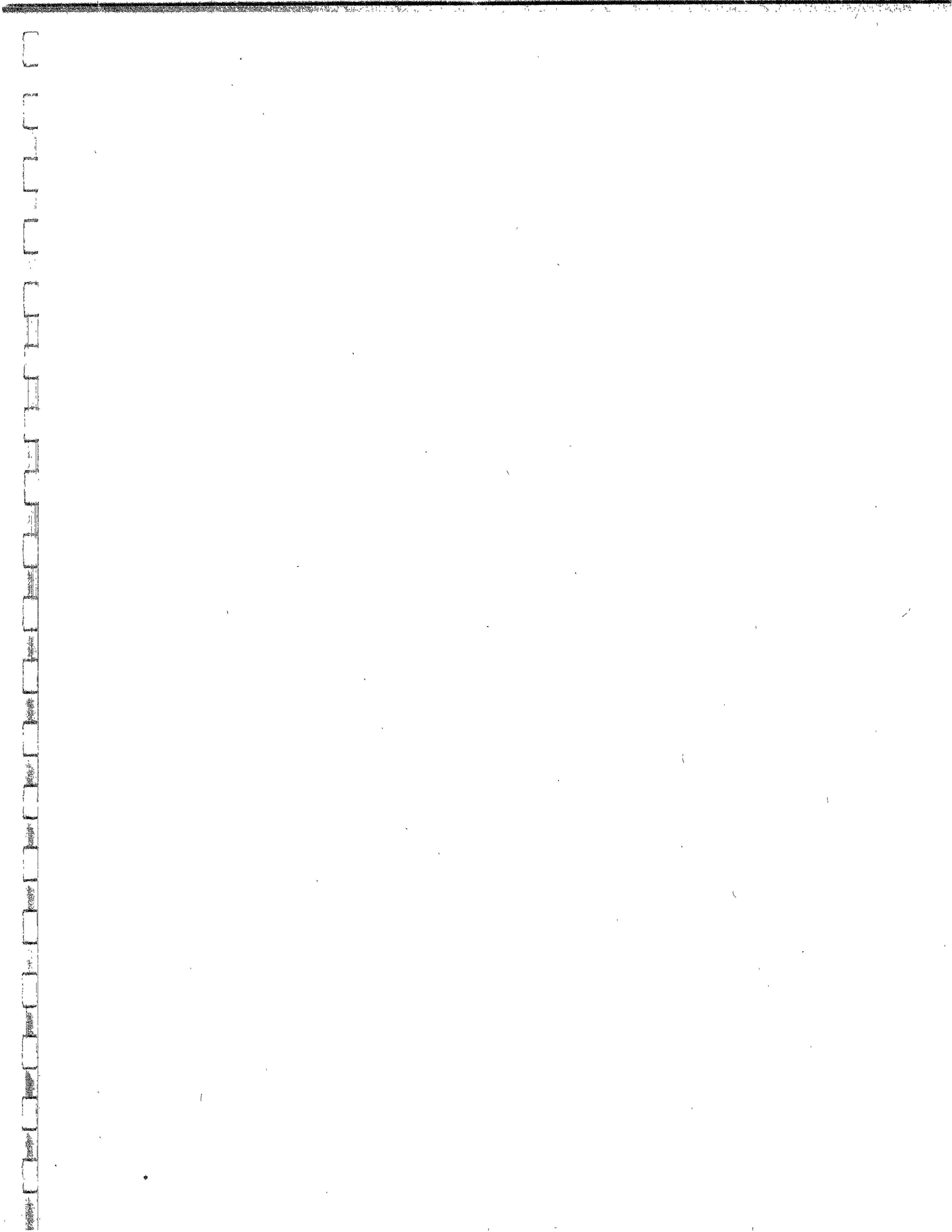
The committee is scheduled to hold its next meeting on Thursday and Friday, January 7 and 8, 1999. Judge Stotler asked the members for suggestions as to a meeting place so that

the staff could begin making reservations. She also asked the members to check their calendars and let the staff know their available dates for the June 1999 committee meeting.

Respectfully submitted,

Peter G. McCabe
Secretary





# AGENDA DOCKETING

## ADVISORY COMMITTEE ON EVIDENCE RULES

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 101]** — Scope | | 6/92 — Approved by ST Cmte.<br>9/92 — Approved by Jud. Conf.<br>4/93 — Approved by Sup. Ct.<br>12/93 — Effective<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 102** — Purpose and Construction | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 103]** — Ruling on EV | | 9/93 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 103(a)]** — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e)) | | 9/93 — Considered<br>5/94 — Considered<br>10/94 — Considered<br>1/95 — Approved for publication by ST Cmte.<br>5/95 — Considered. Note revised.<br>9/95 — Published for public comment<br>4/96 — Considered<br>11/96 — Considered. Subcommittee appointed to draft alternative.<br>4/97 — Draft requested for publication<br>6/97 — ST Cmte. recommitted to advisory committee for further study<br>10/97 — Request to publish revised version<br>1/98 — Approved for publication by ST Cmte.<br>8/98 — Published for comment<br>**PENDING FURTHER ACTION** |
| **[EV104]** — Preliminary Questions | | 9/93 — Considered<br>1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 105]** — Limited Admissibility | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 106]** — Remainder of or Related Writings or Recorded Statements | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 106]** — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record | Prof. Daniel Capra (4/97) | 4/97 — Reporter to determine whether any amendment is appropriate<br>10/97 — No action necessary<br>**COMPLETED** |
| **[EV 201]** — Judicial Notice of Adjudicative Facts | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Decided not to amend<br>**COMPLETED** |
| **[EV 201(g)]** — Judicial Notice of Adjudicative Facts | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Decided to take no action<br>**DEFERRED INDEFINITELY** |
| **[EV 301]** — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.) | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Deferred until completion of project by Uniform Rules Committee<br>**PENDING FURTHER ACTION** |
| **[EV 302]** — Applicability of State Law in Civil Actions and Proceedings | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 401]** — Definition of "Relevant Evidence" | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 402]** — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 403]** — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 404]** — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes | Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a) | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>10/94 — Considered with EV 405 as alternative to EV 413-415<br>4/97 — Considered<br>6/97 — Stotler letter to Hatch on S.3<br>10/97 — Recommend publication<br>1/98 — Approved for publication by the ST Cmte.<br>8/98 — Published for comment<br>**PENDING FURTHER ACTION** |
| **[EV 404(b)]** — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.) | Sen. Hatch S.3, § 713 (1/97) | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>10/94 — Discussed<br>11/96 — Considered and rejected any amendment<br>4/97 — Considered<br>6/97 — Stotler letter to Hatch on S.3<br>10/97 — Proposed amendment in the Omnibus Crime Bill rejected<br>**COMPLETED** |
| **[EV 405]** — Methods of Proving Character. (Proof in sexual misconduct cases.) | | 9/93 — Considered<br>5/94 — Considered<br>10/94 — Considered with EV 404 as alternative to EV 413-415<br>**COMPLETED** |
| **[EV 406]** — Habit; Routine Practice | | 10/94 — Decided not to amend (Comprehensive Review)<br>1/95 — Approved for publication by ST Cmte.<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
| --- | --- | --- |
| **[EV 407]** — Subsequent Remedial Measures. (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.) | Subcmte. reviewed possibility of amending (Fall 1991) | 4/92 — Considered and rejected by CR Rules Cmte.<br>9/93 — Considered<br>5/94 — Considered<br>10/94 — Considered<br>5/95 — Considered<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by ST Cmte.<br>9/96 — Approved by Jud. Conf.<br>4/97 — Approved by Sup. Ct.<br>12/97 — Enacted<br>**COMPLETED** |
| **[EV 408]** — Compromise and Offers to Compromise | | 9/93 — Considered<br>5/94 — Considered<br>1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 409]** — Payment of Medical and Similar Expenses | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **EV 410]** — Inadmissibility of Pleas, Plea Discussions, and Related Statements | | 9/93 — Considered and recommended for CR Rules Cmte.<br>**COMPLETED** |
| **[EV 411]** — Liability Insurance | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 412]** — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition | Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92) | 4/92 — Considered by CR Rules Cmte.<br>10/92 — Considered by CR Rules Cmte.<br>10/92 — Considered by CV Rules Cmte.<br>12/92 — Published<br>5/93 — Public Hearing, Considered by EV Cmte.<br>7/93 — Approved by ST Cmte.<br>9/93 — Approved by Jud. Conf.<br>4/94 — Recommitted by Sup. Ct. with a change<br>9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action)<br>12/94 — Effective<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 413]** — Evidence of Similar Crimes in Sexual Assault Cases | | 5/94 — Considered<br>7/94 — Considered by ST Cmte.<br>9/94 — Added by legislation<br>1/95 — Considered<br>1/95 — Reported to but disregarded by Congress<br>7/95 — Effective<br>**COMPLETED** |
| **[EV 414]** — Evidence of Similar Crimes in Child Molestation Cases | | 5/94 — Considered<br>7/94 — Considered by ST Cmte.<br>9/94 — Added by legislation<br>1/95 — Considered<br>1/95 — Reported to but disregarded by Congress<br>7/95 — Effective<br>**COMPLETED** |
| **[EV 415]** — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation | | 5/94 — Considered<br>7/94 — Considered by ST Cmte.<br>9/94 — Added by legislation<br>1/95 — Considered<br>1/95 — Reported to but disregarded by Congress<br>7/95 — Effective<br>**COMPLETED** |
| **[EV 501]** — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.) | 42 U.S.C., § 13942(c) (1996) | 10/94 — Considered<br>1/95 — Considered<br>11/96 — Considered<br>1/97 — Considered by ST Cmte.<br>3/97 — Considered by Jud. Conf.<br>4/97 — Reported to Congress<br>**COMPLETED** |
| **[EV 501]** — Privileges, including extending the same attorney client privilege to in-house counsel as to outside counsel | | 11/96 — Decided not to take action<br>10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel<br>**COMPLETED** |
| **[EV 501]** Parent/Child Privilege | Proposed Legislation | 4/98 — Considered; draft statement in opposition prepared |
| **[EV 601]** — General Rule of Competency | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 602]** — Lack of Personal Knowledge | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 603]** — Oath or Affirmation | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 604]** — Interpreters | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 605]** — Competency of Judge as Witness | | 9/93 — Considered<br>10/94 — Decided not to amend (Comprehensive Review)<br>1/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 606]** — Competency of Juror as Witness | | 9/93 — Considered<br>10/94 — Decided not to amend (Comprehensive Review)<br>1/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 607]** —Who May Impeach | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 608]** — Evidence of Character and Conduct of Witness | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 609]** — Impeachment by EV of Conviction of Crime. See 404(b) | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Considered<br>4/97 — Declined to act<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 609(a)** — Amend to include the conjunction "or" in place of "and" to avoid confusion. | Victor Mroczka 4/98 (98-EV-A) | 5/98 — Referred to chair and reporter for consideration<br>**PENDING FURTHER ACTION** |
| **[EV 610]** — Religious Beliefs or Opinions | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 611]** — Mode and Order of Interrogation and Presentation | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 611(b)]** — Provide scope of cross-examination not be limited by subject matter of the direct | | 4/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Decided not to proceed<br>**COMPLETED** |
| **[EV 612]** — Writing Used to Refresh Memory | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 613]** — Prior Statements of Witnesses | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 614]** — Calling and Interrogation of Witnesses by Court | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 615]** — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.) | 42 U.S.C., § 10606 (1990) | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Considered<br>4/97 — Submitted for approval without publication<br>6/97 — Approved by ST Cmte.<br>9/97 — Approved by Jud. Conf.<br>4/98 — Sup Ct approved<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 615]** — Exclusion of Witnesses | Kennedy-Leahy Bill (S. 1081) | 10/97 — Response to legislative proposal considered; members asked for any additional comments<br>**COMPLETED** |
| **[EV 701]** — Opinion testimony by lay witnesses | | 10/97 — Subcmte. formed to study need for amendment<br>4/98 — Recommend publication<br>6/98 — Stg. Comte approves request to publish<br>8/98 — Published for comment<br>**PENDING FURTHER ACTION** |
| **[EV 702]** — Testimony by Experts | H.R. 903 and S. 79 (1997) | 2/91 — Considered by CV Rules Cmte.<br>5/91 — Considered by CV Rules Cmte.<br>6/91 — Approved for publication by ST Cmte.<br>8/91 — Published for public comment by CV Rules Cmte.<br>4/92 — Considered and revised by CV and CR Rules Cmtes.<br>6/92 — Considered by ST Cmte.<br>4/93 — Considered<br>5/94 — Considered<br>10/94 — Considered<br>1/95 — Considered (Contract with America)<br>4/97 — Considered. Reporter tasked with drafting proposal.<br>4/97 — Stotler letters to Hatch and Hyde<br>10/97 — Subcmte. formed to study issue further<br>4/98 — Recommend publication<br>6/98 — Stg. Comte approves request to publish<br>8/98 — Published for comment<br>**PENDING FURTHER ACTION** |
| **[EV 703]** — Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.) | | 4/92 — Considered by CR Rules Cmte.<br>6/92 — Considered by ST Cmte.<br>5/94 — Considered<br>10/94 — Considered<br>11/96 — Considered<br>4/97 — Draft proposal considered.<br>10/97 — Subcmte. formed to study issue further<br>4/98 — Recommend publication<br>6/98 — Stg. Comte approves request to publish<br>8/98 — Published for comment<br>**PENDING FURTHER ACTION** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 705]** — Disclosure of Facts or Data Underlying Expert Opinion | | 5/91 — Considered by CV Rules Cmte.<br>6/91 — Approved for publication by ST Cmte.<br>8/91 — Published for public comment by CV Rules Cmte.<br>4/92 — Considered by CV and CR Rules Committees<br>6/92 — Approved by ST Cmte.<br>9/92 — Approved by Jud. Conf.<br>4/93 — Approved by Sup. Ct.<br>12/93 — Effective<br>**COMPLETED** |
| **[EV 706]** — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.) | Carnegie (2/91) | 2/91 — Tabled by CV Rules Cmte.<br>11/96 — Considered<br>4/97 — Considered. Deferred until CACM completes their study.<br>**PENDING FURTHER ACTION** |
| **[EV 801(a-c)]** — Definitions: Statement; Declarant; Hearsay | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 801(d)(1)]** — Definitions: Statements which are not hearsay. Prior statement by witness. | | 1/95 — Considered and approved for publication<br>5/95 — Decided not to amend (Comprehensive Review)<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 801(d)(1)]** Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility | Judge Bullock | 4/98 — Considered; tabled<br>**DEFERRED INDEFINITELY** |
| **[EV 801(d)(2)]** — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*) | Drafted by Prof. David Schlueter, Reporter, 4/92 | 4/92 — Considered and tabled by CR Rules Committee<br>1/95 — Considered by ST Cmte.<br>5/95 — Considered draft proposed<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 802]** — Hearsay Rule | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 803(1)-(5)]** — Hearsay Exceptions; Availability of Declarant Immaterial | | 1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 803(6)]** — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change) | Roger Pauley, DOJ 6/93 | 9/93 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>11/96 — Considered<br>4/97 — Draft prepared and considered. Subcommittee appointed for further drafting.<br>10/97 — Draft approved for publication<br>1/98 — Approved for publication by the ST Cmte.<br>8/98 — Published for comment<br>**PENDING FURTHER ACTION** |
| **[EV 803(7)-(23)]** — Hearsay Exceptions; Availability of Declarant Immaterial | | 1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 803(8)]** — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports. | | 9/93 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered regarding trustworthiness of record<br>11/96 — Declined to take action regarding admission on behalf of defendant<br>**COMPLETED** |
| **[EV 803(24)]** — Hearsay Exceptions; Residual Exception | EV Rules Committee (5/95) | 5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807.<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br><br>4/97 — Approved by Sup. Ct.<br>10/97 — Effective<br>**COMPLETED** |
| **[EV 803(24)]** — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence) | | 10/96 — Considered and referred to reporter for study<br>10/97 — Declined to act<br>**COMPLETED** |

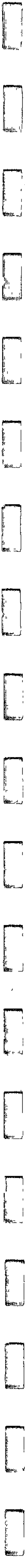
| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 804(a)]** — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability | Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92) | 4/92 — Considered by CR Rules Cmte.<br>6/92 — Considered by ST Cmte. for publication<br>1/95 — Considered and approved for publication<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 804(b)(1)-(4)]** — Hearsay Exceptions | | 10/94 — Considered<br>1/95 — Considered and approved for publication by ST Cmte.<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 804(b)(5)]** — Hearsay Exceptions; Other exceptions | | 5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807.<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br><br>4/97 — Approved by Sup. Ct.<br>10/97 — Effective<br>**COMPLETED** |
| **[EV 804(b)(6)]** — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.) | Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92) | 4/92 — Considered by CR Rules Cmte.<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by ST Cmte.<br>9/96 — Approved by Jud. Conf.<br>4/97 — Approved by Sup. Ct.<br>**COMPLETED** |
| **[EV 805]** — Hearsay Within Hearsay | | 1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 806]** — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.) | EV Rules Committee 5/95 | 5/95 — Decided not to amend<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 806]** — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant | | 11/96 — Declined to act<br>**COMPLETED** |
| **[EV 807]** — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule. | EV Rules Committee 5/95 | 5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5).<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br>10/96 — Expansion considered and rejected<br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 807]** — Notice of using the provisions | Judge Edward Becker | 4/96 — Considered<br>11/96 — Reported. Declined to act.<br>**COMPLETED** |
| **[EV 901]** — Requirement of Authentication or Identification | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 902]** — Self-Authentication | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 902 (11) and (12)]** — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change) | | 4/96 — Considered<br>10/97 — Approved for publication<br>1/98 — Approved for publication by the ST Cmte.<br>8/98 — Published for comment<br>**PENDING FURTHER ACTION** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 903]** — Subscribing Witness' Testimony Unnecessary | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1001]** — Definitions | | 9/93 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1001]** — Definitions (Cross references to automation changes) | | 10/97 — Considered<br>**PENDING FURTHER ACTION** |
| **[EV 1002]** — Requirement of Original. Technical and conforming amendments. | | 9/93 — Considered<br>10/93 — Published for public comment<br>4/94 — Recommends Jud. Conf. make technical or conforming amendments<br>5/95 — Decided not to amend<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1003]** — Admissibility of Duplicates | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1004]** — Admissibility of Other Evidence of Contents | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1005]** — Public Records | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1006]** — Summaries | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1007]** — Testimony or Written Admission of Party | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 1008]** — Functions of Court and Jury | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1101]** — Applicability of Rules | | 6/92 — Approved by ST Cmte.<br>9/92 — Approved by Jud. Conf.<br>4/93 — Approved by Sup. Ct.<br>12/93 — Effective<br>5/95 — Decided not to amend<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED**<br>4/98 — Considered |
| **[EV 1102]** — Amendments to permit Jud. Conf. to make technical changes | CR Rules Committee (4/92) | 4/92 — Considered by CR Rules Cmte.<br>6/92 — Considered by ST Cmte.<br>9/93 — Considered<br>6/94 — ST Cmte. did not approve<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1103]** — Title | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[Admissibility of Videotaped Expert Testimony]** | EV Rules Committee (11/96) | 11/96 — Denied but will continue to monitor<br>1/97 — Considered by ST Cmte.<br>**PENDING FURTHER ACTION** |
| **[Attorney-client privilege for in-house counsel]** | ABA resolution (8/97) | 10/97 — Referred to chair<br>10/97 — Denied<br>**COMPLETED** |
| **[Automation]** — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology | EV Rules Committee (11/96) | 11/96 — Considered<br>4/97 — Considered<br>4/98 — Considered<br>**PENDING FURTHER ACTION** |
| **[Circuit Splits]** — To determine whether the circuit splits warrant amending the EV Rules | | 11/96 — Considered<br>4/97 — Considered<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[Obsolete or Inaccurate Rules and Notes]** — To identify where the Rules and/or notes are obsolete or inaccurate. | EV Rules Committee (11/96) | 5/93 — Considered<br>9/93 — Considered. Cmte. did not favor updating absent rule change<br>11/96 — Considered<br>1/97 — Considered by the ST Cmte.<br>4/97 — Considered and forwarded to ST Cmte.<br>10/97 — Referred to FJC<br>1/98 — ST Cmte. Informed of reference to FJC<br>**COMPLETED** |
| **[Privileges]** — To codify the federal law of privileges | EV Rules Committee (11/96) | 11/96 — Denied<br>**COMPLETED** |
| **[Statutes Bearing on Admissibility of EV]** — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court | | 11/96 — Considered<br>4/97 — Considered and denied<br>**COMPLETED** |
| **[Sentencing Guidelines]** — Applicability of EV Rules | | 9/93 — Considered<br>11/96 — Decided to take no action<br>**COMPLETED** |
| | | |



**FORDHAM** Item IIA

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Commentary Received on Proposed Amendment to Rule 103
Date: September 15, 1998

To date there has been only one public comment concerning the proposed amendment to Rule 103. The Standing Committee approved the proposal unanimously, and the comments at the meeting were extremely positive. The Style Subcommittee of the Standing Committee has made no suggestion for stylistic changes. This memorandum summarizes the lone public comment, which was in the form of a column by Professor Laird Kirkpatrick in the AALS Evidence Section Newsletter. (As such it is not a formal comment, but that should not deter the Committee from its consideration). Attached to this memorandum is the proposed amendment to Rule 103.

Professor Kirkpatrick's column is essentially descriptive, but does contain a few editorial comments. He states that the amendment "is intended to resolve the conflict in the cases and the confusion in practice about whether an objection or offer of proof must be renewed at trial if there has been an in limine ruling on the point." He concludes that the proposed amendment "wisely takes the opposite position from the proposal submitted in 1995 which would have presumptively required renewal of an objection or offer."

Professor Kirkpatrick expresses a few doubts about the proposal. His most important concern is that the term "definitive ruling", which determines whether an objection must be renewed, will "likely to be a source of dispute", because it is not defined in the Rule.

Professor Kirkpatrick also contends that the Rule's explicit applicability to advance rulings made during trial is unlikely to be helpful, "because at trial the issue is usually not whether the earlier ruling sustaining an objection was definitive but whether it extends to

additional testimony the witness is proposing to give on similar or related points." This latter criticism appears off the point, however. For one thing, the Rule applies not only when objections are sustained; it also applies to the more common situation when objections are overruled and the evidence is to be proffered. Moreover, the point of the Rule is to provide guidance on whether an objection or proffer must be renewed when the evidence is to be introduced. This renewal question arises with respect to any evidence that is the subject of an advance ruling, whether that ruling is made before trial or at trial. So it makes eminent sense for the Rule to apply to all advance rulings on evidence.

# Attachment to Rule 103 Memorandum

**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 103(a)**

1 **Rule 103. Rulings on Evidence***

2 (a) Effect of erroneous ruling.—Error may not be
3 predicated upon a ruling which admits or excludes evidence
4 unless a substantial right of the party is affected, and
5 (1) Objection.—In case the ruling is one
6 admitting evidence, a timely objection or motion to
7 strike appears of record, stating the specific ground of
8 objection, if the specific ground was not apparent from
9 the context; or
10 (2) Offer of proof.— In case the ruling is one
11 excluding evidence, the substance of the evidence was
12 made known to the court by offer or was apparent
13 from the context within which questions were asked.

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

14 Once the court, at or before trial, makes a definitive ruling on
15 the record admitting or excluding evidence, a party need not
16 renew an objection or offer of proof to preserve a claim of
17 error for appeal. But if under the court's ruling there is a
18 condition precedent to admission or exclusion, such as the
19 introduction of certain testimony or the pursuit of a certain
20 claim or defense, no claim of error may be predicated upon the
21 ruling unless the condition precedent is satisfied.

* * * * *

## COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always

required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have held that an objection or offer of proof once made is sufficient to preserve a claim of error because the trial court's ruling thereon constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). Where the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *Favala v. Cumberland Engineering Co.*, 17 F.3d 987, 991 (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"). On the other hand, where the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's

attention subsequently. *See, e.g., United States v. Vest,* 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti,* 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence). While formal exceptions are unnecessary, the amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point.

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.,* 896 F.2d 949, 956 (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) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

The amendment codifies 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 in order to

preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations, and logically applies whenever the occurrence of a trial event is a condition precedent to the admission or exclusion of evidence. *See United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error for appeal); *United States v. Bond,* 87 F.3d 695 (5th Cir. 1996) (where the 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).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher,* 106 F.3d 622 (5th Cir. 1997), *as corrected* 1997 U.S. App. LEXIS 12671 (1997) (where the trial judge ruled *in limine* that the government could use

a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *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"); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

**FORDHAM** Item III B
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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Commentary Received on Proposed Amendment to Evidence Rule 404(a)
Date: September 15, 1998

To date we have received no formal comments on the proposed amendment to Rule 404(a). There is a published column commenting on the proposal, however, written by Professor Laird Kirkpatrick in the Spring, 1998 Newsletter of the AALS Section on Evidence. Professor Kirkpatrick is a noted Evidence scholar, and he points up one possible anomaly in the proposed amendment to Rule 404(a) that the Committee may wish to consider.

## *The Proposed Amendment*

The Committee's proposal is as follows:

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

(a) Character evidence generally. — Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. — Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same~~;~~, or if evidence of a trait of character of the victim of the crime is offered by an accused and admitted under

subdivision (a)(2), evidence of a pertinent trait of character of the accused offered by the prosecution;

* * *

### *Kirkpatrick Critique*

Professor Kirkpatrick states first that the proposal "would further erode the traditional character evidence ban, following the trend set by new FRE 413-415." (Whether the Committee wishes to be seen as following that trend is obviously a question for the Committee).

In describing the proposal, Professor Kirkpatrick notes a possible problem with the amendatory language:

> A problematic aspect of the proposed amendment is that it seems to open the door to *any* "pertinent" character trait of the defendant and is not limited to the same trait of character about which the defendant offered evidence pertaining to the victim. Thus, in a prosecution for assault *and* conspiracy to distribute drugs, if the defendant introduces evidence of the victim's character for violence to support a self-defense claim, the door would apparently be opened for the prosecutor to offer evidence of the defendant's propensity toward drug dealing. It is even possible that prosecutors may argue that they are entitled to offer evidence of defendant's propensity toward additional types of illegal activity as a "pertinent" trait if the amendment is approved in its current form.

### *Reporter's Comment*

Professor Kirkpatrick appears correct about the scope of the amendment. Nothing in the language of the amendment limits the character evidence to the same character trait as to which the defendant opened the door by attacking the victim's character.

The question is whether the Committee actually wishes the character door to be opened as to *all* pertinent character traits of the defendant, or rather whether the open door should be limited to character traits *corresponding* to the victim's trait that was attacked. If the latter, more limited Rule is what the Committee had in mind, then the proposed amendment must be modified. It is notable that the example set forth in the Committee Note is one where the character traits of the defendant and the victim are the same, i.e., aggressiveness in a self-defense case.

### *Possible Change*

If the proposal is to be modified to reflect a more limited open door principle, then it might read as follows:

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

(a) Character evidence generally. — Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. — Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same~~;~~, or if evidence of a trait of character of the victim of the crime is offered by an accused and admitted under subdivision (a)(2), evidence of **the same** ~~a pertinent~~ trait of character of the accused offered by the prosecution;

### *Reporter's Comment*

I used the term "the same" because the term "corresponding" is arguably too vague. Obviously, it is up to the Committee to determine whether the language of the proposal should be changed in response to Professor Kirkpatrick's observations.

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Item IIIC

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Commentary Received on proposed amendment to Rule 701
Date: September 15, 1998

To date, we have received a number of informal comments concerning the proposed amendment to Rule 701. Two comments are from members of the public; a third is from the Style Subcommittee of the Standing Committee. In addition, there was some discussion at the Standing Committee meeting concerning how the rule would apply to treating physicians, and I summarize that discussion here for the Committee's information. Finally, this memo summarizes a recent case that provides some indication that the amendment to Rule 701 would not result in a major change in practice. The proposed amendment and Advisory Committee Note are attached to this memorandum.

### *Style Subcommittee Suggestion*

The Style Subcommittee proposes a minor change in the title (not the text) of the Rule. The goal is to remedy the inconsistency between the use of plural terminology in the title and singular terminology in the text. The proposal to amend the title reads as follows:

**Rule 701. Opinion Testimony by a Lay ~~Witnesses~~ Witness**

### *Reporter's Comment*

Since changing the title is unlikely to upset any settled expectations, the general Committee approach of refusing to amend existing language for style does not appear to apply in this instance. And it is always a good idea for the title of a Rule to be consistent with its text Judge Parker, Chair of the Style Subcommittee, has been informed that the Evidence Rules Committee will consider the Subcommittee's suggestion at its October meeting.

### *Comments From Members of the Public*

*1. Peter B. Ellis, Esq.*

Peter B. Ellis, a partner at Foley, Hoag & Eliot, wrote a letter on behalf of himself and a number of the members of the Firm's litigation department. (The letter was received before the April Committee meeting, so it is not a formal comment). Mr. Ellis states that he strongly supports the Advisory Committee's proposed amendment to Rule 701.He declares that the proposed amendment "has the virtue of substantially clarifying the ambiguous distinction between 'lay' and 'expert' testimony, and should tend to eliminate the markedly inconsistent rulings that have surrounded this issue . . ." He concludes that the amendment "should reduce the incidence of unfair surprise that results from both sharp practice and genuine misconception." He notes that "unexpected expert opinion from a 'lay witness' can place the opposing party at a substantial disadvantage" and that the remedy of a deposition during the trial imposes a substantial burden on trial counsel and is often inadequate as well, "particularly where one's ability effectively to impeach the witness's opinion would require substantial additional document discovery or depositions of the witness's co-workers."

Mr. Ellis disagrees with the contention that the proposed amendment works a major change in the law. He elaborates as follows:

> To the contrary, the amendment merely clarifies what I have always understood to be the appropriate line of demarcation between 'lay' and 'expert' opinion. In my experience, trial judges find the interplay between Rules 701 and 702 to be unclear and confusing, and the amendment would go a long way toward eliminating that confusion.

Mr. Ellis has one suggestion for improvement of the proposal. He believes that the purpose of the amendment would be better served if the added clause, rather than ending with the words "specialized knowledge", instead used the phrase "specialized knowledge, skill, experience, training or education" (thus tracking the Rule 702 qualification requirements). He explains his suggestion as follows:

> While it can be argued that the simple term "specialized knowledge" includes the enhanced judgmental ability that experience in a particular field may bring, I am concerned that judges applying the amended Rule might view the word "knowledge" as confined to formal academic or "book" learning, or at least as relating to a body of learning capable of being reduced to writing.

### ***Reporter's Comment***

One possible criticism of Mr. Ellis' proposal is that it blurs the distinction between the type of subject matter within the exclusive purview of experts and the qualifications of a person to be an expert. Adding Mr. Ellis' proposed language to Rule 701 might give the wrong signal about 702, by implying that the proper subject matter for expert testimony can go beyond that defined by "scientific, technical, or other specialized knowledge."

*2. Product Liability Advisory Council*

The second comment received to date on the Rule 701 proposal is from the Product Liability Advisory Council. (The letter from PLAC was received before the April Advisory Committee meeting, and therefore it is not a formal comment.) The Council supports the proposed amendment, noting that the amendment is necessary to prevent an end-run around the *Daubert* requirements and concomitant disclosure obligations that govern expert testimony. The Council states that "the proposed amendment is consistent with the federal courts' interpretation of Rule 701" and concludes that persons ordinarily have been permitted to testify as a lay witness "only if their opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person." In support the Council cites *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996) (person who would testify to the toxicity of substances in a well must be qualified as an expert), and *Brady v. Chemical Const. Corp.*, 740 F.2d 195, 200 (2d Cir. 1984) (witness who investigated employee financial misconduct could testify that the employee stole money, without having to qualify as an expert: the witness's conclusions "did not require any specialized knowledge and could have been reached by any ordinary person").

### *Standing Committee Discussion on Treating Physicians*

At the Standing Committee meeting, the question was raised as to how the Advisory Committee's proposed amendment to Rule 701 would apply to the testimony of a treating physician in a personal injury case. There was some disagreement on this point. Many of the Judges on the Committee initially were of the opinion that such a witness could not testify under Rule 701. Others disagreed. Ultimately, there appeared to be general agreement that whether the treating physician could testify as a fact witness would depend on what the testimony was. To the extent the witness related facts within common knowledge--such as how the plaintiff appeared on a certain occasion or whether the plaintiff complained of a certain condition--the testimony would be covered by Rule 701. To the extent that the witness testified to matters outside common knowledge--such as a medical diagnosis of the plaintiff's condition--the testimony would be governed by Rule 702.

### *Reporter's Comment*

The general agreement eventually reached by the Standing Committee during its discussion is consistent with the Advisory Committee's Note to the proposed amendment to Rule 701. The Note states that the ruled "does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*."

In light of the Standing Committee's discussion, however, the Committee might consider whether to add a reference to treating physicians in the Committee Note. The argument against such an addition is that no Committee Note can attempt to cover all the fact situations that might arise under the Rule. The argument in favor is that the problem of treating physicians rises fairly often, and there appears to be at least some disagreement on how the proposed amendment would apply to them.

### *Possible Modification of Committee Note*

If the Committee decides to add to the note, an appropriate place to discuss treating physicians is right after the statement distinguishing between witnesses and testimony. A possible sentence to add, as the third sentence in the paragraph, is as follows:

> The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. For example, a treating physician could testify to the plaintiff's appearance during a consultation, or to the plaintiff's reaction to certain tests, without being qualified as an expert. On the other hand, a treating physician who testifies to a medical diagnosis goes beyond matters of common knowledge and must be qualified as an expert to give that testimony See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

## *New Case*

A recent case from the Eleventh Circuit appears consistent with the Evidence Rules Committee's proposal to amend Rule 701, and tends to indicate that the amendment would not result in a radical change in practice. In *United States v. Trujillo,* 146 F.3d 838 (11th Cir. 1998), the defendants appealed from cocaine convictions. They challenged the testimony of an agent who had returned to the warehouse where he had arrested the defendant Fuentes. The agent testified that he had inspected the warehouse door, and was unable to see anything through the door when it was closed. This testimony contradicted that of Fuentes, who had testified that he had looked through cracks in the door on the date of his arrest to determine that he was in danger. Fuentes argued that the agent's testimony was inadmissible, because he had never been qualified as an expert to conduct the "experiment" at the warehouse. But the Court found no error. It declared that the agent's observation of the door "did not require the skill of an expert, as it was not beyond the understanding and experience of an average citizen." Certainly it is common knowledge for a person to look at a door and to determine whether it has cracks or not. The result in *Trujillo* would undoubtedly be the same under the proposed amendment to Rule 701. See the last sentence of the Advisory Committee Note.

# Attachment to Rule 701 Memorandum

**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 701**

1 **Rule 701. Opinion Testimony by Lay Witnesses***

2 If the witness is not testifying as an expert, the
3 witness' testimony in the form of opinions or inferences is
4 limited to those opinions or inferences which are (a) rationally
5 based on the perception of the witness, ~~and~~ (b) helpful to a
6 clear understanding of the witness' testimony or the
7 determination of a fact in issue~~.~~ and (c) not based on
8 scientific, technical or other specialized knowledge.

* * * * *

## COMMITTEE NOTE

Lay witnesses have often been permitted to testify on complicated, technical subjects. This permissiveness has created a problematic overlap between lay and expert witness testimony. See, e.g., *Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991) (insurance broker, who might have been qualified as an expert, was permitted to testify that the construction collapse at issue may have contributed to a substantial increase in the plaintiff's insurance premiums). Some courts have found it unnecessary to decide whether a witness is offering expert or lay opinion, reasoning that the proffered opinion would be admissible under either Rule 701 or 702. See *Malloy v. Monahan*, 73 F.3d 1012 (10th Cir. 1996) (the plaintiff's testimony as to future profits was admissible under either Rule 701 or Rule 702); *United States v. Fleishman*, 684 F.2d 1329 (9th Cir.1982) (whether the testimony was lay or expert opinion, it was permissible for an undercover agent to testify that a defendant was acting as a lookout). Other courts have held that a witness need

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

not be qualified as an expert where the opinion is helpful and admissible under Rule 701. See, e.g., *United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989) (Rule 701 ``blurred any rigid distinction that may have existed between" lay and expert testimony).

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing scientific, technical, or other specialized information to the trier of fact. See generally *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony on scientific, technical and other specialized knowledge through the rules governing expert testimony, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a layperson. See Joseph, *Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony", and that "the court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g, *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge is governed by the standards of Rule 702 and the corresponding

disclosure requirements of the Civil and Criminal Rules.

The phrase "scientific, technical or other specialized knowledge" is drawn from and is intended to have the same meaning as the identical phrase in Rule 702. See, e.g., *United States v. Saulter,* 60 F.3d 270 (7th Cir. 1995) (law enforcement agent was properly permitted to provide expert testimony on the process of manufacturing crack cocaine; his testimony was based on specialized knowledge). The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g,* 57 F.3d 1190, 1196 (3d Cir. 1995).

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Commentary Received on proposed amendment to Rule 702
Date: September 15, 1998

To date five comments on the proposed amendment to Rule 702 have been received. One is from the Style Subcommittee of the Standing Committee, which suggests a minor change to the title of Rule 702. One member of the Standing Committee expressed some concern over the phrasing of one part of the Rule. Finally, three members of the public have provided comment, though not within the formal comment period. This memorandum summarizes all of these comments. The proposed amendment and Advisory Committee Note are attached to this memorandum.

Finally, this memorandum briefly discusses two important cases that might have some bearing on the proposed amendment to Rule 702. The first is the Fifth Circuit's en banc opinion in *Moore v. Ashland Chemical,* which rejected the argument that clinical medical testimony need not satisfy the *Daubert* standards as they apply to hard science. The second is the Eleventh Circuit's opinion in *Carmichael v. Samyang Tire,* which presents the question whether *Daubert* applies to non-scientific expert testimony, and which the Supreme Court will review this October. Both the en banc opinion in *Moore* and the Eleventh Circuit's decision in *Carmichael* are attached to this memorandum.

## *Style Subcommittee Suggestion*

The Style Subcommittee proposes a minor change in the title (not the text) of Rule 702. The goal is to remedy the inconsistency between the use of plural terminology in the title and singular terminology in the text. The proposal to amend the title reads as follows:

**Rule 702. Testimony by ~~Experts~~ <u>an Expert</u>**

## *Reporter's Comment*

The *Daubert* Subcommittee refused to restylize the existing language in Rule 702, on the ground that to do so might result in unintended changes and might upset settled expectations. This position does not really apply to the title of a Rule, however. No unintended changes will result from changing the title in the manner suggested by the Style Subcommittee; nor are there any settled expectations in the title as currently set forth. It is therefore appropriate and advisable to consider the suggested change in the title to Rule 702, as proposed by the Style Subcommittee.

## *Comment by Member of the Standing Committee*

Subdivision (1) of the proposed amendment requires, among other things, that expert testimony must be "sufficiently based upon reliable facts or data." One member of the Standing Committee thought that the phrasing "sufficiently based" was awkward. He suggested that a better phrasing would be to require that the testimony be **"based upon reliable and sufficient facts or data."**

Others at the meeting disagreed and thought that the Committee's phraseology better caught the concern of the Supreme Court in *Joiner v. General Electric*--i.e., that an expert might be using reliable information, and yet the information might not lead to the conclusion reached by the expert. Thus, the Committee's phrasing was thought by some members of the Standing Committee to be an effective means of regulating an expert who impermissibly extrapolates from accepted data to an unsupported conclusion. Such an expert has not "sufficiently based" his opinion on the reliable facts or data he used--the facts or data may be sufficient in a legal sense--

perhaps even to come to the opposite conclusion-- but the testimony would be inadmissible under the proposal unless the expert actually bases his opinion *sufficiently* on those facts or data. Thus, the view was expressed that "sufficiently based" regulates a problem that "based upon sufficient" does not.

The Standing Committee's discussion on this matter is brought to the Committee's attention for its determination of whether the phrase should be changed.

## *Public Comments*

*1. Product Liability Advisory Council*

The Product Liability Advisory Council supports the proposed amendment to Rule 702 "without reservation." (PLAC's written comment was received before the April Committee meeting, so it is not a formal comment). PLAC notes the amendment's salutary resolution of the question whether *Daubert* gatekeeping standards apply to non-scientific expert testimony. It declares that the proposed amendment "would serve to prevent an undesirable race to the bottom, i.e., a move toward experts whose testimony was based only on abstract principles and experience." PLAC also notes that the proposed amendment "would ensure that before expert testimony can be presented to a trier of fact, it has met a threshold test of reliability, which precisely expresses the intent of the Supreme Court" as set forth in *Daubert* and *Joiner*.

*2. Bert Black and Clifton Hutchinson*

Bert Black and Clifton Hutchinson, of the firm of Hughes and Luce, would prefer to "leave Rule 702 alone." They argue that case law "seems to be converging on a rational approach to determining admissibility." If Rule 702 is to be amended, however, Black and Hutchinson suggest that the amendment focus on the "reasoning" that the expert employs. They state that "[r]easoning is a broader term than methodology, and it captures more of the attitude and approach that is the essence of science and other fields of expertise." They suggest that factor (2) of the new language be changed as follows:

(2) the testimony is ~~the product of reliable principles and methods~~ <u>derived through valid reasoning and a reliable methodology</u>.

## *Reporter's Comment*

Black and Hutchinson stop their proposed amendment at that point, i.e., offering only an amendment to factor (2). One problem with this is that subdivision (3) of the new amendment requires that "the witness has applied the principles and methods reliably to the facts of the case." This clause, which refers to "principles and methods", would make no sense if subdivision (2) is amended to substitute the term "reasoning" for "principles and methods." The option of changing subdivision (3) to refer to "reasoning" rather than "principles and methods" is not ideal. It would mean that subdivision (3) would provide that "the witness has applied the reasoning and methodology reliably to the facts of the case." Even if one can "apply reasoning", this language is awkward. Moreover, the Black/Hutchinson proposal uses the term "methodology" rather than "methods"--this could create the impression that the text of the rule is geared toward scientific experts rather than all experts. The Evidence Rules Committee has already determined that the term "methods" is preferable because it gives a better signal that the Rule is to apply to all experts. It appears that the Black/Hutchinson suggested redrafting creates more problems than it solves.

### *3. Professor David Faigman*

Professor David Faigman sent an e-mail to the Reporter expressing concern over subdivision (3) of the proposed amendment. That subdivision requires exclusion unless "the witness has applied the principles and methods reliably to the facts of the case." Professor Faigman noted that experts are often called to educate the jury as to general principles only, e.g., thermodynamics, how electrical current works, how a heart valve operates, how a disease attacks white blood cells, etc. Professor Faigman felt that subdivision (3) of the new language would end up categorically excluding the testimony of experts who testify only to general principles and who make no attempt to apply their methods to the facts of the case.

## *Reporter's Comment*

One possible response to Professor Faigman's criticism is that even generalized expert testimony must be applicable to the case; if not, it is inadmissible under the *Daubert* "fit" requirement. Testimony about how a heart valve operates is inadmissible if the case is about liver damage. On the other hand, the Committee's proposed amendment requires that "the *witness* has applied" the principles and methods reliably to the facts of the case. Where experts give generalized instructive testimony, their testimony must be applicable to the facts of the case, but the *witness* does not have to do the application. Therefore, the Committee might wish to consider whether subdivison (3) of the new language should be amended to provide for a "fit"

requirement, without necessarily requiring the fit to be made by the expert herself.

### *Possible Change*

One possible response to the problem of experts who testify to general principles only is to modify the proposed amendment as follows:

> * * * provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) ~~the witness has applied~~ the principles and methods have been applied reliably to the facts of the case.

Under this modified language, the expert's principles and methods must be applicable to the case, but the expert himself need not always make the application. Whether such a modification is necessary, or even preferable to the current proposal, is a question for the Committee.

## *Relevant Court Decisions*

### *1. Moore v. Ashland Chemical*

In *Moore,* the Magistrate Judge refused to allow a clinical doctor to testify that the plaintiff's respiratory condition was caused by exposure to Toluene that had leaked out of a drum in a truck trailer. The panel found that the Magistrate Judge erred by holding the expert to a standard of hard science, when in fact the expert had used the methods of clinical medicine to reach his conclusion. The en banc Court reversed the panel and affirmed the decision of the Magistrate Judge. The majority employed a traditional *Daubert* analysis, and found that the Magistrate Judge did not abuse her discretion in finding that the expert's opinion was insufficiently supported, unscientific and, essentially, speculative.

## *Reporter's Comment on the Problem Arising in Moore*

The majority in *Moore* glided over the distinction relied upon by the panel, between "hard science" and clinical medicine. *Moore* could be seen as raising the question whether "soft science" should be permitted to reach a conclusion that "hard science" could not. For the panel, and for the dissenting judge en banc, it was enough that the expert used methods that were standard in his field. But if the field uses a less rigorous methodology than that used by hard science, shouldn't the testimony be excluded? This is not to say that all expert opinions must be grounded in hard science to be admissible. But if hard science *can* be employed and *is* employed by other experts to the matter in dispute, shouldn't the rule be that it *must* be employed by the experts in the case?

An important question is whether the proposed amendment to Rule 702 would assist a trial court in handling a problem like that addressed in *Moore.* The Committee Note to the Rule 702 proposal states that a trial court should consider whether the expert's field is known to reach reliable results. (This is factor number 5 of the factors listed to assist the courts in determining whether expert testimony is sufficiently reliable to be admissible). That comment might not completely answer the problem raised by *Moore,* however. Clinical medicine is known to reach reliable results about *some* things, but it has its limits. The problem created by the panel opinion in *Moore* was that a plaintiff could evade the requirements of hard science simply by calling a clinical expert who could then testify to causation without having to rely on epidemiological evidence, animal studies, or any other of the bases ordinarily used by scientists. The fact that clinical medicine and laboratory medicine have different goals does not mean that a clinical doctor should be able to testify to causation on the basis of information that a laboratory scientist

would reject as insufficient.

Perhaps the *Moore* problem is addressed in the other factors for courts to take into account that are listed in the Advisory Committee Note. Those factors include the risk of unjustified extrapolation, the failure to account for alternative explanations, and the possibility that the expert would not reach the same conclusion in his professional life outside the courtroom. Indeed, these are the very factors relied upon by the majority in *Moore* to find that there was no abuse of discretion in excluding the clinical doctor's testimony on causation. Clinical experts treat patients--they do not conclude definitively on causation in toxic tort situations. The *Moore* panel would have allowed the clinical expert to testify in court to a conclusion that the expert would not and could not reliably draw in his professional life. This is contrary to the reliability guidelines already set out in the Advisory Committee Note.

### *Possible Change to the Advisory Committee Note*

All these observations concerning the problem arising in *Moore* are set forth for the Committee's consideration of whether the Rule or the Note should be amended to deal specifically with the problem of an expert using standard methodology in his field, who comes to a conclusion that a hard scientist would reject. Perhaps all that is required is to add to factor (5) in the list of reliability factors in the Committee Note, as follows:

> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See *Moore v. Ashland Chemical, Inc.*, — F.3d — (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

No assertion is made that the Note *must* be changed. The *Moore* en banc majority held the clinical expert's testimony properly excluded on straightforward *Daubert* grounds. On the other hand an addition to the Committee Note to take account of a major case could be useful.

*2. Carmichael v. Samyang Tire*

In *Carmichael*, the Eleventh Circuit held that *Daubert* was inapplicable to the testimony of a tire failure expert who testified solely on the basis of experience. The Court reasoned that *Daubert* was limited to experts applying scientific principles. The Supreme Court granted certiorari, under the name *Kumho Tire Co. v. Carmichael.* Obviously, the Supreme Court's decision will have some effect on the Evidence Rules Committee's proposed amendment to Rule 702. Generally speaking, the effect will be positive if the Court rejects the reasoning of the panel and finds that the *Daubert* gatekeeping standards apply to all expert testimony. Such a ruling would be completely consistent with the proposed amendment. In contrast, the effect on the proposed amendment will be negative if the Court agrees with the reasoning of the panel in *Carmichael*. The Committee must be prepared at least to include *Carmichael* in the Committee Note when that case is decided.

# Attachments to Rule 702 Memorandum

BOB T. MOORE; SUSAN MOORE, Plaintiffs-Appellants Cross-Appellees, versus ASHLAND CHEMICAL INC.; ASHLAND OIL INC., Defendants-Appellees Cross-Appellants, AND DOW CORNING CORPORATION; CDC SERVICES, INC., Defendants.

No. 95-20492

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

1998 U.S. App. LEXIS 18883

August 14, 1998, Decided

PRIOR HISTORY: [*1] Appeals from the United States District Court for the Southern District of Texas. CA-H-92-1017. Maryrose Milloy, US Magistrate Judge.

DISPOSITION: AFFIRMED.

JUDGES: Before KING, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHe, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, STEWART, BENAVIDES, PARKER, and DENNIS, Circuit Judges. BENAVIDES, Circuit Judge, concurring. Dennis, J., dissenting.

OPINIONBY: W. EUGENE DAVIS

OPINION:
W. EUGENE DAVIS, Circuit Judge:

In this toxic tort case, we consider whether the district court abused its discretion in excluding the opinion of a physician on the causal relationship between Plaintiff's exposure to industrial chemicals and his pulmonary illness. We find no abuse of discretion and affirm.

I.

Bob T. Moore was employed as a delivery truck driver for Consolidated Freightways, Inc. ("Consolidated"), a motor freight company. On the morning of April 23, 1990, Mr. Moore delivered several drums of chemicals manufactured by Dow Corning Corporation ("Dow") to Ashland Chemical Incorporated's ("Ashland") terminal in Houston. When Mr. Moore opened the back door of his trailer, he smelled a chemical odor that caused him to suspect that a drum was leaking. Mr. Moore and the Ashland plant manager, Bart Graves, identified two leaking drums and removed them from the trailer. Mr. [*2] Graves contacted Dow and requested cleanup instructions and a copy of the material safety data sheet ("MSDS") for the spilled chemicals. The MSDS identified the contents of the leaking drum and health hazards associated with the contents. n1 The MSDS stated that the chemical solution included hazardous ingredients, most

notably Toluene. It warned that depending upon the level and duration of the exposure to fumes from the chemicals, irritation or injury to various organs, including the lungs, could result.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 The MSDS provided, in part, as follows:

MATL NAME: DOW CORNING(R) 1-2531 RELEASE COATING

. . . .

SECTION II - HAZARDOUS INGREDIENTS AS DEFINED IN 29 CFR 1910.1200 . . .

TOLUENE . . .

SOLVENT NAPHTHA, PETROLEUM, LIGHT ALIPHATIC . . .

ISOBUTYLISOBUTYRATE

PROPYLENE GLYCOL METHYL ETHER . . .

SECTION III - EFFECTS OF OVEREXPOSURE

. . .

INHALATION: SHORT VAPOR EXPOSURE MAY CAUSE DROWSINESS AND IRRITATE NOSE AND THROAT. VAPORS MAY INJURE BLOOD, LIVER, LUNGS, KIDNEYS, AND NERVOUS SYSTEM. DEGREE OF EFFECTS DEPENDS ON CONCENTRATION AND LENGTH OF EXPOSURE.

. . .

COMMENTS: PROLONGED TOLUENE OVEREXPOSURE MAY INJURE BLOOD, LIVER, LUNGS, KIDNEYS, AND NERVOUS SYSTEM AND MAY AGGRAVATE EXISTING EYE, SKIN, AND RESPIRATORY DISORDERS.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*3]

After Moore and Graves obtained cleanup instructions, they put the leaking drums into larger salvage drums. Moore and another Consolidated employee then proceeded to place absorbent material on the spilled chemicals, sweep them up, and dispose of them. The men were engaged in this cleanup for forty-five minutes to an hour. After the cleanup, Moore returned to the Consolidated terminal. At trial, he testified that about an hour after finishing the cleanup, he began

experiencing symptoms, including dizziness, watery eyes, and difficulty in breathing. However, Moore was able to drop off another Consolidated trailer as requested by his supervisor.

When he completed this delivery, Moore returned to Consolidated's terminal and told his supervisor that he was sick. The supervisor sent Moore to the company doctor. The next day, Mr. Moore saw his family physician. After two to three weeks of treatment by the family physician, Moore placed himself under the care of a Dr. Simi, a pulmonary specialist. Dr. Simi released Moore to return to work on the 11th day of June, 1990. After working several days, Moore terminated his employment due to difficulty breathing. On three occasions in the summer [*4] of 1990, Mr. Moore also consulted Dr. Daniel E. Jenkins, a pulmonary specialist. Dr. Jenkins diagnosed Moore's condition as reactive airways dysfunction syndrome ("RADS"), an asthmatic-type condition. In November of 1990, Moore consulted another pulmonary specialist, Dr. B. Antonio Alvarez, who became his primary treating physician. Dr. Alvarez confirmed Dr. Jenkins's diagnosis and treated Mr. Moore for RADS.

Mr. Moore reported to his physicians that he had smoked approximately a pack of cigarettes a day for approximately twenty years, and he continued to smoke at the time of trial. He also reported that on April 23, 1990, when he was exposed to the Dow chemical, he had just returned to work following a bout with pneumonia. Mr. Moore also related a history of childhood asthma to his treating physician.

Mr. Moore and his wife filed suit against Ashland Chemical, Inc., Ashland Oil, Inc., and others, primarily on grounds that Ashland was negligent in insisting that Mr. Moore expose himself to vapors created by the chemical spill. More specifically, Mr. Moore complained that Ashland's employee, Bart Graves, should have permitted Moore to return to Consolidated's terminal where other [*5] employees could have cleaned up the spill. He also complained that Graves did not permit him to use a respirator during the cleanup. Ashland removed the suit to federal court on the basis of diversity jurisdiction.

After extensive discovery and motion practice dealing particularly with whether Moore's expert physicians, Dr. Jenkins and Dr. Alvarez, would be permitted to testify, the case proceeded to trial before a jury. At the conclusion of the trial, the jury answered the following interrogatory in the negative: "Do you find, from a preponderance of the evidence, that the negligence, if any, of the person named below proximately caused the injury in question: . . . (b) Ashland Chemical, Inc. and/or Ashland Oil, Inc." Thereafter, the district court entered a take nothing judgment against Mr. Moore. On appeal, a divided panel of this Court concluded that the district court had erred in refusing to allow Dr. Jenkins, one of Moore's experts, to give an opinion on the cause of Mr. Moore's illness, and reversed the district court's judgment and remanded the case for a new trial. Moore v. Ashland Chem., Inc., 126 F.3d 679 (5th Cir. 1997). We granted rehearing to consider this case [*6] en banc and to clarify the standards district courts should apply in determining whether to admit expert testimony.

II.

In this appeal we focus on the trial court's refusal to permit one of Moore's medical witnesses, Dr. Daniel E. Jenkins, to give an opinion on the cause of Mr. Moore's illness. Some factual and procedural background is necessary to understand the arguments of the parties.

Mr. Moore sought to call two medical witnesses, Dr. Jenkins and Dr. Antonio Alvarez. Dr. Jenkins, a well-qualified medical specialist, was certified by the American Board of Internal Medicine in 1947. He also had special training and taught in the fields of pulmonary disease, allergy, and environmental medicine. n2 Dr. Jenkins saw Mr. Moore on three occasions. He examined Mr. Moore, performed a series of tests, and reviewed Mr. Moore's medical records. He concluded that Moore was suffering from RADS. Based upon his examination and tests, Dr. Jenkins expressed the opinion that Moore's RADS had been caused by Moore's exposure to vapors from the chemical spill at Ashland's facility in April of 1990. We will discuss later in more detail the reasons Dr. Jenkins assigned for his opinion. Generally, [*7] he relied upon the MSDS which warned that exposure to the Toluene solution could be harmful to the lungs, his examination and test results, and the close, temporal connection between Mr. Moore's exposure to the Toluene solution and the onset of symptoms.

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n2 The Defendants agree that Dr. Jenkins's qualifications are outstanding. He served residencies in internal medicine, tuberculosis, and chest disease and allergy, and was certified by the American Board of Internal Medicine in 1947. After serving as Chief Resident in Medicine and Assistant Professor of Medicine and Physician in Charge of the Tuberculosis and Chest Unit at the University of Michigan Medical School from 1943 to 1947, he spent forty-four years on the medical school faculty at Baylor Medical School. In 1991, he went into practice in Houston with a group of physicians specializing in respiratory ailments.

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Dr. Alvarez, who was a former student of Dr. Jenkins, agreed with Dr. Jenkins about the cause of Mr. Moore's RADS. Dr. Alvarez was Mr. Moore's [*8] primary treating physician. In addition to the reasons relied on by Dr. Jenkins, Dr. Alvarez supported his theory of causation with a report of a study on RADS co-authored by Dr. Stuart Brooks that he found in a medical magazine. n3 One case study in the report involved a clerk who was exposed to a Toluene mixture in a small, enclosed room for two and one-half hours. Dr. Jenkins initially stated in his deposition that he knew of no reported literature that supported his causation opinion. During his in limine testimony outside the presence of the jury at trial, Dr. Jenkins, for the first time, pointed to the Brooks study relied on by Dr. Alvarez.

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n3 Stuart M. Brooks, M.D. et al., Reactive Airways Dysfunction Syndrome (RADS), 88 CHEST 376 (1985).

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Dr. Jenkins admitted that Mr. Moore was his first RADS patient with a history of exposure to Toluene. He had conducted no research on this subject. Dr. Jenkins had previously treated other patients whose RADS he attributed to exposure to chemicals that were known [*9] to irritate the airways. However, he conceded that the chemicals involved with these previous patients were stronger and more irritating than the Toluene solution to which Mr. Moore was exposed. Dr. Jenkins made no attempt to explain how any of the other chemicals that he believed caused RADS in his earlier patients had properties similar to the Dow Toluene solution.

The district court, after reviewing Dr. Jenkins's deposition and listening to his in limine testimony, decided to exclude his causation opinion. The court did permit Dr. Jenkins to testify about his examination of Mr. Moore, the tests he conducted, and the diagnosis he reached. The only feature of Dr. Jenkins's testimony the court excluded was his opinion that the Toluene solution caused Mr. Moore's RADS. The district court concluded that Dr. Jenkins had no scientific basis for this opinion, that it was not sufficiently reliable under Fed. R. Evid. 702, and that it would be inconsistent with the court's gatekeeper role under Daubert to admit this opinion.

The district court decided to admit Dr. Alvarez's causation opinion even though it was essentially identical to Dr. Jenkins's proffered opinion. The district [*10] court was apparently convinced that Dr. Alvarez's opinion linking the RADS to Mr. Moore's exposure to the Toluene solution was more reliable than Dr. Jenkins's opinion because Dr. Alvarez had been the treating physician, and also because he had relied from the outset on the Brooks study and therefore had some support from the scientific literature for his conclusion. In view of the verdict, the Defendants do not challenge the district court's decision to admit Dr. Alvarez's opinion. Thus, the propriety of this ruling is not presented to us for review.

The single defense expert, Dr. Robert Jones, was the third medical witness to testify. Based upon his review of the medical records, Dr. Jones concluded that Mr. Moore did not have RADS; rather, according to Dr. Jones, Mr. Moore suffered from a form of bronchial asthma. Dr. Jones further testified that the evidence in the case was insufficient to allow him to conclude that Mr. Moore's exposure to Toluene caused his pulmonary problems. Dr. Jones's conclusion was reinforced by Mr. Moore's medical history, which included conditions that Dr. Jones thought were much more likely triggering agents for RADS. These conditions included Moore's [*11] history as a heavy smoker for approximately twenty years, his history of asthma, and his recent bout with pneumonia. Dr. Jones also testified that the scientific literature revealed that Toluene and similar substances have a low potential for causing lung injury except when encountered in such high dosages that the person is overcome and passes out.

With this background, we now turn to the issue presented by this appeal: whether the district court erred in excluding Dr. Jenkins's causation testimony.

III.

A.

Fortunately, the Supreme Court recently resolved a disagreement among the circuits about the standard for reviewing a district court's admission or exclusion of expert testimony. In General Elec. Co. v. Joiner, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997), the Court held that we should review such decisions for an abuse of discretion. In evaluating whether the district court abused its discretion in excluding Dr. Jenkins's testimony on causation, the Supreme Court's decisions in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and Joiner control our analysis.

In Daubert, the lower courts considered the [*12] admissibility of expert testimony on medical causation. The expert witnesses sought to testify that ingestion of Bendectin, a prescription anti-nausea drug, by several mothers caused birth defects in their children. The lower courts excluded the evidence on the basis that the experts' methodology was not generally accepted in the scientific community and had not been subjected to peer review. The Supreme Court, speaking through Justice Blackmun, first concluded that the "Frye doctrine," n4 requiring that a theory be generally accepted in the scientific community before it can be the basis of an expert's opinion, was not a controlling principal in federal trials. Daubert, 509 U.S. at 589, 113 S. Ct. at 2794. Justice Blackmun then turned to Rule 702 of the Federal Rules of Evidence n5 and the proper test for admissibility of scientific evidence.

-----------------Footnotes-----------------

n4 Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

n5 Fed. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

-----------------End Footnotes----------------- [*13]

That the Frye test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" an expert "may testify thereto." The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods

and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary [*14] 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation--i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert, 509 U.S. at 589-90, 113 S. Ct. at 2794-95 (emphasis in original) (internal citations omitted).

The Court stated further that:

Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." This condition goes primarily to relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful."

Id. at 591, 113 S. Ct. at 2795 (citation omitted). The Court then proceeded to enumerate a five-factor, non-exclusive, flexible test for district courts to consider when assessing whether the [*15] methodology is scientifically valid or reliable. These factors include: (1) whether the expert's theory can be or has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error of a technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community. 509 U.S. at 593-95, 113 S. Ct. at 2796-97. n6

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n6 The panel majority took the position that because Dr. Jenkins's causation opinion was not predicated on "hard science," it was therefore not subject to Daubert's standards for admissibility. We disagree. Daubert and Joiner both involved questions of medical causation. As one of the scientists who filed an amicus brief, Professor Alvan R. Feinstein, stated: "In other words, determining the etiology of a disease--its cause--involves the same scientific exercise, whether the decision is made by a clinician, an epidemiologist, or other scientist." Brief of Dr. Feinstein Sterling Professor of Medicine and Epidemiology at the Yale University School of Medicine and author and co-author of more than 375 peer-reviewed articles and five scientific texts, including Clinical Judgment.

In any event, in this Circuit an opinion is governed by Fed. R. Evid. 702 and Daubert, even though the opinion is not grounded in "hard science," assuming such a distinction exists. In Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997), we rejected the position that application

of the Daubert factors is unwarranted in cases where expert testimony is based solely on experience or training. Id. at 988-90.

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The Supreme Court concluded by pointing out that important differences exist between truthseeking in the courtroom and in the laboratory:

Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment--often of great consequence--about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.

Daubert, 509 U.S. at 597, 113 S. Ct. at 2798-99. The Court remanded the case to permit the lower courts to evaluate their rulings in light of the multi-factor, flexible test it had just announced.

Procedurally, Daubert instructs us that the district court must determine admissibility under Rule 702 by following the [*17] directions provided in Rule 104(a). n7 Rule 104(a) requires the judge to conduct preliminary fact-finding and to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 592-93, 113 S. Ct. at 2796.

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n7 Fed. R. Evid. 104(a) provides:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).

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Thus, the party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method, and, therefore, are reliable. This requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient. [*18] See Daubert v. Merrell-Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir. 1995) (on remand). The proponent need not prove to the judge that the expert's testimony is correct, but

she must prove by a preponderance of the evidence that the testimony is reliable. See In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3d Cir. 1994); see also 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1229-40 (7th ed. 1998).

In sum, the law cannot wait for future scientific investigation and research. We must resolve cases in our courts on the basis of scientific knowledge that is currently available. The inquiry authorized by Rule 702 is a flexible one; however, a scientific opinion, to have evidentiary relevance and reliability, must be based on scientifically valid principles.

Last term, in General Elec. Co. v. Joiner, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997), the Supreme Court gave us helpful insight into the application of the Daubert principles. In Joiner, the plaintiff sued, claiming that his small-cell lung cancer was caused by his exposure to polychlorinated biphenyls ("PCBs") in the workplace. The plaintiff offered expert testimony to establish [*19] his causation theory. The district court ruled that the testimony was scientifically unreliable and refused to admit the proffered evidence. The Eleventh Circuit Court of Appeals reversed and held that the simple abuse of discretion standard of review did not apply to the ruling; rather, "a particularly stringent standard of review" applied "to the trial judge's exclusion of expert testimony" which resulted in the dismissal of the suit. Joiner v. General Elec. Co., 78 F.3d 524, 529 (11th Cir. 1996). The Supreme Court reversed, holding that the usual abuse of discretion standard generally applied to evidentiary rulings also applied to the admission or exclusion of expert testimony. General Elec. Co. v. Joiner, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997). The Supreme Court's treatment of several of Joiner's arguments is instructive to both trial courts and courts of appeals in the area of admissibility of expert testimony.

The Court emphasized that a district court, while acting as a gatekeeper for expert evidence, must evaluate whether there is an adequate "fit" between the data and the opinion proffered. Joiner, 118 S. Ct. at 519. One of the bases for the experts' causation [*20] opinion in Joiner was animal studies on the effects on rats injected with large doses of PCBs. In analyzing Joiner's argument, the Court observed that rather than explaining how and why the experts could have extrapolated their opinions from these seemingly far-removed animal studies, respondent chose to proceed as if the only issue [was] whether animal studies can ever be a proper foundation for an expert's opinion. Of course, whether animal studies can ever be a proper foundation for an expert's opinion was not the issue. The issue was whether these experts' opinions were sufficiently supported by the animal studies on which they purported to rely. The studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court [sic] to have rejected the experts' reliance on them.

Id. at 518 (internal quotation and citation omitted).

The Court next considered four published epidemiological studies on which the proffered experts relied to determine whether they provided a sufficient basis for the experts' opinion. The Court observed that the authors of the first two studies, while finding that the rate of cancer [*21] deaths among former employees at plants where workers were exposed to PCBs was higher than might have been expected, nevertheless concluded that "there were apparently no

grounds for associating lung cancer deaths (although increased above expectations) and exposure in the plant." Joiner, 118 S. Ct. at 518 (citation omitted). The Court concluded that given that the authors of the article were "unwilling to say that PCB exposure had caused cancer among the workers they examined, their study did not support the experts' conclusion that Joiner's exposure to PCBs caused his cancer." Id. at 518. n8 The Court next referred to the two remaining studies, one of which made no mention of PCBs and the other in which the PCB-exposed group had also been subjected to additional potential carcinogens. The Court observed that the district court was entitled to conclude that these studies were likewise no help to the experts in supporting their opinions. Id. at 519.

------------------Footnotes------------------

n8 This analysis by the Supreme Court is particularly relevant to our case. The Brooks study relied upon by Dr. Jenkins suffered from the same self-doubts as the studies in Joiner. Dr. Brooks was unable to reach any conclusions based on his isolated studies.

------------------End Footnotes------------------ [*22]

The Court concluded its discussion of Joiner's arguments as follows:

Respondent points to Daubert's language that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." He claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. That is what the District Court did here, and we hold that it did not abuse its discretion in so doing.

Joiner, 118 S. Ct. at 519 (internal citations omitted).

B.

With this background, we turn to the record evidence in this case to apply the Supreme Court's directives in Daubert and [*23] Joiner, and determine whether the district court abused its discretion in excluding Dr. Jenkins's testimony.

Dr. Jenkins pointed to the following support for his causation conclusion: (l) the material safety data sheet from Dow warned that exposure to fumes from the Toluene solution could cause injury to the lungs; (2) Mr. Moore had an onset of symptoms shortly after his exposure to the Toluene solution; (3) although Dr. Jenkins did not initially rely on the Brooks article, when it was called to his attention at trial by counsel, he did claim to have knowledge of the article and stated that he

had relied on it; (4) his training and experience; and (5) his examination and test results.

The district court was entitled to conclude that the above bases for Dr. Jenkins's opinion were individually and collectively inadequate under Daubert. First, Dr. Jenkins's training and experience and his examination and tests, items 4 and 5 above, were obviously important to his diagnosis. However, Dr. Jenkins gave no reason why these items were helpful in reaching his conclusion on causation. He admitted that he had never previously treated a patient who had been exposed to a similar Toluene [*24] solution. Dr. Jenkins was a highly qualified pulmonary specialist, but, as the Seventh Circuit observed in Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir. 1996), "under the regime of Daubert a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." Id. at 318 (internal citation omitted).

With respect to the Brooks article, item 3 above, the authors made it clear that their conclusions were speculative because of the limitations of the study. Also, in the single study involving exposure to Toluene fumes, the level and duration of the exposure was several times greater than Mr. Moore's exposure.

The bases for Dr. Jenkins's causation opinion are therefore reduced to the following: (l) the Dow MSDS from which Dr. Jenkins could have gleaned that the contents of the drum were irritating to the lungs at some level of exposure; and (2) the relatively short time between Mr. Moore's exposure to the chemicals and the onset of his breathing difficulty.

The district court was entitled to find that the Dow MSDS had limited value to Dr. Jenkins. [*25] First, Dr. Jenkins admitted that he did not know what tests Dow had conducted in generating the MSDS. Second, and perhaps more importantly, Dr. Jenkins had no information on the level of exposure necessary for a person to sustain the injuries about which the MSDS warned. The MSDS made it clear that the effects of exposure to Toluene depended on the concentration and length of exposure.

The district court was also correct in viewing with skepticism Dr. Jenkins's reliance on the temporal proximity between the exposure and injury. Cavallo v. Star Enter., 892 F. Supp. 756 (E.D. Va. 1995), aff'd. in part, 100 F.3d 1150 (4th Cir. 1996), contains a helpful discussion of this issue. In that case, the plaintiff alleged that she suffered respiratory illness as a result of exposure to aviation jet fuel vapors. The proffered expert relied substantially on the temporal proximity between exposure and symptoms. The court concluded that this reliance was "not supported by appropriate validation" as required by Daubert, and was "ultimately unreliable." Id. at 773. The court observed that although "there may be instances where the temporal connection between exposure to a given chemical [*26] and subsequent injury is so compelling as to dispense with the need for reliance on standard methods of toxicology," this was not such a case. Id. at 773-74. The court pointed out that the plaintiff in Cavallo was not doused with jet fuel and that there was no mass exposure of jet fuel to many people who in turn suffered similar symptoms. In the absence of an established scientific connection between exposure and illness, or compelling circumstances such as those discussed in Cavallo, the temporal connection between exposure to

chemicals and an onset of symptoms, standing alone, is entitled to little weight in determining causation. n9

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n9 See also Porter v. Whitehall Labs., Inc., 9 F.3d 607 (7th Cir. 1993); 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1233-34 (7th ed. 1998).

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Dr. Jenkins offered no scientific support for his general theory that exposure to Toluene solution at any level would cause RADS. Because he had no accurate information on the level of Mr. Moore's exposure [*27] to the fumes, Dr. Jenkins necessarily had no support for the theory that the level of chemicals to which Mr. Moore was exposed caused RADS. n10 Dr. Jenkins made no attempt to explain his conclusion by asserting that the Toluene solution had properties similar to another chemical exposure to which RADS had been scientifically linked. Several post-Daubert cases have cautioned about leaping from an accepted scientific premise to an unsupported one. See Wheat v. Pfizer, Inc., 31 F.3d 340, 343 (5th Cir. 1994); see also Braun v. Lorillard Inc., 84 F.3d 230, 235 (7th Cir. 1996); Daubert, 43 F.3d at 1319; Cavallo, 892 F. Supp. at 769. To support a conclusion based on such reasoning, the extrapolation or leap from one chemical to another must be reasonable and scientifically valid. See Daubert, 43 F.3d at 1319-20; Cavallo, 892 F. Supp. at 769.

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n10 Given the paucity of facts Dr. Jenkins had available about the level of Mr. Moore's exposure to the Toluene solution, his causation opinion would have been suspect even if he had scientific support for the position that the Toluene solution could cause RADS in a worker exposed to some minor level of the solution. Under Daubert, "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 745 (3d Cir. 1994) (emphasis in original).

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In the end, Dr. Jenkins was relegated to his fall-back position that any irritant to the lungs could cause RADS in a susceptible patient. Dr. Jenkins cited no scientific support for this theory. None of Daubert's factors to assess whether the opinion is based on sound scientific principles is met. Dr. Jenkins's theory had not been tested; the theory had not been subjected to peer review or publication; the potential rate of error had not been determined or applied; and the theory had not been generally accepted in the scientific community. In sum, Dr. Jenkins could cite no scientific support for his conclusion that exposure to any irritant at unknown levels triggers this asthmatic-type condition. Under the Daubert regime, trial courts are encouraged to exclude such speculative testimony as lacking any scientific validity.

The district court was also entitled to conclude that Mr. Moore's personal habits and medical

history made Dr. Jenkins's theory even more unreliable. Moore had been a moderate to heavy smoker for twenty years. In addition, he had just recovered from pneumonia shortly before his contact with the chemicals.

Finally, Mr. Moore had suffered from asthma [*29] (a condition very similar to RADS) in his youth.

In sum, the district court did not abuse its discretion in finding that the "analytical gap" between Dr. Jenkins's causation opinion and the scientific knowledge and available data advanced to support that opinion was too wide. The district court was entitled to conclude that Dr. Jenkins's causation opinion was not based on scientific knowledge that would assist the trier of fact as required by Rule 702 of the Federal Rules of Evidence.

CONCLUSION

Daubert and its progeny give the district court discretion to "keep the gate" for the purpose of admitting or excluding opinion testimony. In this case, the district court did not abuse that discretion in concluding that the causation evidence proffered by Dr. Jenkins should be excluded. It was within the judge's discretion to conclude that Dr. Jenkins's testimony was not grounded in science as required by Daubert and its progeny, and, therefore, was not sufficiently reliable for the jury to consider. We therefore affirm the judgment of the district court.

AFFIRMED.

CONCURBY: BENAVIDES

CONCUR:
BENAVIDES, Circuit Judge, concurring:

Although I join both the reasoning and result [*30] of the majority opinion, I write separately to reiterate that, under General Electric Co. v. Joiner, U.S. , 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), the issue before us is whether the magistrate judge abused her discretion in excluding the testimony of Dr. Jenkins. While I believe this case to be a close one, I must agree that the magistrate judge acted within her discretion in excluding Dr. Jenkins's proffered testimony. It does not follow from this, however, that she would have abused her discretion by admitting the proffered testimony. On the contrary, had she admitted the testimony, I would likewise be of the opinion that she acted within her discretion. I do not read the majority opinion to require otherwise.

DISSENTBY: Dennis

DISSENT: Dennis, J., dissenting:

I respectfully dissent.

The majority en banc opinion (1) conflicts with the view of other circuits, a state court of last resort, and scholarly commentary, in holding that (a) a clinical medical expert cannot express an opinion as to a causal relationship between a chemical compound and a plaintiff's disease, although the opinion is based on the sound application of generally accepted clinical medical methodology, unless the causal [*31] link is confirmed by hard scientific methodology as per the Daubert factors n11, see Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993); (b) the temporal relationship between chemical exposure and symptoms of disease are to be accorded little weight by courts in assessing an expert's determination of causation with either clinical medical or hard science methodology; (c) even when an expert has hard scientific support for a general causal relationship between a chemical compound and a particular disease, his opinion of a specific causal relationship between the compound and an individual's disease is "suspect" unless the expert also has scientifically accurate data as to the level of that person's exposure to the chemical compound; (2) conflicts with Supreme Court decisions by conducting a de novo trial of the preliminary assessment hearing on the record, substituting its own erroneous ruling and reasons for those of the district court, and disregards the district court's errors of law, clearly erroneous factual findings, and abuse of discretion.

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n11 Evidently, the majority interprets the final Daubert factor, "general acceptance," to mean acceptance within a relevant "hard scientific" community. For it is undisputed that the methods and techniques used by Dr. Daniel Jenkins to determine that Mr. Moore's RADS had been caused by his exposure to the chemical compound, i.e. history taking, physical examinations, differential etiology (conducting tests to eliminate other diagnoses and causes of the patient's disease), and review of other physicians' reports were generally accepted within the doctor's own clinical medical disciplines of pulmonary and environmental medicine.

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1.

After Daubert, federal courts have become balkanized on important questions that confront federal trial judges daily, e.g., whether Daubert applies outside the field of hard science; if so, whether Daubert's gatekeeping function applies to the admission of any or all of the other types of expert testimony; if so, whether application of the Daubert "factors" is required in the admission of any or all testimony based on knowledge not derived by hard scientific methodology. Even before the present en banc circuit opinion there was a clear and present need for the Supreme Court to clarify whether and, if so, how, Daubert applies to expert testimony based on knowledge derived by disciplines or sources other than the hard sciences. E.g., 29 Charles A. Wright and Victor J. Gold, FEDERAL PRACTICE AND PROCEDURE @ 6266 (1997); 2 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE @ 702.5, pp.22-26 (Supp. 1998).

(a)

The majority opinion represents an eccentric additional fragmentation of the Daubert picture that underscores the need for Supreme Court guidance. This circuit now takes the position that a clinical medical expert, correctly using and applying [*33] generally accepted clinical medical methodology, may not express an opinion as to whether a particular chemical compound caused, aggravated, or contributed to a person's disease or disorder unless that opinion is corroborated by hard scientific methodology that passes muster under a rigid application of the Daubert factors.

The majority's rule applies even to single plaintiff negligence actions that do not involve substances alleged to cause diseases in large numbers of persons or diseases having long latency periods. The en banc majority opinion emanates from a case in which a single plaintiff claims to have developed a reactive airways disorder as a result of a defendant's negligence in causing him to clean up a spillage of a chemical compound without taking any safety precautions. The defendant refused to provide the plaintiff with a respirator or to measure the air contamination with a safety meter although the defendant had both devices ready at hand. The plaintiff was required to work in and around an enclosed 28-foot trailer for about an hour in cleaning up the spilled chemical compound.

Unlike many toxic torts situations, in Mr. Moore's case there was not a long latency [*34] period between the onset of symptoms and the chemical compound gases that were alleged to have caused his illness. The onset of the plaintiff's respiratory disease occurred less than an hour after his exposure during his clean up of the chemical compound. He immediately sought emergency medical treatment, which included being given oxygen, and he has been under treatment for his respiratory disease ever since. The particular circumstances of the plaintiff's inhalation injury, combined with the fact that so few humans have ever been subjected to a similar exposure to the chemical compound involved, obviously impacted on the manner in which the plaintiff could prove causation. The quantity of persons who sustain this type of exposure was simply too small for a plaintiff to be able to provide epidemiological, animal testing or other hard scientific evidence linking the particular chemical compound to reactive airways disease. See Zuchowicz v. United States, 140 F.3d 381, 385-86 (2nd Cir. 1998)(described infra.).

Although the en banc majority recognizes that cases involving chemical compounds which have not been subjected to hard scientific testing must be timely resolved [*35] and cannot await the fortuity of relevant scientific experimentation, the majority nevertheless insists that every admissible medical causation opinion in a chemical injury case must have a hard science, Daubert factor related basis. If such hard scientific data is not available, the majority decrees, a plaintiff must face trial or the defendant's summary judgment motion without a medical causation expert witness. n12

-----------------Footnotes-----------------

n12 In Daubert, the Court stated:

Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve

disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are correct will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment--often of great consequence--about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. Daubert, 509 U.S. at 597.

The majority en banc opinion quotes this passage at page 12 and proceeds to stand it on its head on page 13, interpreting the Supreme Court's words as supporting the majority's proposition that although hard scientific proof of medical causation will not always be available in chemical injury cases, the cases must be quickly resolved; therefore, in chemical injury cases, if the plaintiff can produce only clinical medical experts whose opinions are based solely on well accepted clinical medicine methodology, they must face trial without a medical causation expert witness.

The Daubert Court neither expressed nor implied such a draconian rule. Being confronted with a case involving the admissibility of hard science epidemiological expert opinions, not generally accepted in that field, proffered to prove that Bendectin could have caused birth defects in children whose mothers used the drug, the Court concluded that the evidence could not be excluded under the Frye rule which was superseded by the Federal Rules of Evidence, but that the trial judge as gatekeeper must determine that the hard science evidence proffered is not only relevant but also reliable as based on a sound application of the methodology of the expert's discipline and suggested several ways, based on basic elements of hard science methodology, that a party who proffers an expert who proposes to testify to a hard scientific opinion can show that the opinion is reliable or, reciprocally, that a court can use to test the opinion's reliability.

These ways of testing or showing reliability of hard scientific opinions have become known as the "Daubert factors." But the Court did not intend to require that these gauges of reliability be applied monolithically to all expert testimony. When the expert does not propose to testify to an opinion based on hard scientific methodology, the Court indicated that the reliability of his opinion should be assessed according to the methodology of the expert's own discipline. The Daubert court did not indicate, and this court is not called upon to decide, what a trial court should do if it is confronted by proffers of experts who propose to testify to directly conflicting opinions as to medical causation, one based on hard scientific methodology and the other based on clinical medical methodology. In such a case, it is likely that the trial court should find the clinical medical expert's opinion unreliable if it fails to take into account and distinguish the hard scientific expert's opinion and its basis in hard scientific data, if the court finds the latter to be reliable. The Daubert Court did no suggest, however, that the Federal Rules of Evidence authorize a federal court to formulate a rule, as the en banc majority has done, that, in effect, bars a clinical physician from expressing an opinion as to the probable chemical causation of a disease in a specific individual until the existence of a general causal relationship has been confirmed by the use of hard scientific methodology.

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The majority opinion creates a schism between this court and other circuits and a state court of last resort and disregards the teachings of federal evidence law scholars.

The Second, Fourth, and Third Circuits have held that a clinical physician may, consistently with Daubert, express an opinion, based on clinical medical methodology generally accepted within that discipline, that a particular toxic substance caused the patient's disease or death, without hard scientific corroboration under an inflexible application of the Daubert factors.

The Second Circuit in McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2nd Cir. 1995), rejected the defendant's argument for exclusion of a clinical physician's opinion, as scientifically unfounded, that glue fumes caused the plaintiff's respiratory symptoms and throat polyps. The doctor's opinion was based entirely upon his use of clinical medical methodology, without any hard science or strict Daubert factor related basis. The doctor could not point to a single piece of medical literature that said that glue fumes cause throat polyps. In describing the doctor's use of clinical medical methodology as vouching for the reliability of [*37] his opinion, the court stated:

[Dr.] Fagelson based his opinion on a range of factors, including his care and treatment of McCullock; her medical history (as she related it to him and as derived from a review of her medical and surgical reports); pathological studies; review of Fuller's MSDS; his training and experience; use of a scientific analysis known as differential etiology (which requires listing possible causes, then eliminating all causes but one); and reference to various scientific and medical treatises. Disputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony. Id. at 1044.

In Zuchowicz v. United States, 140 F.3d 381 (2nd Cir. 1998), the Second Circuit reaffirmed its holding in McCullock. The Zuchowicz court approved the admission of a pulmonary medical expert's opinion that a negligent overdose of Danocrine had been responsible for the pulmonary disease related death of the plaintiff's wife. The doctor based his opinion on the temporal relationship between the overdose and the start of the disease, [*38] the deceased's apparent good health prior to the overdose, and the differential etiology method of excluding other possible causes. Id. at 385. He also testified that Mrs. Zuchowicz's illness was similar in onset, timing and course of development to other cases of pulmonary diseases known to have been caused by other classes of drugs. Id. at 385-86. There had been no scientific tests to determine the effects of dosages at the level received by Mrs. Zuchowicz, and the doctor's opinion as to medical causation, based solely on clinical medical methodology, was not confirmed by any hard science or strict Daubert factor evidence. See also Ambrosini v. Labarraque, 322 U.S. App. D.C. 19, 101 F.3d 129, 138 (D.C. Cir. 1996)(stating that the fact that a case may be the first of its type should not prevent a plaintiff's doctor from testifying as to causation).

Similarly, the Fourth Circuit in Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1384 (4th Cir. 1995), upheld the plaintiff's recovery for severe liver damage resulting from his use of Extra-Strength Tylenol contemporaneously with alcohol due to the manufacturer's negligent failure to warn. The Court of Appeals rejected [*39] McNeil's argument that the medical

causation testimony of the plaintiff's clinical physicians based on the methodology of their discipline, such as the microscopic appearance of his liver, the Tylenol found in his blood, the history of several days of using Tylenol and alcohol, the liver enzyme blood level, and the lack of evidence of a viral or other cause of liver failure, was unreliable because they did not have or rely on epidemiological data. The Benedi court stated: "We will not declare [the clinical medicine] methodologies invalid and unreliable in light of the medical community's daily use of the same methodologies in diagnosing patients." Id.; see also, Maryland Casualty Co. v. Therm-O-Disc, Inc., 137 F.3d 780, 785 (4th Cir. 1998)("This circuit has taken the position that the Daubert court 'was not formulating a rigid test or checklist,' and was 'relying instead on the ability of federal judges to properly determine admissibility.'")(citing and quoting Benedi, 66 F.3d at 1384)).

The Third Circuit in In Re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3rd Cir. 1994) held that a clinical physician's methodology of differential diagnosis was sufficiently [*40] reliable to support the admissibility of that expert's opinion that polychlorinated biphenyls (PCBs) caused specific plaintiffs' illnesses. The Paoli court, heeding Daubert's admonition that the inquiry as to whether a particular technique or method is reliable is a flexible one, id. at 742, reasoned that "differential diagnosis can be considered to involve the testing of a falsifiable hypothesis (e.g. that PCBs caused a plaintiff's cancer) through an attempt to rule out alternative causes," and although it "involves assessing causation with respect to a particular individual[,]this merely makes it a different type of science than science designed to produce general theories; it does not make it unreliable science." Id. at 758. Moreover, the Paoli court concluded that a clinical physician's performance of standard diagnostic techniques provides prima facie evidence that a doctor has considered alternative causes and has attempted to test his or her initial hypothesis as to cause. Id.

The Court of Criminal Appeals of Texas, a state court of last resort, in Nenno v. State, 970 S.W.2d 549, 1998 WL 331283 (Tex. Crim. App. 1998)("This opinion has not been released [*41] for publication in the permanent law reports. Until released, it is subject to revision or withdrawal."), in reviewing the defendant's capital murder conviction and death sentence, held that the trial court did not err in finding reliable and admitting the state's future dangerousness expert's opinion that the defendant would be a threat to society. The expert, an FBI agent who specialized in studying the sexual victimization of children, based his opinion on his study of over 1,000 cases, personal interviews with inmates convicted of child sex offenses, examination of inmates' psychological records, and study of the facts of the offenses involved. The Nenno court rejected the defendant's argument that the expert's opinion was not reliable because it did not rely on criteria substantially identical to the Daubert factors. Instead, the Nenno court concluded that "the four factors listed in Daubert do not necessarily apply outside of the hard science context; instead methods of proving reliability will vary, depending upon the field of expertise." Id. at *11 (citing the panel opinion in the present case, Moore v. Ashland Chemical, Inc., 126 F.3d 679, 685-689 [*42] (5th Cir. 1997)).

Although the Nenno decision did not involve the testimony of a clinical physician as to cause of disease in a specific person, the court relied directly upon the Moore panel decision and its underlying principle that the reliability of an expert witness's opinion ordinarily should be judged

by whether it is soundly grounded in the methodology of the expert's discipline. Thus, Nenno, which permits experts to predict the future causation of criminal harm by a specific person without the support of any hard scientific, strict Daubert factor type methodology, is at odds with the premise of the present en banc majority opinion.

In similar manner, additional federal circuit decisions conflict in principle with the en banc majority opinion's insistence on an inflexible, unthinking application of the Daubert factors to expert opinions based on knowledge and methodology outside the realm of hard science. E.g., Tyus v. Urban Search Management, 102 F.3d 256, 263 (7th Cir. 1997)("Social science testimony, like other expert testimony . . . must be tested to be sure that the person possesses genuine expertise in a field and that her testimony [*43] adheres to the same standards of intellectual rigor that are demanded in her professional work." (internal quotation marks and brackets omitted); Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 974 (8th Cir. 1995)(clinical physician's opinion that patient's inhalation of manganese caused patient's manganese encephalopathy was reliable although based only on patient history, laboratory studies of manganese levels in patient's body and work clothes, clinical examinations, a series of MRIs, and other doctors' reports); United States v. Jones, 107 F.3d 1147 (6th Cir. 1997)(although Daubert's gatekeeper function is applicable to all expert testimony, the Daubert factors do not extend outside the hard scientific orbit to handwriting experts); see also Tassin v. Sears, Roebuck and Co., 946 F. Supp. 1241, 1247-48 (M.D. La. 1996)(holding that for an expert's opinion to be considered reliable he must use the methodology of experts in his particular field).

The majority's opinion requiring a rigid, mechanical application of the Daubert factors beyond the ambit of the hard sciences also conflicts with the views of leading scholars, jurists and practitioners. n13 [*44] For example, the report of the American College of Trial Lawyers on Standards and Procedures For Determining the Admissibility of Expert Evidence After Daubert, 157 F.R.D. 571 (1994) recognizes that the basic Daubert requirement that a trial judge determine whether a proffer of expert testimony is reliable or valid applies to all forms of expert testimony and that the particular expert at issue should have her methodology, i.e. the validity of her opinion, judged by the principles applicable to "that particular field." Id. at 577. In regard to the specific Daubert factors which the majority so rigidly applies, the American College of Trial Lawyers' report concludes that:

. . . Justice Blackmun's "general observations" about the factors that a federal judge ought to consider in evaluating the soundness of scientific methodology, set forth in part II-C of his opinion, are specifically aimed at the evaluation of scientific testimony. Of course, some of these factors may be highly relevant to an evaluation of certain types of non-scientific expert evidence. For example, whether the proffered methodology can be and has been tested may very well be pertinent to an examination [*45] of non-scientific but "technical" expert evidence. Peer review and publication may be an important factor with respect to testimony involving social sciences. And the "general acceptance" of a methodology within a particular discipline will be crucial in many cases. The point is that any one of Justice Blackman's four factors may or may not have applicability to proffers of non-scientific expert evidence. The inquiry to be made concerns the fundamental principles by which the validity of a methodology is to be judged in the particular

field of knowledge. Id. (footnotes omitted)(emphasis added)

-----------------Footnotes-----------------

n13 In addition to the views expressed by commentators and practitioners, Stephen A. Saltzburg, et al. 2 FEDERAL RULES OF EVIDENCE MANUAL at 1250-1251 (7th ed. 1998) reports that:

The Advisory Committee on Evidence Rules has made a determination that Rule 702 should be amended in light of Daubert and its progeny. The Advisory Committee has prepared a working draft for an amended 702, which, at this writing, has yet to receive final approval from the Committee. The working draft, which is adapted from a proposal by Professor Michael Graham, reads as follows:

Testimony providing scientific, technical or other specialized information, in the form of an opinion, or otherwise, may be permitted if:

(1)the information is based upon adequate underlying facts, data or opinions;

(2)the information is based upon a methodology either (a) established to have gained widespread acceptance in the particular field to which the explanative theory belongs, or (b) shown to possess indicia of trustworthiness;

(3)the methodology has been applied reliably to the facts of the case;

(4) the witness is qualified as an expert by knowledge, skill, experience, training or education to provide such information; and

(5) the information will assist the trier of fact to understand the evidence or to determine a fact in issue.

While the language set forth above is still in development, the Advisory Committee has agreed upon some general substantive points. First, the gatekeeper standards of Rule 702 must apply to all expert testimony..... Second, the reliability standards must apply not only to the theory or methodology used by the expert, but also to the application of that theory or methodology in the specific case.... Third, it does not pay to get too detailed about the factors that a Trial Judge should use in assessing reliability.... The risk of leaving out important reliability factors is especially great because experts in different fields will necessarily use different methodologies, and it would be very difficult to describe an all-inclusive list of reliability factors that would cover the testimony of all experts.

-----------------End Footnotes----------------- [*46]

Leading federal evidence commentators have noted that the Daubert opinion is ambiguous and has given rise to a number of interpretations. E.g. 29 Charles A. Wright and Victor J. Gold, FEDERAL PRACTICE AND PROCEDURE @ 6266 (1997). They observe that at its narrowest Daubert can be read to allow judges to exercise a signifigant gatekeeping function only in the case of expert testimony in the hard sciences based on novel theories and methodologies. Id. at 289. They further state that the broadest reading of Daubert is that it applies to all reliability issues presented by all expert testimony. Id. at 290. In rejecting the broadest view, Wright and Gold state:

This broadest interpretation of Daubert should be rejected. As noted above, it is inconsistent with both policy and precedent to make the admissibility of all expert testimony depend upon a showing that the expert's testimony is completely reliable in every respect. Since Daubert does not explicitly take such a position, and nothing in the Evidence Rules compels it, it seems unlikely that the Court intended such a departure from past practice. In overturning Frye, it is unlikely that the Court in Daubert [*47] sought to make the admission of scientific evidence harder. Id. at 290-91 (footnotes omitted).

Professor Michael Graham contends that Daubert boxes the courts into working within a structure that has not functioned as anticipated by the Supreme Court and can fairly be said to not have functioned well at all. 2 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE, @ 702.5, pp.22-26 (Supp. 1998). Graham strongly advises against a rigid application of the Daubert factors and suggests that:

Until the Daubert box is removed, on balance, it is suggested that Daubert's gatekeeping language should be held by lower courts to apply to "scientific" evidence only. This interpretation is most consistent with the plain meaning of the opinion and the clear choice for liberalization if liberal admissibility is in fact the goal. Most importantly, nonapplication of judicial gatekeeping to "technical or other specialized knowledge" would prevent the hardship incurred by many plaintiffs in product liability litigation. Such an interpretation also avoids unthinking application of the four Daubert factors as well as the alternative trying process of developing a list of factors for [*48] determining whether a construction worker with 30 years of reinforced concrete experience is testifying to an explanative theory that is sufficiently trustworthy. Id. at 25-26.

In Daubert, the Supreme Court stated: "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one." Daubert, 509 U.S. at 594. The en banc majority opinion, however, heedless of Daubert's precept, and unmindful of the other circuits' unanimous adoption of a flexible approach in applying the Daubert factors, holds that district courts in this circuit must unthinkingly and rigidly apply the Daubert factors in assessing the reliability of a clinical physician's opinion as to the causal relationship between an individual's exposure to a chemical or substance and that person's disease or medical disorder. n14 This means, of course, that in cases such as the present one, in which the association between a specific chemical compound and a particular disease has not yet been, and perhaps never will be, subjected to hard science investigation, that the plaintiff will be unable to present any expert testimony that his or her exposure to the chemical compound was the probable medical [*49] cause of his or her disease.

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n14 The panel opinion in the present case, Moore v. Ashland Chemical Co., Inc., 126 F.3d 679 (5th Cir. 1997), consistently with the foregoing authorities, concluded that: (1) the basic principles of the Federal Rules of Evidence recognized in Daubert apply to the admission or exclusion of every type of expert testimony; (2) a trial judge, therefore, must assess every proffer of expert testimony to determine whether it is relevant to the case and a reliable application of the principles and methodology of that expert's discipline; (3) the Supreme Court in Daubert interpreted "scientific knowledge" under Federal Rule of Evidence 702, for purposes of that case, to mean knowledge obtained and tested by the scientific method, i.e., "hard" scientific knowledge; (4) accordingly, the Daubert court indicated that a trial court should assess the reliability of expert testimony professedly based on "hard" scientific knowledge using several factors, the "Daubert factors," which are "hard" science methods or techniques; (5) clinical medicine (as opposed to research and laboratory medical science) is not, strictly speaking, a "hard" scientific discipline; its goals, subject matter, conditions of study, and well developed, sui generis methodology are quite different from that of purely "hard" science and its methodology; (6) Consequently, a trial judge assessing the reliability of the proffer of a clinical physician's expert testimony based on clinical medical knowledge, without purporting to be based on hard scientific methodology, should determine whether it is a sound application of the knowledge, principles and methodology of clinical medicine; (7) In the present case, the district court committed an error of law by rigidly applying the "Daubert factors" and excluding the expert clinical physician's opinion because the doctor did not have any "hard" scientific data to support his clinical medical opinion.

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The en banc majority adopts a mechanistic interpretation of the Daubert factors that threatens to require the exclusion from evidence of vast numbers of clinical medical opinions, although they are generally accepted as trustworthy by physicians practicing in their fields, and, until the majority's decision today, were routinely accepted as reliable by our courts both before and after Daubert. See Carroll v. Morgan, 17 F.3d 787, 789-90 (5th Cir. 1994). Disturbingly, the majority does not explain the reasons for its deviation from the other circuits or its departure from the prior precedent and practice in our courts. Ironically, the majority's divergence occurs in a rather run-of-the-mill setting, a case involving a clinical physician's opinion, based on generally accepted clinical methodology, as to the cause of a non-catastrophic disease following a person's episodic and traumatic occupational exposure to a chemical compound. Unlike Daubert, and other highly publicized toxic torts cases, the present case does not involve "junk science," or purportedly hard scientific opinions, based on epidemiological and animal studies not generally accepted in their discipline, [*51] as to the surreptitious causal relationship between drugs or other substances and catastrophic systemic diseases or disorders such as cancer and birth defects.

(b)

Having depleted the ranks of medical causation experts available to plaintiffs suffering non-catastrophic chemical exposure injuries, the majority adds insult to injury by casting doubt on

the importance of a principal element used by both hard scientific and clinical medical experts in determining whether there is a causal relationship between an individual's exposure to a substance and his or her disease viz., the temporal relationship between the person's exposure and the development of symptoms or signs of disease. The majority asserts that in the absence of an established scientific connection between exposure and illness or compelling circumstances, the temporal connection between exposure to chemicals and an onset of symptoms is entitled to little weight in determining causation. Maj. Op. at p. 19. This dictum conflicts with the great weight of scientific and judicial authority.

In the sphere of hard science, the opinion of an expert who opines that exposure to a compound caused a person's disease is "based [*52] on an assessment of the individual's exposure, including the amount, the temporal relationship between the exposure and disease, and exposure to other disease-causing factors." Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, p. 205 (1994)(emphasis added). The temporal relationship may either support or contradict causation. "In most acute injuries, there is a short time period between cause and effect. However, in some situations, the length of basic biological processes necessitates a longer period of time between initial exposure and the onset of observable disease." Id. at 207. Moreover, temporal relationship is one of the seven factors that an epidemiologist considers in determining whether the association between an agent and a disease is causal. Id. at 161.

Courts and commentators have also recognized that the fact that an individual's symptoms followed an appropriate time after exposure is an important consideration in determining causation. E.g., Kannankeril v. Terminix Int'l., Inc., 128 F.3d 802, 805, 809 (3rd Cir. 1997); Zuchowicz, 140 F.3d at 385 (affirming the admissibility of an expert whose "conclusion was based on the temporal [*53] relationship between the overdose and the start of disease and the differential etiology method of excluding other possible causes."); 1 Margie Searcy-Alford, A GUIDE TO TOXIC TORTS @ 10.03[2], p.10-69 (1998)("The fact that the symptoms follow an appropriate time after exposure does not prove causation, but it is an important consideration."); Stephen A. Saltzburg et al., FEDERAL RULES OF EVIDENCE MANUAL at 1233-1234 (7th ed. 1998); see Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1384 (4th Cir. 1995); 3 Stuart M. Speiser et al., THE AMERICAN LAW OF TORTS @ 11.27, at 465 (1986).

The district court case relied on by the majority, Cavallo v. Star Enter., 892 F. Supp. 756 (E.D. Va. 1995), is distinguishable in numerous respects and does not support the majority's assertion that temporal relationship is entitled to "little weight" in the absence of compelling circumstances. In Cavallo, the plaintiff's exposure occurred in the open parking lot of a shopping mall during a five minute period at a distance of 500 feet from the source of the jet fuel fumes, the chemical substance at issue; she did not seek medical assistance until nine days later for her symptoms that resulted [*54] in an initial diagnosis of "conjunctivitis, or eye redness;" her experts did not have even a rough idea of the amount of her exposure; and there was no showing that the fumes the plaintiff inhaled from the defendant's alleged negligent spillage were actually more dense than the ordinary daily atmosphere in the shopping mall near defendant's petroleum distribution, mixing

and transfer terminal. Significantly, Cavallo's experts did not have a material safety data sheet (MSDS) or full knowledge of some of the chemicals inhaled and, more importantly, they did not reliably use or apply the methodology of their own disciplines.

In sum, the Cavallo court ruled the experts' opinions inadmissible because their opinions were based almost exclusively on a very tenuous temporal and spatial connection between exposure and symptoms and because they significantly departed from the accepted toxicology methodology, while the defendant's toxicology expert followed the generally accepted methodology of that discipline. Id. at 763, 773. Moreover, the Cavallo court never said that, in the absence of compelling circumstances, a temporal relationship is "entitled to little weight." Instead, [*55] that court merely observed that there may be instances where the temporal connection is so compelling as to dispense with the need for toxicologists to rely on the standard methodology of their discipline. Id. at 773.

(c)

As a coup de grace to inhalation injury claimants, the majority indicates that, if a plaintiff's expert does not have scientifically accurate measurements of the level of the plaintiff's exposure, "his causation opinion [will be] suspect even if he has scientific support for the position that the [chemical compound] could cause [the plaintiff's disease]." Maj. Op. p.19 n.9. The majority downplays the lethal swath of its new rule by suggesting that it applies here because of "the paucity of the facts Dr. Jenkins had available about the level of Mr. Moore's exposure." But the truth is that Dr. Jenkins had better information about the nature of the substances, the level of exposure, and its duration than experts in most inhalation accident cases. n15 "Only rarely are humans exposed to chemicals in a manner that permits a quantitative determination of adverse outcomes. [] Human exposure occurs most frequently in occupational settings where workers are [*56] exposed to industrial chemicals like lead or asbestos; however, even under these circumstances, it is usually difficult, if not impossible, to quantify the amount of exposure." Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, p. 187 (1994). Consequently, the majority's rule will apply in virtually all inhalation cases to exclude the opinions of plaintiffs' experts as to specific medical causation even if they are fortunate enough to have hard science data supporting a general causal relationship or association between the chemical compound and the disease involved. The majority does not have even a paucity of authority to support this extra, gratuitous ratcheting down of inhalation accident victims' chances of recovery.

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n15 As explained by the panel opinion:

From Moore's history that Dr. Jenkins had taken, he had information that before the exposure Moore was in good health, that two 400 pound drums of the chemicals had begun leaking in the back of Moore's truck at some time before his arrival at Ashland, that Moore's rig consisted of a diesel tractor and a 28 foot enclosed trailer, that after the discovery of the leakage upon arrival at Ashland the drums were allowed to continue to leak inside the trailer with the doors shut for

another 45 minutes until the Ashland supervisor told Moore to remove them, that at this point the 400 pound drums had become light enough to allow Moore and others to roll them manually out onto the dock, that Moore and a co-employee worked in and around the trailer for about 45 to 60 minutes sprinkling "Absorbo" over the contaminated areas sweeping the saturated material into shovels, removing the materials from the trailer, and shoving the leaking drums into salvage drums, that Moore finished the cleanup at Ashland about 11:00 a.m., that Moore began to experience tightness of chest at about 11:45 a.m., that as his symptoms were continuing to worsen Moore consulted the company doctor who put him on oxygen and inhalants." Moore, 126 F.3d at 702.

From this information, Dr. Jenkins was able to roughly estimate that Mr. Moore had been exposed to possibly "200 parts per million or higher" of the chemical compound. Id. at 695.

-----------------End Footnotes----------------- [*57]

2.

The majority has conducted a trial de novo of the district court's preliminary assessment of whether the reasoning and methodology underlying Dr. Jenkins' testimony was reliable, substituting its own erroneous judgment and reasoning for that of the trial judge, rather than reviewing the district court's rulings and reasoning for abuse of discretion, General Electric Co. v. Joiner, 139 L. Ed. 2d 508, 118 S. Ct. 512, 517 (1997), clearly erroneous factual findings, Bourjaily v. United States, 483 U.S. 171, 181, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987), and errors of law, Koon v. United States, 518 U.S. 81, 100, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996)("A district court by definition abuses its discretion when it makes an error of law").

In the district court proceedings, the defendants objected to the introduction of Dr. Jenkins' opinion as to the diagnosis and cause of Mr. Moore's disease on the grounds that the doctor lacked hard scientific support that the chemical compound involved could cause reactive airways disease. The district court admitted Dr. Jenkins' opinion that Mr. Moore had reactive airways disease but excluded Dr. Jenkins' opinion that the disease had [*58] been specifically caused by exposure to the chemical compound involved because Dr. Jenkins had not presented any hard scientific support for a general causal link or association between that particular compound and that particular disease. n16

-----------------Footnotes-----------------

n16 Dr. Jenkins performed a physical examination, took a detailed medical history, observed Moore on three occasions, reviewed the MSDS prepared by Dow Corning, and performed a series of tests on Moore including pulmonary function tests, a bronchodilator test, a spirometry test, a plethysmographic test, a lung volume determination, an intrapial gas distribution test, a diffusion test, an arterial bloods test, a mechanics test, X-rays, and laboratory tests. Dr. Jenkins reviewed the medical records and reports of a bronchodilator test performed by Dr. Simi two to

three weeks after the accident that showed severe airways obstruction. Additionally, Dr. Jenkins reviewed a report of an allergy test performed by Dr. Alvarez, which ruled out allergic or immunologic disease and confirmed RADS. Finally, Dr. Jenkins also relied upon the temporal proximity between the exposure to the chemicals at the Ashland facility and the onset of symptoms.

-----------------End Footnotes----------------- [*59]

The majority opinion retries the preliminary assessment of Dr. Jenkins' proffer de novo and concludes that (1) the district court was "entitled to conclude" that (a) Dr. Jenkins had not explained in sufficient detail how his differential diagnosis or etiology and his training and experience were helpful in reaching his conclusion on causation; (b) the MSDS had limited value in supporting Dr. Jenkins' opinion because he did not know what tests Dow had conducted in preparing the MSDS or what level of exposure was necessary for a person to sustain the injuries warned of in the MSDS; (c) Mr. Moore's asthma in his youth, history of smoking and recovery from pneumonia shortly before his exposure made Dr. Jenkins' opinion even more unreliable; and (d) the "analytical gap" between Dr. Jenkins's causation opinion and the scientific knowledge and available data advanced to support that opinion was too wide; and (2) Dr. Jenkins did not explain precisely how the irritating properties in the compound described by the MSDS were similar to those in other chemicals or compounds that had been linked with reactive airways disease.

Dr. Jenkins testified that he did not know what tests Dow had performed [*60] in preparing the MSDS warnings of the hazards of the chemical compound. The district court commented on this fact but based its ruling on the lack of hard scientific support for the doctor's clinical medical opinion, not on his lack of knowledge of Dow's testing. The MSDS was introduced without objection and referred to in testimony by the experts on both sides, none of whom professed to have any knowledge of Dow's MSDS-related testing. The record clearly demonstrates that Dr. Jenkins used the MSDS only for the same purpose as did the other experts, merely as a source of information as to the kinds of chemicals in the compound to which Mr. Moore had been exposed. Thus, the district court evidently gave no weight to the experts' lack of knowledge of Dow's testing, and if it did find any relevance in this fact, it would have been clearly erroneous in doing so. See Moore, 126 F.3d at 701.

The district court, moreover, did not base its decision on many of the findings and reasons that the majority now attributes to it. Neither the defendant nor the district court found any fault with Dr. Jenkins' qualifications n17, experience, testimony regarding the similarity of irritating chemical [*61] properties, or his proper performance of differential etiology to eliminate alternative causes of Mr. Moore's disease. Because the defendant did not object to Dr. Jenkins' opinion on these grounds or question him on these points and the district court did not base its ruling on them, these issues should not be raised sua sponte by this court. The performance of physical examinations, taking of medical histories, and employment of reliable laboratory tests provide significant evidence of a reliable differential diagnosis and prima facie evidence that a doctor has considered alternative causes and has attempted to test his or her initial hypothesis as to cause. See Paoli, 35 F.3d at 759. The failure of the defendant or the district court to ask for, or the

doctor's failure to volunteer, further elaboration on how each differential diagnosis test is designed to eliminate each alternative cause of disease or a chemistry professor's exegesis on the structure and composition of each chemical identified as having similar irritating properties, does not afford a proper basis for an appellate trial de novo on the record of the district court's preliminary assessment hearing.

-----------------Footnotes-----------------

n17 The majority opinion fails to point out that Dr. Jenkins' qualifications were never an issue at any point in these proceedings. In fact, Dr. Jenkins was more than eminently qualified to render an opinion in this matter as a brief summary of his education, training and experience reveals. Dr. Jenkins received his medical degree from the University of Texas in 1940, received training at the University of Michigan Hospital as an intern, resident in Tuberculosis and Chest Disease and resident in Allergy in 1940-45, served as Instructor and Chief Resident in Medicine and Assistant of Medicine and Physician in charge of the Tuberculosis and Chest Unit, University of Michigan Medical School, 1943 to 1947, was certified by the American Board of Internal Medicine in 1947, served in various capacities as a professor at Baylor College of Medicine from 1947-91 where from 1947-74 he was chief of the Pulmonary Disease Section and from 1975-91 chief of environmental medicine. Additionally, in the course of over fifty years of practicing medicine, Dr. Jenkins has examined and evaluated over 100 persons for injuries occurring from exposure to various chemical compounds in an occupational setting.

----------------End Footnotes---------------- [*62]

Likewise, the defendants did not contend, and the trial judge did not rule, that Dr. Jenkins' opinion was inadmissible because of Mr. Moore's childhood asthma, smoking or pneumonia. Dr. Jenkins concluded that the exposure to the chemical compound triggered Mr. Moore's reactive airways disease after taking these and all other relevant factors into consideration. The plaintiff is not required to prove that the exposure was the exclusive cause of the disease. It is well settled in Texas and elsewhere that a defendant takes the plaintiff as he finds him. Coates v. Whittington, 758 S.W.2d 749, 752 (Tex. 1988)(citing Driess v. Friederick, 73 Tex. 460, 11 S.W. 493, 494 (Tex. 1889)); Mondragon v. Austin, 954 S.W.2d 191, 194 (Tex. Ct. App. 1997); see Maurer v. United States, 668 F.2d 98, 99-100 (2nd Cir. 1981)("It is a settled principle of tort law that when a defendant's wrongful act causes injury, he is fully liable for the resulting damage even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim. The defendant takes the plaintiff as he finds him."); W. Page Keeton, [*63] et al., PROSSER AND KEETON ON TORTS @ 43 at 291-92 (5th ed. 1984).

The majority's most blatant addition of its own ex post facto finding and rationale in an effort to bolster the district court's ruling, however, is its erroneous claim that the district court found "that the 'analytical gap' between Dr. Jenkins's causation opinion and the scientific knowledge and available data advanced to support that opinion was too wide." Maj. Op. p. 21. The district court made no such finding. The term "analytical gap," comes from the Supreme Court's Joiner opinion

of 1997, see 118 S. Ct. at 519, and does not appear in the district court's 1995 ruling in the present case. n18 Moreover, as explained above, the district court based its decision on the same erroneous theory as the majority's primary rationale, i.e., that a clinical medical physician cannot express an admissible opinion, regardless of how soundly he or she relies on and applies well settled clinical medical methodology, unless the opinion is further supported by hard science, rigid Daubert factor type data.

-----------------Footnotes-----------------

n18 In General Electric Co. v. Joiner, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997), the Supreme Court held that abuse of discretion, rather than the particularly stringent standard of review applied by the court of appeals in that case, is the proper standard by which to review a district court's decision to admit or exclude scientific evidence. The plaintiff Joiner proffered expert testimony based on hard science methodology, animal and epidemiological studies, to prove that the defendants' PCBs and related products had caused his lung cancer. "Joiner's experts used a 'weight of the evidence' methodology to assess whether Joiner's exposure to transformer fluids promoted his lung cancer. They did not suggest that any one study provided adequate support for their conclusions, but instead relied on all the studies taken together (along with their interviews of Joiner and their review of his medical records)." Id. at 521 (Stevens, J. concurring in part and dissenting in part) (footnote omitted). The district court examined the studies and excluded the experts' opinions on the ground that none of the studies was sufficient alone to show a link between PCBs and lung cancer.

The Supreme Court held that the district court did not abuse its discretion in excluding the experts' testimony on grounds that the studies upon which the experts relied were not sufficient, whether individually or in combination, to support their conclusions. The Supreme Court remarked that "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Id. at 519.

In the present case, there was no "analytical gap" between Dr. Jenkins' data and his opinion that Mr. Moore's exposure caused his disease. In fact, the district court allowed Dr. Alvarez to use the identical data to express the same opinion. It is easy to see that the district court's decision in Joiner was reasonable and not an abuse of discretion because the plaintiff himself conceded that there was an analytical gap between each one of his expert's studies and the conclusion that PCBs caused his cancer. He argued, although unsuccessfully, however, that every analytical gap could be bridged if all of the experts' studies were considered in combination. In the present case, the district court excluded Dr. Jenkins' opinion simply because he did not have any hard scientific support for his clinical medical opinion, not because of a gap in reasoning. Dr. Jenkins' clinical medical opinion was, in fact, snugly based on the sound application of the well accepted methodology of his discipline. Thus, en banc the majority itself is simply attempting to bridge too great an analytical gap by trying to stretch Joiner to cover the present case.

-----------------End Footnotes----------------- [*64]

Conclusion

In the final analysis, this case presents the legal question of the proper interpretation of Federal Rule of Evidence 702 and Daubert in cases involving expert witness proffers based on knowledge beyond the realm of hard scientific knowledge. Indeed, the majority en banc opinion is far too "rulefied" for anyone to seriously contend that it does not set broad, eccentric precedents that will profoundly affect the trials and outcomes in substantial numbers of future cases involving injuries and diseases alleged to have been caused by exposure to chemical compounds. The en banc majority, in my opinion, makes several errors of law, the most serious of which is its holding that a clinical medical expert, whose opinion is based on a sound application of the principles and methodology of his or her discipline, cannot reliably testify as to the causal relationship between and individual's exposure to a chemical compound and his or her subsequent onset of symptoms and disease. As a result of this error of law and others, the en banc opinion subverts the liberal thrust of the Federal Rules of Evidence and the principles enunciated in Daubert by locking the [*65] gate on causation evidence derived through the principles and methodology of clinical medicine.

Patrick CARMICHAEL, Sr., an individual, father and next of kin to Patrick Carmichael, Jr., a minor; Luziminda Carmichael, an individual, mother and next friend of Carina Horn, a minor and administratrix of estates of Janice Horn; Carina Horn, a minor; Leona Carmichael, Shameela Carmichael, Natimah Carmichael, Plaintiffs-Appellants, v.

SAMYANG TIRE, INC.; Hercules Tire Company; Kuhmo, U.S.A.; Kumho & Company, Inc., Defendants-Appellees, Cooper Rubber and Tire Company, Ford Motor Company, Defendants.

No. 96-6650

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

131 F.3d 1433; 1997 U.S. App. LEXIS 35981

December 23, 1997, Decided
SUBSEQUENT HISTORY: [**1] As Amended January 8, 1998.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Alabama.

DISPOSITION: REVERSED and REMANDED case to the district court.

JUDGES: Before BIRCH and CARNES, Circuit Judges, and PROPST, * Senior District Judge.

* Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

OPINIONBY: BIRCH

OPINION: [*1434] BIRCH, Circuit Judge:

In this appeal, we determine whether the Supreme Court's Daubert n1 criteria for admission of scientific evidence should apply to testimony from a tire failure expert. In granting summary judgment against plaintiff-appellants, the district court relied on Daubert to exclude testimony from plaintiff-appellants' expert. Plaintiff-appellants, however, argue that the district court should not have applied Daubert because their expert's proffered testimony is not "scientific." We [**2] REVERSE.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

I. BACKGROUND

On July 6, 1993, plaintiff-appellants, eight members of the Carmichael family (collectively "the Carmichaels"), were involved in a serious automobile mishap when the right rear tire on their minivan failed. This occurrence resulted in significant trauma to each of the Carmichaels; one member of the family ultimately died from her injuries. For the purposes of this appeal, the parties agree that the failure of a tire manufactured and sold by defendant-appellees (collectively "Samyang") directly caused the mishap.

Following the incident, the Carmichaels submitted the carcass of the failed tire to George Edwards, a purported expert on tire failure. After examining the tire, Edwards determined that its failure was not the result of any abuse by the Carmichaels. Therefore, Edwards concluded that a defect in either the tire's design or its manufacture caused the blowout. Before Edwards could [**3] be deposed by Samyang, however, he became too ill to testify and transferred the case to his employee, Dennis Carlson. n2 After reviewing Edwards's file on the tire and discussing the case with Edwards, Carlson confirmed Edwards's conclusion that a design or manufacturing defect caused the blowout. Carlson, though, did not personally examine the tire until approximately one hour before his deposition by Samyang, long after he had rendered his opinion on the cause of the blowout. In his deposition, Carlson then set forth both his analytical process and his conclusion that the Carmichaels' tire was defective.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n2 Carlson holds a bachelor's and a master's degree in mechanical engineering from the Georgia Institute of Technology. Carlson worked from 1977 to 1987 as a research engineer for Michelin Americas Research & Development, where he was involved for the majority of his tenure in tire testing. Following that experience, Carlson became a senior project engineer at S.E.A., Inc., where he served from 1987 to 1994 as a tire failure consultant before becoming an employee of George R. Edwards, Inc. The District Court assumed for the purpose of its Daubert analysis that Carlson is qualified to testify as an expert in tire failure analysis. See Carmichael v. Samyang Tires, Inc., 923 F. Supp. 1514, 1518-19 (S.D.Ala.1996). We, like the district court, assume that Carlson is an expert for the purposes of this appeal.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**4]

Before the district court, Samyang moved for the exclusion of Carlson's testimony on the ground that it could not satisfy Daubert 's standards for reliability of scientific evidence. After

reviewing Carlson's deposition, the district court agreed and excluded Carlson, writing that "none of the four admissibility criteria outlined by the Daubert court are satisfied in this case." Carmichael, 923 F. Supp. at 1521. Because the Carmichaels' only proffered evidence of a tire defect was Carlson's testimony, the district court then granted summary judgment for Samyang. See id. at 1524. The Carmichaels now appeal the exclusion of their tire expert.

## II. DISCUSSION

In Daubert, the Supreme Court established several general criteria for the admission of scientific expert testimony under Federal Rule of Evidence 702. n3 See Daubert, 509 U.S. at 593-95, 113 S. Ct. at 2796-98. n4 [*1435] Appealing the district court's exclusion of Carlson's testimony, the Carmichaels argue that the district court should not have applied Daubert 's reliability framework because Carlson is not a "scientific" expert. In response, Samyang contends that Carlson's testimony is based on an unreliable [**5] scientific analysis. We review the district court's legal decision to apply Daubert de novo, see Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1517 (10th Cir.), cert. denied, U.S.

, 117 S. Ct. 611, 136 L. Ed. 2d 536 (1996), and its decision to exclude particular evidence under Daubert for abuse of discretion, see General Elec. Co. v. Joiner, U.S. , 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

-----------------Footnotes-----------------

n3 Rule 702 provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

n4 The Court suggested four primary inquiries for determining the reliability of a scientific theory or technique: (1) whether it has been tested; (2) whether it has been subject to peer review and publication; (3) its known or potential rate of error; and (4) whether it is generally accepted by the relevant scientific community. However, the Court emphasized that "the inquiry envisioned by Rule 702 is ... a flexible one. Its overarching subject is the scientific validity--and thus the evidentiary relevance and reliability--of the principles that underlie a proposed submission." Daubert, 509 U.S. at 594-95, 113 S. Ct. at 2797.

-----------------End Footnotes----------------- [**6]

Despite Samyang's protestations, "Daubert does not create a special analysis for answering questions about the admissibility of all expert testimony. Instead, it provides a method for evaluating the reliability of witnesses who claim scientific expertise." United States v. Sinclair, 74 F.3d 753, 757 (7th Cir.1996). In fact, the Supreme Court in Daubert explicitly limited its holding to cover only the "scientific context." Daubert, 509 U.S. at 590 n. 8, 113 S. Ct. at 2795 n. 8; see also United States v. Cordoba, 104 F.3d 225, 230 (9th Cir.1997) ("Daubert applies only to the

admission of scientific testimony."); Compton, 82 F.3d at 1518 (same); Iacobelli Constr., Inc. v. County of Monroe, 32 F.3d 19, 25 (2d Cir.1994) (same). n5 Although the Court's analysis in Daubert may suggest reliability issues for district courts to consider as they determine whether proffered evidence is sufficiently reliable for admission under Rule 702, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional [**7] and appropriate means of attacking shaky but admissible evidence.' " United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir.1996) (quoting Daubert, 509 U.S. at 596, 113 S. Ct. at 2798).

-----------------Footnotes-----------------

n5 Samyang's citations to United States v. Lee, 25 F.3d 997, 999 (11th Cir.) (per curiam), for the contrary position are inapposite. In Lee, we examined whether a district court should apply Daubert 's reliability factors to evidence produced by machines. Id. at 998. Because the results produced by the machines were "only admissible through the testimony of an expert witness," and because "courts do not distinguish between the standards controlling admission of evidence from experts and evidence from machines," we remanded for reconsideration in light of Daubert. Id. at 998-99. Nowhere in Lee did we imply that Daubert applied to non-scientific expert testimony.

-----------------End Footnotes-----------------

What, then, is the difference between scientific and non-scientific expert testimony? In short, a scientific expert is an expert [**8] who relies on the application of scientific principles, rather than on skill- or experience-based observation, for the basis of his opinion. See Daubert, 509 U.S. at 590, 113 S. Ct. at 2795. As the Sixth Circuit explained in Berry v. City of Detroit:

The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but [*1436] he has seen a lot [**9] more bumblebees than they have.

25 F.3d 1342, 1349-50 (6th Cir.1994); see also Sorenson v. Robert B. Miller & Assoc., Inc., 1996 U.S. App. LEXIS 25328, Nos. 95-5085, 95-5086, 1996 WL 515351, (applying Berry ). n6 Thus, the question in this case is whether Carlson's testimony is based on his application of scientific principles or theories (which we should submit to a Daubert analysis) or on his

utilization of personal experience and skill with failed tires (which we would usually expect a district court to allow a jury to evaluate). In other words, is the testimony at issue in this case more like that of a beekeeper applying his experience with bees or that of an aeronautical engineer applying his more generalized knowledge of the scientific principles of flight?

-----------------Footnotes-----------------

n6 An analogy closer to the facts of this case would be the example of an auto mechanic and a burned-out spark plug discussed at oral argument. Given a proper foundation, a mechanic with years of experience with spark plugs might be able to identify for a jury burns or other marks on a spark plug that he believes disclose whether the plug burned out because of normal wear or some defect; an experienced mechanic may recognize patterns of normal and abnormal wear on an auto part even though he has no knowledge of the general principles of physics or chemistry that might explain why or how a spark plug works. Such a mechanic's testimony would be non-scientific, while the testimony of another expert on the nature and effects of combustion (applied to spark plugs) would be scientific.

-----------------End Footnotes----------------- [**10]

Having clarified the question posed by this case, it seems apparent to us that Carlson's testimony is non-scientific. Although Samyang is no doubt correct that the laws of physics and chemistry are implicated in the failure of the Carmichaels' tire, Carlson makes no pretense of basing his opinion on any scientific theory of physics or chemistry. n7 Instead, Carlson rests his opinion on his experience in analyzing failed tires. After years of looking at the mangled carcasses of blown-out tires, Carlson claims that he can identify telltale markings revealing whether a tire failed because of abuse or defect. n8 Like a beekeeper who claims to have learned through years of observation that his charges always take flight into the wind, Carlson maintains that his experiences in analyzing tires have taught him what "bead grooves" and "sidewall deterioration" indicate as to the cause of a tire's failure. Indeed, Carlson asserts no knowledge of the physics or chemistry that might explain why the Carmichaels' tire failed. Thus, we conclude that Carlson's testimony falls outside the scope of Daubert and that the district court erred as a matter of law by applying Daubert in this case. [**11]

-----------------Footnotes-----------------

n7 If Carlson or the Carmichaels' counsel were to assert or imply a "scientific" basis for Carlson's testimony at trial, after representing to the district court and to this court that Carlson's opinions are "non-scientific," then we are confident that the district court will be able to take appropriate remedial measures.

n8 We note that both Carlson's and Samyang's experts rely on the same markings on the Carmichaels' tire for their analyses; the existence and relevance of these signs has not been questioned by either party before this court.

-----------------End Footnotes-----------------

Still, the inapplicability of Daubert should not end the day regarding Carlson's reliability. Under Rule 702, it is the district court's duty to determine if Carlson's testimony is sufficiently reliable and relevant to assist a jury. See 14.38 Acres, 80 F.3d at 1078. Moreover, Carlson's testimony is subject to exclusion under Federal Rule of Evidence 403 if its probative value is substantially outweighed by its likely prejudicial effect. n9 Aside from its [**12] Daubert related arguments, Samyang has presented this court with a number of potentially troubling criticisms of Carlson's alleged expertise and methodology, including his rendering of an opinion regarding the Carmichaels' tire before he had personally [*1437] inspected its carcass. n10 We leave judgments about such matters to the discretion of the district court on remand.

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n9 After analyzing Carlson's proffered testimony under Daubert, the district court concluded that "Carlson's testimony is simply too unreliable, too speculative, and too attenuated to the scientific knowledge on which it is based to be of material assistance to the trier of fact...." See Carmichael, 923 F. Supp. at 1522. Even without requiring Carlson's testimony to satisfy the Daubert criteria on remand, the district court still may find that, under all the circumstances, Carlson's testimony is so unreliable as to be unhelpful to a jury. We do not intend our comments regarding Carlson's testimony or qualifications to constrain the district court's discretion to admit or exclude his testimony under the proper Rule 702 or Rule 403 standards. [**13]

n10 We note that many of Samyang's criticisms of Carlson may also apply to the qualification of Samyang's own tire failure expert. However, we leave such issues for the district court to consider on remand.

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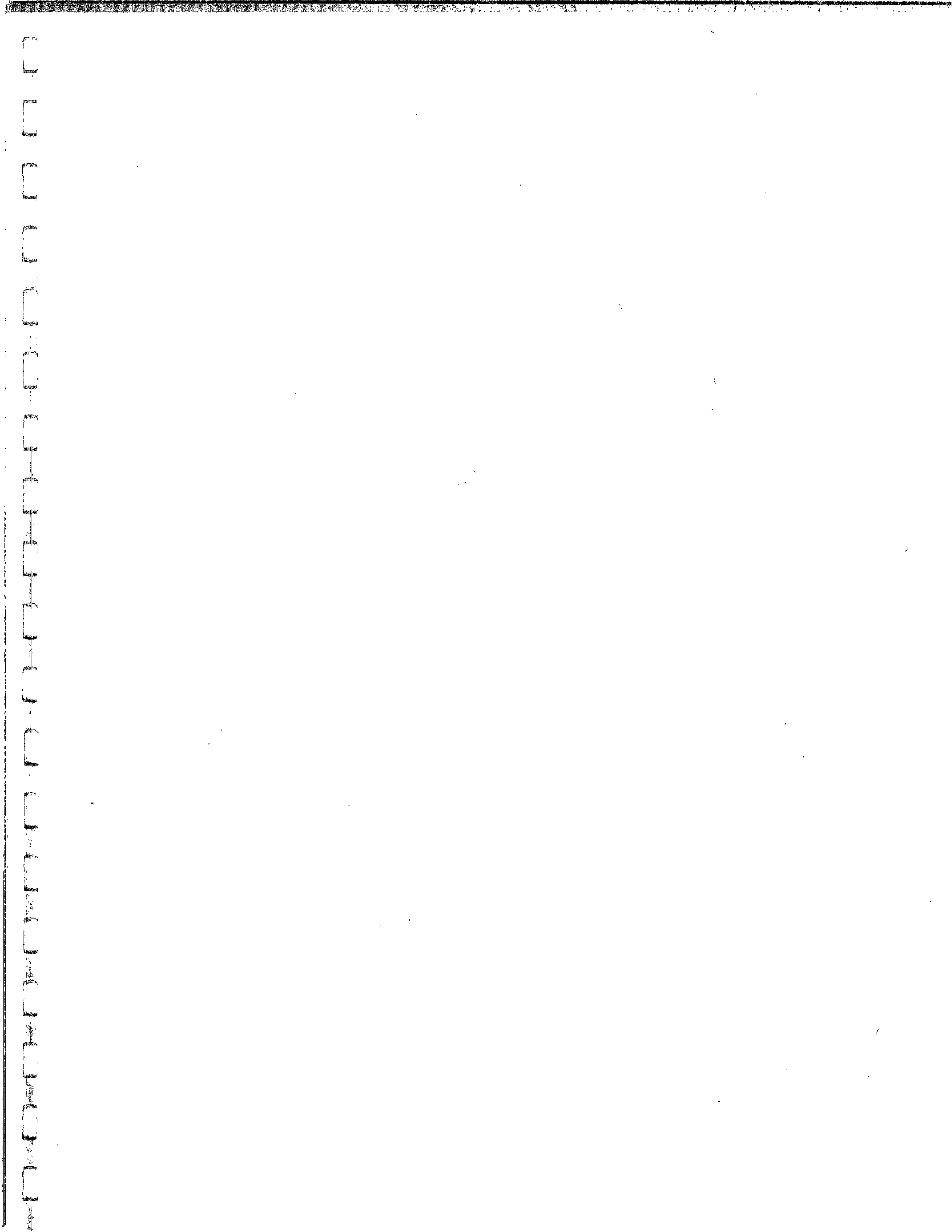
III. CONCLUSION

The district court erred as a matter of law in applying the Daubert criteria to the Carmichaels' proffered expert testimony. Therefore, we REVERSE and REMAND the case to the district court for further proceedings consistent with this opinion.



**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 702**

1 **Rule 702. Testimony by Experts***

2 If scientific, technical, or other specialized knowledge
3 will assist the trier of fact to understand the evidence or to
4 determine a fact in issue, a witness qualified as an expert by
5 knowledge, skill, experience, training, or education, may
6 testify thereto in the form of an opinion or otherwise~~.~~,
7 provided that (1) the testimony is sufficiently based upon
8 reliable facts or data, (2) the testimony is the product of
9 reliable principles and methods, and (3) the witness has
10 applied the principles and methods reliably to the facts of the
11 case.

## COMMITTEE NOTE

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*. In *Daubert* the Court charged district judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. The Rule as amended provides that expert testimony of all types -- not only the scientific testimony specifically addressed in *Daubert*--presents questions of admissibility for the trial court in

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

deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See *Bourjaily v. United States*, 483 U.S. 171 (1987).

*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are: (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.

No attempt has been made to "codify" these specific factors set forth in *Daubert*. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other courts have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. See *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

> (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."

> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner*, 118 S.Ct. 512, 519 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations. See *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).
>
> (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). See also *Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (*Daubert* requires the trial court to assure itself that the expert "adheres to the same standards of intellectual rigor that are demanded in his professional work.").
>
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended.

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner*, 118 S.Ct. at 519. Under the

amendment, as under *Daubert*, when an expert purports to apply principles and methods consistent with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. See *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether these principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994): "*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*"

*Daubert* involved scientific experts, and the Court left open whether the *Daubert* standards apply to expert testimony that does not purport to be scientifically-based. The inadaptability of many of the specific *Daubert* factors outside the hard sciences (e.g., peer review and rate of error) has led some courts to find that *Daubert* is simply inapplicable to testimony by experts who do not purport to be scientists. *See Compton v. Subaru of Am., Inc.*, 82 F.3d 1513 (10th Cir. 1996) (*Daubert* inapplicable to expert testimony of automotive engineer); *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (2d Cir. 1993) (*Daubert* inapplicable to testimony based on a payroll review prepared by an accountant). Other courts have held that *Daubert* is applicable to all expert testimony, while noting that not all of the specific *Daubert* factors can be applied readily to the testimony of experts who are not scientists. See *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997), where the court recognized that "[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience", but stressed that the trial court after *Daubert* is still obligated to determine whether expert testimony is reliable; therefore, "[w]hether the expert would opine on economic evaluation, advertising psychology, or engineering," the trial court must determine "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers."

The amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping

function applies to testimony by any expert. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. See *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. If there is a well-accepted body of learning and experience in the expert's field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after* Daubert, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey one impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are sufficiently reliable, and so long as the proponent

demonstrates that these principles and methods are applied reliably to the facts of the case, this type of testimony should be admitted.

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1319 (9th Cir. 1995). ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).

The amendment requires that expert testimony must be based upon reliable and sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the adequacy of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the ``reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. By its terms, Rule 703 does not regulate the basis of the expert's opinion per se. Rather, it regulates whether the expert can rely on information that is otherwise inadmissible. If the expert purports to rely on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied upon by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question of whether the expert is relying on a *sufficient* and reliable basis of information--whether admissible information or not--is governed by the reliability requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony, such as are discussed in, e.g., Margaret Berger,

*Procedural Paradigms for Applying the Daubert Test,* 78 Minn.L.Rev. 1345 (1994). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert.*, and it is contemplated that this will continue under the amended Rule. See, e.g., *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert". Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

**FORDHAM** Item IIIE
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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Commentary Received on proposed amendment to Rule 703
Date: September 15, 1998

Several comments have been made concerning the proposed amendment to Rule 703. These include questions about the scope and application of the Rule that were expressed by various members of the Standing Committee at its June meeting; suggestions of the Style Subcommittee of the Standing Committee; and two comments from members of the public supporting the Rule, but with some suggestions for improvement. This memorandum considers each set of comments in turn. The proposed amendment to Rule 703 and the Committee Note are attached to this memorandum.

## *Standing Committee Discussion*

The Rule 703 proposal spurred a lively discussion at the Standing Committee meeting. The Committee unanimously approved the proposal for release for public comment. Two problematic hypotheticals were addressed, however, and there was a good deal of disagreement over what the results would be under the Rule as amended--which is to say that the Rule might give rise to conflicting outcomes. That is probably inevitable under any rule employing a balancing test. Nonetheless, the questions discussed by the Standing Committee are set forth for this Committee's consideration as to how the amended Rule might operate.

1. *Question 1*: Assume that a physician is called to testify as to the plaintiff's condition in a medical malpractice case. The physician wants to state that he talked to the treating doctor at the Mayo Clinic, or that he relied on the reports of the Mayo Clinic concerning the plaintiff's condition. Neither source of information is presently admissible Can the physician describe what

the doctor or the reports stated? If not, can he at least state that he spoke to the Mayo Clinic doctor or read the reports from the Mayo clinic? If not, can he at least state that he relied on other physicians' oral and written reports?

One Judge on the Standing Committee stated that under the proposed amendment he would allow discussion of the reports, and give a limiting instruction; other Judges said that they would allow a general reference to the report, but prohibit particulars; other Judges said that under the exclusionary balancing test in the proposed amendment, the expert would be prohibited from even saying that he relied on any reports from other physicians.

2. *Question 2*: Rule 703 does not prohibit the adversary from bringing out the expert's basis. Since that is so, can the proponent bring out the inadmissible information on direct, in order to "remove the sting" of an anticipated attack? If so, should it always be so? The Standing Committee was divided on the resolution of this question.

***Reporter's Comment***

A possible response to each of these hypotheticals is that there is bound to be dispute over the application of a balancing test to particular evidentiary situations. This is certainly true under Rule 403. All the amendment does is to tell the trial court to lean toward exclusion rather than admissibility; the ultimate resolution is still a matter of judicial discretion, and in that way the amendment is completely within the spirit of the Federal Rules of Evidence. Nonetheless, the Committee may wish to consider the possibility that the Rule 703 balancing test will result in ambiguity and disputed judgment calls. One possibility is to address the matter in the Committee Note.

## *Style Subcommittee Suggestions*

The Style Subcommittee of the Standing Committee proposes minor changes to both the title and the text of Rule 703. Judge Smith informed Judge Parker, chair of the Style Subcommittee, that the Evidence Rules Committee would consider these suggestions at its October, 1998 meeting.

As to the title, the Style Subcommittee notes an inconsistency in the use of the plural "witnesses", when compared to the use of the singular in the text. Therefore, the proposed change in the title is as follows:

**Rule 703. Bases of an Expert's Opinion Testimony ~~by Experts~~**

As to the text, the Style Subcommittee proposes a minimal change in the proposed new last sentence of Rule 703. No changes are proposed to the text of the existing Rule. The Style Subcommittee's suggested textual change from the proposal as currently out for public comment is as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. ~~If the facts~~ Facts or data that are otherwise inadmissible~~, they~~ shall not be disclosed to the jury by the proponent of the opinion or inference unless their probative value substantially outweighs their prejudicial effect.

### *Reporter's Comment on Style Subcommittee Suggestions*

As discussed in the memoranda on Rules 701 and 702, the proposed change to the title is not inconsistent with this Committee's position that existing language of a Rule should be maintained wherever possible. The change to the title would be an improvement, by tying the title more closely to the text. As to the proposed textual change, a strong argument can be made in its favor--it streamlines the language, and takes out a pronoun from a clause that might be considered too heavily pronoun-laden.

### *Comments From Members of the Public*

Before the April, 1998 Evidence Rules Committee meeting, the Committee received two written comments on the *Daubert* Subcommittee's proposal to amend Rule 703. That proposal provided that inadmissible information relied upon by an expert could be disclosed to the jury unless the prejudicial effect of the disclosure would substantially outweigh the probative value of the information in allowing the jury to assess the expert's opinion. Both comments from the public objected to the use of this Rule 403 balancing test, on the ground that it was unduly permissive.

One of the commentators, the Product Liability Advisory Council, criticized the proposal's implication that hearsay relied upon by an expert would be presumptively admissible. The Council also criticized the articulation of a Rule 403 balancing test as "unnecessary", since the trial court could rely on Rule 403 directly to exclude inadmissible information relied upon by an expert.

Bert Black and Clifton T. Hutchinson, of the law firm of Hughes and Luce, also objected to the presumption of admissibility resulting from the reference to Rule 403 in the *Daubert* Subcommittee's proposal. They argued that "the reverse should be true, and that the Rule should make clear that the presumption is against admissibility unless specific exceptions apply."

At the April meeting, the *Daubert* Subcommittee's draft of the Rule 703 proposal was revised to provide a presumption against the disclosure of otherwise inadmissible information relied upon by an expert. Thus, the proposal released for public comment is in general accord with the comments discussed immediately above.

### *Possible Changes*

It should be noted, however, that both sets of commentators suggested that the amendment provide more detail on how the balancing test should be applied. The Product Liability Advisory Council suggests that specific criteria be set forth, either in the Rule or in the Committee Note, to assist trial judges applying the Rule 703 balancing test. The suggested factors for explication are: 1. The trustworthiness of the underlying data; 2. Whether the underlying data is seriously disputed; 3. Whether the underlying data is case-specific; and 4. Whether the data is of a type that, if disputed, can be meaningfully rebutted by the opponent. It is, of course, for the Committee to decide whether the Rule or the Note should contain the level of

detail suggested by PLAC. Including the factors as guidelines for trial courts in the Committee Note would appear to be consistent with the approach taken by the Committee Note to Rule 702.

If the Committee Note were amended along the lines suggested by PLAC, it might read as follows:

* * *

When information is reasonably relied upon by an expert and yet is not independently admissible, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information on the other. If the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect, the information may be disclosed to the jury, and a limiting instruction must be given upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider ~~the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances~~, among other things, the following factors:

(1) Whether a limiting instruction is likely to be effective under the particular circumstances.

(2) The degree of trustworthiness of the inadmissible facts or data relied upon by the expert.

(3) Whether the inadmissible facts or data are seriously disputed.

(4) Whether the inadmissible facts or data are specific to the parties, or of more general applicability.

(5) Whether the underlying facts or data are of a type that, if disputed, can be meaningfully rebutted by the opponent.

The trial court must keep in mind that disclosure of the inadmissible information is permitted only if the probative value of the information, in the manner that it is disclosed to the jury, substantially outweighs its prejudicial effect.

* * *

For their part, Black and Hutchinson suggest that the Rule state specific situations in

which the presumption of inadmissibility of underlying data will be overcome. They suggest "exceptions similar to the exceptions to the rule against hearsay." The problem with this proposal is that if the underlying data fits an exception to the hearsay rule, it is admissible on its own, and thus outside the purview of the proposed amendment to Rule 703. Black and Hutchinson seem to be suggesting some kind of watered-down hearsay exceptions, to be applied only to information relied upon by an expert. Such a proposal is likely to give rise to substantial confusion. A similar proposal by the ABA (permitting disclosure of the underlying information only when it reaches some level of trustworthiness less than a hearsay exception but more than nothing) has already been rejected by the Evidence Rules Committee.

# Attachment to Rule 703 Memorandum

**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 703**

1 **Rule 703. Bases of Opinion Testimony by Experts***

2 The facts or data in the particular case upon which an expert
3 bases an opinion or inference may be those perceived by or made
4 known to the expert at or before the hearing. If of a type reasonably
5 relied upon by experts in the particular field in forming opinions or
6 inferences upon the subject, the facts or data need not be admissible
7 in evidence <u>in order for the opinion or inference to be admitted</u>. <u>If the</u>
8 <u>facts or data are otherwise inadmissible, they shall not be disclosed to</u>
9 <u>the jury by the proponent of the opinion or inference unless their</u>
10 <u>probative value substantially outweighs their prejudicial effect.</u>

## COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, it is the opinion or inference, and not the information, that is admitted as evidence. Courts have reached different results on how to treat otherwise inadmissible information that is reasonably relied upon by an expert in forming an opinion or drawing an inference. 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 *United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken

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

differing views. *See, e.g.*, Ronald Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul 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 court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information on the other. If the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect, the information may be disclosed to the jury, and a limiting instruction must be given upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances. Furthermore, the trial court must keep in mind that disclosure of the inadmissible information is permitted only if the probative value of the information, in the manner that it is disclosed to the jury, substantially outweighs its prejudicial effect.

The amendment governs the use before the jury of otherwise inadmissible information reasonably relied on by an expert. It is not intended to affect the admissibility of an expert's testimony, nor to deprive an expert of the use of inadmissible information to form and propound an expert opinion or inference. Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705.

The amendment provides a presumption against disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion or inference, where that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

**FORDHAM** Item III F

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Commentary Received on proposed amendments to Rules 803(6) and 902.
Date: September 15, 1998

To date we have received no public comments concerning the proposed amendments to Rules 803(6) and 902. We have, however, received an important comment from Judge Stotler, the former Chair of the Standing Committee, concerning some possibly inconsistent terminology in proposed Rules 902(11) and (12). In response to Judge Stotler's comment, Judge Smith has prepared an alternative version of Rules 902(11) and (12), set forth below. The Standing Committee approved the initial version of Rules 902(11) and (12) to be released for public comment. The understanding with Judge Stotler was that the alternative version would be considered in the public comment period.

*The Current Proposal*

The proposed amendment to Rule 902, released for public comment, reads as follows:

**Rule 902. Self-authentication**

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

* * * * *

(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—

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

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

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

A party intending to offer a record in evidence under this paragraph must provide written notice of that intention 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.

(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—

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

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

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

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record in evidence under this paragraph must provide written notice of that intention 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.

### *The Problem*

Judge Stotler noted that Rule 902(11) requires that the qualified person "certifies under oath" that the requirements of the rule have been met. In apparent contrast, Rule 902(12) refers to a "written declaration" rather than a certification.

The apparent discrepancy in the language can be explained only by the fact that the proposal was derived from the Indiana rule that had the same discrepancy. While there is obviously no intent to set forth some legal distinction between a "declaration" and a "certification", it is at least possible that courts and litigants might be confused by the different terminology employed in the two subdivisions.

## *The Proposed Solution*

Judge Smith has drafted an alternative to the proposal currently out for public comment. This alternative is intended to address the concerns expressed by Judge Stotler. The alternative reads as follows:

**Rule 902. Self-authentication**

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

* * * * *

(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 is accompanied by a **written declaration of the custodian thereof or another qualified person certifying that the record—**

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

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

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

A party intending to offer a record in evidence under this paragraph must provide written notice of that intention 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.

(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 certifying that the record—**

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

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

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

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record in evidence under this paragraph must provide written notice of that intention 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.

Judge Smith's proposal uses the same language in both subdivisions: "a written declaration certifying that the record" complies with the admissibility requirements. The Committee should consider this alternative during the public comment period.

## *Reporter's Comment on Another Aspect of the Proposed Amendment to Rule 902*

Another phrase in both subdivisions (11) and (12) might be considered awkward. Under the proposal, the qualified person must certify that the record was "made by the regularly conducted activity as a regular practice." It seems awkward to refer to an *activity*, as opposed to the organization, as making a record. The Committee might consider whether the language "by the regularly conducted activity" should be deleted. The proposed amendment would then simply require a certification that the record was "made as a regular practice." The reference to regularly conducted activity in the clause seems superfluous at any rate, since the subdivision already requires that the record must be one recording regularly conducted activity.

When combined with Judge Smith's proposal, the deletion of the awkward language would result in the following:

(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 is accompanied by a **written declaration of the custodian thereof or another qualified person certifying that the record—**

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

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

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

* * *

(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 certifying that the record—**

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

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

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

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Evidence Rule 1101— Proceedings In Which the Evidence Rules Do Not Apply
Date: September 15, 1998

At the April, 1998 meeting of the Evidence Rules Committee, the suggestion was made that the Committee might consider how and to what extent Evidence Rule 1101 operates to exempt certain proceedings from the Evidence Rules. This memorandum is in response to that suggestion.

Rule 1101 provides as follows:

**Rule 1101. Applicability of Rules**

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

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

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

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

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

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

(3) Miscellaneous proceedings. — Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

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

penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled ``An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

This memorandum sets forth the proceedings to which the Evidence Rules are not applicable under the terms of Rule 1101, as well as certain proceedings not specified by the Rule as to which the Rules have been found to be inapplicable. With each proceeding listed, this memorandum discusses the stated reason, if any, for rendering the Federal Rules inapplicable, and makes a preliminary suggestion as to whether the Rules could or should be extended to that type of proceeding. The memorandum also discusses whether Rule 1101 should be amended to specifically exempt from the Evidence Rules those proceedings which the courts have found exempt even though they are not currently mentioned in the Rule. Finally, the Rule considers certain drafting anomalies that are found in Rule 1101.

It must be stressed that the ultimate question of amending Rule 1101 is dependent on sensitive statutory and policy questions that require substantial deliberation by this Committee, should it decide to proceed on these matters. In this sense, the memorandum is merely an introduction to the question of whether Rule 1101 should be amended.

I make no pretense that the memorandum is comprehensive. There are a lot of proceedings out there. This memorandum only describes those that are either mentioned in Rule 1101 itself, or that have been the subject of judicial consideration as to whether the Evidence Rules are applicable.

This memorandum has two attachments. The first is a memorandum previously distributed to this Committee, setting forth a large number of statutes that affect the admissibility of evidence. Many of these statutes operate to replace all or some of the Federal Rules in specific proceedings to which the Federal Rules are otherwise applicable. Other statutes, set forth at the end of the attachment, provide that the Federal Rules are inapplicable to certain kinds of proceedings and therefore supplement the provisions of Rule 1101(d). The second attachment is a report by the American College of Trial Lawyers, arguing that at least some of the Federal Rules of Evidence should be applicable in sentencing proceedings.

# Proceedings In Which the Rules of Evidence Are Inapplicable

### *1. Preliminary Questions of Fact*

Rule 1101(d) echoes Rule 104 in providing that the Rules of Evidence are inapplicable to preliminary determinations by the trial judge. The rationale is that many of the Rules of Evidence are justified on the basis of the inability of the jury to handle certain kinds of evidence, something that is not a concern when the trial judge alone decides questions. For example, a trial judge can consider hearsay "for what it's worth", whereas a jury might think a hearsay statement to be more reliable than it actually is. See generally *Bourjaily v. United States,* 483 U.S. 171 (1987). See also *Thompson v. Board of Education,* 71 F.R.D. 398 (W.D.Mich. 1976) (rules of evidence inapplicable in a preliminary hearing to determine whether a class should be certified).

It is apparent that Rule 1101(d) should not be amended to extend the Rules of Evidence to preliminary determinations by a trial judge. The rationale for the current procedure appears sound. Extending the Rules to preliminary determinations would result in a substantial change of practice throughout the Federal Courts, with at best an uncertain benefit of a marginal increase in the accuracy of preliminary determinations.

### *2. Grand Jury Proceedings*

In *Costello v. United States,* 350 U.S. 359 (1965), the Supreme Court categorically rejected the proposition that the Rules of Evidence should be applicable to grand jury proceedings. The Court stated that such an extension "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." The Advisory Committee Note to Rule 1101(d) specifically relies on *Costello*, and if it were written today it could also rely on a steady string of Supreme Court cases rejecting the application of technical rules and procedural requirements to grand jury proceedings. See, e.g., *United States v. Williams,* 504 U.S. 36 (1992) (rejecting the argument that the grand jury must consider exculpatory evidence).

It might be argued that today the grand jury is not so much a body of laymen conducting an inquiry as it is an excuse for prosecutorial inquisition. See the discussion in Saltzburg and Capra, *American Criminal Procedure* 710-18 (5th ed. 1996). Yet even if that argument were true, it would probably not justify the application of the Rules of Evidence to grand jury proceedings. The strongest argument against such an extension is that it is not practicable. The operation of the Evidence Rules is largely dependent on objections coming from the adversary. Given the ex parte nature of grand jury proceedings, no objections to inadmissible evidence could be made.

Unless the goal is to turn the grand jury into a full-blown adversary proceeding -- a question that appears well beyond the jurisdiction of the Evidence Rules Committee -- the notion of extending the Rules of Evidence to such proceedings is simply not viable.

### *3. Proceedings for Extradition or Rendition*

Proceedings for extradition or rendition are governed by statute, see 18 U.S.C. § § 3181-95. They are essentially administrative in character. As the court explained in *Martin v. Warden,* 993 F.2d 824 (11th Cir. 1993):

> Extradition is an executive, not a judicial, function. The power to extradite derives from the President's power to conduct foreign affairs. * * * An extradition proceeding is not an ordinary Article III case or controversy. It clearly is not a criminal proceeding. See Fed.R.Crim.P. 54(b)(5) ("these rules are not applicable to extradition and rendition of fugitives"); Fed.R.Evid. 1101(d)(3) ("The rules ... do not apply ... [to] proceedings for extradition or rendition...."). Rather, the judiciary serves an independent review function delegated to it by the Executive and defined by statute. See, e.g., *Jhirad v. Ferrandina,* 536 F.2d 478, 482 (2d Cir. 1976) ("Orders of extradition are sui generis."). The inquiry conducted by an "extradition magistrate" is limited. The extradition magistrate conducts a hearing simply to determine whether there is "evidence sufficient to sustain the charge [against the defendant] under the provisions of the proper treaty or convention." 18 U.S.C. § 184. If the evidence is sufficient, the extradition magistrate makes a finding of extraditability and certifies the case to the Secretary of State. Id. Extradition ultimately remains an Executive function. After the courts have completed their limited inquiry, the Secretary of State conducts an independent review of the case to determine whether to issue a warrant of surrender. The Secretary exercises broad discretion and may properly consider myriad factors affecting both the individual defendant as well as foreign relations which an extradition magistrate may not. The Secretary of State's decision is not generally reviewable by the courts.

Thus, extradition and rendition proceedings are not trials, and there seems to be no good reason to alter the practice by amending Rule 1101(d) to extend the Rules of Evidence to such proceedings. Moreover, such an extension may be seen as an unwarranted intrusion on the executive function. The costs of an amendment therefore seem to far outweigh the benefits.

It should also be noted that the subject of an extradition proceeding is not completely bereft of evidentiary protection, and therefore the need for protection through the Evidence Rules

is less than it otherwise might be. As the court stated in *In re Hearst,* 1998 WL 395267 (S.D.N.Y.):

> The Federal Rules of Evidence do not apply to extradition hearings, and thus hearsay and other evidence that would be inadmissible at a trial may be considered in determining probable cause. Although hearsay is permitted, and although there are no "bright-line" tests, the materials submitted must set forth facts from which both the reliability of the source and probable cause can be inferred.

The Court in *Hearst* found insufficient reliable evidence to establish probable cause under the circumstances. The only evidence presented by the government was the decision of a foreign court, which did not describe the evidence on which it was based, and therefore there was "no basis on which the Court can make the required independent determination as to whether probable cause exists."

### *4. Preliminary Examinations in Criminal Cases*

The Advisory Committee Note to Rule 1101(d) states that the exemption of preliminary examinations in criminal cases from the Evidence Rules was designed to give deference to the Criminal Rules. The rationale for dispensing with Evidence Rules, especially hearsay, is similar to that supporting the exemption for preliminary determinations of fact--the determination is made by a judge, who will be able to weigh the otherwise inadmissible evidence "for what it's worth."

There appears to be no reason to reject the above rationale when applied to preliminary examinations in criminal cases. I have been unable to find case law or commentary advocating an extension of the Evidence Rules to these proceedings.

### *5. Sentencing*

The attached report from the American College of Trial Lawyers makes the case for extending at least some of the Evidence Rules to sentencing proceedings. The original justification for the exemption, as indicated in the Advisory Committee Note, is that sentencing courts needed all kinds of information in order to assess the defendant, because the entire sentencing system was based on judicial discretion. This rationale is somewhat tempered by the fact-oriented and discretion-limiting system of sentencing guidelines that is currently in place.

However, as the Trial Lawyers note, the courts have uniformly rejected the argument that the advent of sentencing guidelines has brought a concomitant change in the procedural rules of evidence to be applied at sentencing hearings. The Evidence Rules remain inapplicable.

Whatever the merits of extending the Evidence Rules to sentencing proceedings, there are also countervailing practical considerations. Such considerations are indicated by the following excerpt from the minutes of the October, 1996 Evidence Rules Committee meeting:

> 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.

It is for the Committee to decide whether the circumstances have sufficiently changed over two years to warrant a reopening of this question. As stated above, any extension of the Federal Rules to sentencing proceedings requires more than a change in the Evidence Rules. It also requires a statutory change and an amendment to the Sentencing Guidelines.

It should be noted that the current sentencing procedures are not completely lacking in protection by evidentiary principles. As the cases discussed by the Trial Lawyers note, hearsay evidence must reach at least a minimal level of reliability in order to be considered by a sentencing judge. See, e.g., *United States v. Atkin,* 29 F.3d 267 (7th Cir. 1994) ("hearsay is a staple" in sentencing proceedings, so long as it carries minimum indicia of reliability).

### *6. Granting or Revoking Probation*

Rule 1101(d) and the Advisory Committee Note treat "probation proceedings" and sentencing proceedings under the same rationale--the Rules of Evidence do not apply because maximum flexibility is required, and the trier must necessarily consider many sources of information to determine whether probation or revocation is warranted. But the sentencing analogy is not a complete answer to whether the Evidence Rules should apply in the context of probation.

If the question is whether the Evidence Rules should apply to proceedings in which the decision whether or not to *grant* probation is made, then the sentencing analogy is apt. The decision whether to grant probation is part and parcel of the sentencing determination; the perameters are set by statute and Guideline, and therefore the reasons against extending the Evidence Rules to sentencing apply equally to the decision whether to grant probation.

The decision whether to *revoke* probation could arguably be distinguished from sentencing. Usually, the probation revocation question is highly factual--did the probationer do some specific thing or things that violated the terms of probation? Because the revocation determination is largely fact-bound, there is an argument that the Rules of Evidence ought to apply.

But there are also strong arguments against such an extension. First, the probation revocation decision is made by a judicial officer. As with preliminary determinations on admissibility issues, the accepted rationale is that a judicial officer can weigh all the information presented for what it is worth, and should not be bound by technical rules of evidence that are really designed for the benefit of juries. Procedural protection is found not in the rules of evidence but in the requirement that evidence meet a minimal standard of reliability. See, e.g., *United States v. Pierre,* 47 F.3d 241 (7th Cir. 1995) (court in revoking probation could rely on written reports of drug tests and affidavit by the lab director concerning how drug tests are conducted: "The district judge must use reliable evidence, but written reports of medical tests are in the main reliable."). Second, the probation revocation is sometimes dependent not only on whether a condition of probation has been violated, but also on whether steps short of incarceration could be taken to protect society and improve the chances of rehabilitation, and therefore is sometimes more discretionary and flexible, and less fact-oriented -- though this second consideration does not apply where revocation of probation is mandatory upon the finding of a violation. See 18 U.S.C. § 3565 (a) (the court "shall" revoke probation of a person who is found possessing illegal drugs).

It is for the Committee to decide whether probation revocation proceedings are so fact-oriented, and so in need of procedural reform, that the Rules of Evidence should be extended to such proceedings. While probation revocation proceedings can be distinguished from sentencing proceedings, it is an open question whether that distinction will be found sufficiently compelling during the course of the Rules process. Moreover, as stated above, the rationale for exempting preliminary judicial determinations from the Evidence Rules is equally applicable to determinations on probation revocation; this clearly cuts against amending the Rule with respect to probation revocation.

### 7. *Supervised Release Revocation Proceedings*

Rule 1101(d) provides that the Rules of Evidence are not applicable to "sentencing, or granting or revoking probation"; but it makes no reference to supervised release revocation proceedings. Of course, supervised release proceedings did not exist when Rule 1101 became law. But the absence of a specific reference to these proceedings has created a problem for the courts.

In the leading case of *United States v. Frazier,* 26 F.3d 110 (11th Cir. 1994), Frazier made several interesting arguments in support of the proposition that the Evidence Rules are applicable to supervised release revocation proceedings. These arguments were: 1) Supervised release proceedings are not specifically listed in Rule 1101(d); 2) Rule 1101 was amended after supervised release proceedings were instituted in 1984 (for example, to refer to "magistrate judges" rather than "magistrates"), and yet no attempt was made to amend subdivision (d) to include a reference to supervised release proceedings; 3) The Criminal Rules have been amended to refer to supervised release proceedings, while the Evidence Rules have not; and 4) Supervised release proceedings are different from parole and probation proceedings, because supervised release is statutorily required in specified circumstances, whereas parole and probation are discretionary acts of grace.

The Court in *Frazier* rejected all these arguments. It reasoned that the failure to amend Evidence Rule 1101 to refer to supervised release was not dispositive, "because we believe that Congress considered probation revocation and supervised release revocation so analogous as to be interchangeable." It also concluded that supervised release is "conceptually the same" as parole. A proceeding to revoke either parole or supervised release is by definition more flexible than a trial, and therefore neither proceeding should be constricted by the Rules of Evidence. Finally, the Court observed that as with parole revocation proceedings, the subject of a supervised release proceeding is still protected by minimal evidentiary standards of reliability.

The courts that have dealt with the question have all held, consistently with *Frazier*, that the Federal Rules of Evidence are inapplicable to supervised release revocation proceedings. See *United States v. Portalla,* 985 F.2d 621 (1st Cir. 1993); *United States v. Stephenson,* 928 F.2d 728 (6th Cir. 1991) (at a supervised release revocation proceeding, a "judge may consider hearsay if it is proven to be reliable"); *United States v. Walker,* 117 F.3d 417 (9th Cir. 1997).

It appears clear that if the Evidence Rules are not to be extended to probation revocation proceedings, then they should not be extended to supervised release revocation proceedings. The opposite question remains, however: whether Rule 1101(d) should be amended to specifically

*exempt* supervised release proceedings from the purview of the Evidence Rules. As indicated above, the current Rule is silent on the matter, and therefore ambiguous. On the other hand, the courts that have decided the question have reached a uniform result without much problem. Perhaps the best resolution would be that if Rule 1101 is to be amended in some other respect, a reference to supervised release revocation proceedings in subdivision (d) should be included as part of that larger amendment. There does not seem to be a critical need to amend Rule 1101 solely to include a reference to supervised release revocation proceedings.

### *8. Warrants for Arrest, Criminal Summonses, and Search Warrants*

The Advisory Committee Note to Rule 1101(d) states that the nature of proceedings to obtain warrants and criminal summonses "makes application of the formal rules of evidence inappropriate and impracticable." Hearsay is routinely used, for example, in the probable cause determination, and the Supreme Court has roundly rejected the application of technical rules of evidence to the determination of probable cause. See *Illinois v. Gates,* 462 U.S. 213 (1983). Criminal Rule 4(b) states that the finding of probable cause "may be based upon hearsay evidence in whole or in part." Also, like grand jury proceedings, the warrant and summons process is ex parte, so the objection-dependent Rules of Evidence could simply not operate. Under the circumstances, there is no reasonable argument to be made for extending the Rules of Evidence to proceedings to obtain warrants and criminal summonses. And if such an argument did exist, its implementation would require not only an amendment of Rule 1101, but also an amendment of the Criminal Rules.

### *9. Suppression Hearings*

Unlike proceedings to obtain a warrant, suppression hearings are not specifically covered by the Rule 1101(d) exclusion. This has not deterred most courts, however, from holding that the Federal Rules are not applicable to suppression hearings. The Supreme Court dealt with the question in *United States v. Matlock,* 415 U.S. 164 (1974), a pre-Rules case which discussed the then-proposed Rule 1101. The Court reasoned that suppression hearings are essentially preliminary hearings on the admissibility of evidence, and are thus controlled by the general provision of Rule 1101(d) exempting the determination of preliminary questions of fact from the Evidence Rules. The Court also relied on the rationale, discussed several times above, that "in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel." The

*Matlock* Court concluded that at a suppression hearing "the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." See also *United States v. Schaefer,* 87 F.3d 562 (1st Cir. 1996) ("a judge presiding at a suppression hearing may receive and consider any relevant evidence, including affidavits and unsworn documents that bear indicia of reliability.").

There is one important case, however, that holds that at least certain Evidence Rules are applicable in suppression hearings, and rejects the proposition that suppression hearings are always analogous to preliminary hearings on the admissibility of evidence. In *United States v. Brewer*, 947 F.2d 404 (9th Cir. 1991), the defendant moved to sequester a police officer who was scheduled to testify after another police officer at a suppression hearing. The trial court held that Rule 615 was not applicable to suppression hearings. The two police officers testified virtually identically. The Ninth Circuit reversed. The panel addressed the government's argument that Rule 1101(d)(1) (exempting preliminary determinations from the Evidence Rules) covered suppression hearings. The Court noted that Rule 1101(d)(1) essentially restates Rule 104, and elaborated as follows:

> The commentary that follows Rule 104 makes it clear that this section is limited to the preliminary requirements or conditions that must be proved before a particular rule of evidence may be applied. Notes of the Advisory Committee on 1972 Proposed Rules. The examples of foundational facts that may be proved without complying with the exclusionary Rules of Evidence include the qualifications of an expert, the unavailability of a witness whose former testimony is being offered, the presence of a third person during a conversation between an attorney and client, proof of the interest of the declarant in determining whether the out-of-court statement threatens that interest, the competency of a child to testify as a witness.
>
> As pointed out by Charles Alan Wright and Kenneth W. Graham, the statement in Rule 1101(d) that the Rules of Evidence do not apply to preliminary fact determinations made by the court under Rule 104 "obviously cannot be read literally because, if the Rules do not apply to preliminary fact determinations then Rule 104 is inapplicable in any case to which it is supposed to apply." Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence sec. 5053 at 257 (1977).
>
> Wright and Graham reconcile this facial inconsistency by distinguishing between the type of proof that may be presented as a foundation for the admission of evidence, such as a declaration against interest, or a dying declaration, and procedural rules that have been developed to enhance the search for the truth. "What must be meant is that the traditional exclusionary rules do not apply, but that procedural regulation of the process of admission and exclusion remains applicable."

The *Brewer* Court found that Rule 615 was a procedural rule designed to guarantee a fair proceeding, as opposed to a rule dealing with the admissibility of evidence.
The Court distinguished the Supreme Court's decision in *Matlock*, which held specifically that the hearsay rule is inapplicable in suppression hearings. The *Brewer* Court stated that *Matlock* "does not support the notion that procedural rules designed to protect the integrity of the fact finding process are inapplicable in a suppression hearing."

The *Brewer* Court concluded as follows:

> We hold that Rule 615 is a procedural rule directed at the fairness of the proceedings, and not a rule affecting the type of evidence that can be considered in an evidentiary hearing. Therefore, the application of Rule 615 to a motion to suppress evidence is not affected by Rule 104. We also conclude that the Federal Rules of Evidence apply in pretrial suppression proceedings pursuant to Rule 1101(d) because such evidentiary hearings are not expressly excluded under Rule 1101(d)(2) and Rule 1101 (d)(3).

*See also United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (holding that Rule 615 is applicable to a suppression hearing, but not specifically discussing Rule 1101).

The last sentence quoted above from the *Brewer* opinion, i.e., that the Federal Rules are applicable *in toto* to sentencing proceedings, is obviously broader than the actual holding of the case. The *Brewer* Court took pains to distinguish between traditional admissibility rules, such as the hearsay rule, and rules designed to guarantee an accurate *process* of factfinding, such as Rule 615. If the *Brewer* Court really meant that all of the Rules of Evidence are applicable to suppression hearings, it would be rejecting the clear Supreme Court ruling in *Matlock* to the contrary.

The *Brewer* decision raises some important questions for the Committee to consider. The easiest question is whether Rule 1101 should be amended to apply the Evidence Rules, lock stock and barrel, to suppression hearings. The answer to that question should obviously be no. Suppression hearings are indeed substantially similar to preliminary rulings on the admissibility of the evidence, most obviously because the judge is the factfinder. If we assume that judges can and should weigh even inadmissible evidence for what it is worth, then the Rules of Evidence should not apply *in toto* to suppression hearings. That is to say, unless the Committee wishes to amend both Rule 104 and Rule 1101 to extend the Evidence Rules to *all* preliminary determinations by the judge, then it makes no sense to extend the rules as a whole to suppression hearings. There are also sensitive concerns, probably beyond the scope of the Evidence Rules, as

to whether hearsay should be permitted at a sentencing proceeding in order to protect the safety of confidential informants. For all these reasons, it makes no sense to extend the Evidence Rules as a whole to suppression hearings.

A more difficult question is whether Rule 1101(d) should be amended to specifically provide that the Evidence Rules are *inapplicable* to suppression hearings. Such a broad exemption would reject the holding in *Brewer;* it would have to be based on a policy determination that judges at suppression hearings should have complete discretion in determining the facts--including the discretion to allow police officers to be present at the hearing while other officers testify.

A compromise approach would be to amend Rule 1101(d) to provide that Evidence Rules *dealing with the admissibility of evidence* are inapplicable at suppression hearings, while Evidence Rules *designed to guarantee a fair presentation of the evidence* would be applicable. This would codify the specific holding in *Brewer*, and might also allow the application of Rules such as Rules 106 and 612. A more difficult alternative to is to go through the Rules one by one and determine which of them ought to be applicable to suppression hearings, and then to amend Rule 1101 to provide that the Rules of Evidence are inapplicable to suppression hearings, with the exception of these certain enumerated rules.

Finally, the *Brewer* Court raises the question of whether Rule 104 itself should be amended. As Wright and Graham note, the Rule cannot be read literally, otherwise the Rule itself would not be applicable. The distinction set forth in *Brewer*, between rules of admissibility and rules that guarantee fair procedure, might well be used in an amendment to Rule 104 as well.

Ultimately it is for the Committee to decide whether the problems and questions raised by *Brewer* are serious enough to warrant an amendment to Rule 1101. It is true that there is no conflict in the courts as to the questions raised in *Brewer,* because all courts hold that hearsay evidence is admissible at suppression hearings, and all reported decisions on Rule 615's applicability to suppression hearings are consistent with *Brewer*. But the question of Rules applicability to suppression hearings seems important enough--and Rule 1101's silence on the matter appears deafening enough--to warrant further investigation by the Committee.

***10. Summary Contempt Proceedings***

Rule 1101(b) provides that the Evidence Rules apply "to contempt proceedings, except those in which the court may act summarily". Thus Rule 1101(b) contains an exception to Evidence Rules applicability outside those found in subdivision (d), i.e., an exception for summary contempt proceedings. The Advisory Committee's rationale for excluding summary contempt proceedings from the Evidence Rules is that criminal contempts "are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court." See Criminal Rule 42(a). Thus, it makes no sense to apply the Rules of Evidence where the determination is dependent on what the judge saw or heard. In contrast, "[t]he circumstances which preclude application of the rules of evidence in this situation are not present * * * in other cases of criminal contempt." It would appear nonsensical to extend the Evidence Rules to summary contempt proceedings.

*11. Bail Hearings*

The Advisory Committee Note to Rule 1101(d) states in conclusory fashion that bail proceedings "do not call for application of the rules of evidence." Perhaps the best rationale is that, as with other preliminary determinations, the bail decision is made by the judge, who can weigh even inadmissible evidence for what it is worth. Also, bail decisions are not simply fact-based; they also entail consideration of the kind of person that the detainee is. In that sense, the bail decision is analogous to a sentencing decision made before the advent of the Guidelines--a decision to which the Rules of Evidence justifiably do not apply.

A final consideration is that a statute specifically provides that "[t]he rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the [bail] hearing." 18 U.S.C. 3142. Therefore any extension of the Rules of Evidence to bail hearings would require not only an amendment to Rule 1101(d), but also an amendment of the statute. That factor certainly counsels caution. Under all these circumstances, it would appear that an amendment to extend the Evidence Rules to bail hearings is not warranted.

*12. Psychiatric Release and Commitment Proceedings*

Rule 1101 is silent on whether it applies to proceedings for psychiatric commitment and release, such as are established in 18 U.S.C. 4243 for criminal defendants found insane. In

*United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988), the court held that the Rules of Evidence are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility. The court analogized such hearings to bail release hearings, and further reasoned that a judge determining the question of psychiatric commitment or release "should not be too confined in the kinds of evidence it considers".

The reasoning of *Palesky* certainly seems sound, and is consistent with the rationale for exempting other types of proceedings from the Evidence Rules, such as bail hearings and sentencing hearings. The question remaining is whether Rule 1101 should be amended to specifically *exempt* psychiatric commitment proceedings from the Evidence Rules. Since the court in *Palesky* had little trouble reaching its result, and since there is no contrary authority, it would appear that there is no critical need to amend Rule 1101(d) to specifically exempt psychiatric commitment proceedings. But if the Rule is to be amended on other grounds, a clarification with respect to psychiatric commitment proceedings might usefully be added to that amendment.

***13. Arbitrations and Administrative Hearings***

Rule 1101 does not specifically exempt arbitrations and administrative proceedings from the Rules of Evidence. However, those proceedings are inferentially so exempted, because Rule 1101(a) provides that the Rules are applicable to "courts", and arbitration and administrative proceedings are not considered "court" proceedings. Nor are they considered "civil actions and proceedings" within the meaning of Rule 1101(b). Despite the lack of specificity in the Rule, the courts have had no problem in exempting arbitrations and administrative hearings from the Evidence Rules. See, e.g., *Drayer v. Krasner,* 572 F.2d 348 (2d Cir. 1978) (arbitrators are not bound by rules of evidence); *Woolsey v. National Transp. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993) (Evidence Rules inapplicable in NTSB proceedings); *American Coal Company v. Benefits Review Board,* 738 F.2d 387 (10th Cir. 1984) (Evidence Rule 301 not applicable in an administrative hearing held under the Black Lung Benefits Act, because such a proceeding is not in the federal court); *Yanopoulos v. Dept. of the Navy*, 796 F.2d 468 (Fed. Cir. 1986) (leading questions rule does not apply to Merit Systems Protection Board hearings); *Dallo v. INS*, 765 F.2d 581 (6th Cir. 1985) (deportation proceedings are administrative in nature and therefore the Federal Rules of Evidence do not apply). Besides the text of the Rule, the courts rely on the rationale that administrative and arbitration hearings are designed to be informal and flexible--the nature of the proceedings would be undermined by formal, trial-geared rules.

For good measure, there are a plethora of statutes and regulations providing that particular

administrative proceedings are outside the scope of the Federal Rules of Evidence. See, e.g., 8 C.F.R. 242.14 (c) (in immigration proceedings, "the special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case"); 5 C.F.R. 1201.62(a) (in MSPB hearings, the hearing examiner has broad discretion to admit most forms of evidence, including that which is irrelevant, immaterial, or repetitious). The statutes providing that the Rules of Evidence are inapplicable in social security proceedings are set forth in the attached statutory memorandum.

In sum, there appears to be no reason at all to extend the Federal Rules of Evidence to arbitration and administrative proceedings. Any effort to do so would not only involve an amendment to the Rules of Evidence, but also the abrogation of an indeterminate number of statutes and regulations. Moreover, as with other proceedings to which the Federal Rules are inapplicable, administrative proceedings are not devoid of evidentiary protection. The Federal Rules are often used as "a helpful guide to proper hearing practices." *Yanopoulos v. Dept. of the Navy*, 796 F.2d 468 (Fed. Cir. 1986). And there are many cases imposing requirements on the presentation of evidence that are analogous to those found in the Federal Rules. See, e.g., *Baliza v. INS,* 709 F.2d 1231 (9th Cir. 1983) (in immigration deportation proceedings, the Federal Rules are not applicable, but hearsay affidavits must at least be shown to be authentic, and the government must make a reasonable attempt to produce the affiant for cross-examination).

A more difficult question is whether Rule 1101 should be amended to specifically exempt administrative and arbitration hearings from the Evidence Rules. A similar question was raised above with respect to supervised release proceedings, and a similar answer might be given here. While Rule 1101 could be clarified to exclude these proceedings, the current ambiguity does not appear to present a substantial problem for the courts. Probably the best resolution is to provide clarification only if the decision is made to amend Rule 1101 in other respects.

***14. Forfeiture Proceedings***

The law of forfeiture is complex, and the question of whether the Evidence Rules apply to various stages of civil and criminal forfeiture proceedings is equally complex. Rule 1101 does not mention forfeiture proceedings, and so there is some ambiguity about the applicability of the Evidence Rules. This section first discusses civil and then criminal forfeitures.

*A. Civil Forfeitures*

Civil forfeiture proceedings are two-tiered. The first step is a probable cause determination to justify pretrial seizure of the property. See generally *United States v. Real Property Located in El Dorado,* 59 F.3d 974 ($9^{th}$ Cir. 1995). There seems to be a general understanding that the probable cause determination, which is made by a judge, is outside the scope of the Evidence Rules--for reasons similar to those expressed above with respect to preliminary examinations, i.e., this is a determination made by a judge, who can weigh all evidence, admissible or not, for what it is worth.

The second step in civil forfeiture is a trial on the question of forfeitability. This is clearly a civil action, governed by the Evidence Rules. By similar reasoning, the Evidence Rules have been found applicable in ancillary actions involving third parties who claim an interest in the property, whether the property was subject to civil or criminal forfeiture. See *United States v. Premises Known as 281 Syosset Woodbury Road.*, 71 F.3d 1067 (2d Cir. 1995) (Evidence Rules applied in civil forfeiture action in which the wife of a drug trafficker asserted an innocent owner defense).

While there appears to be no dispute on the above propositions, the failure to mention forfeiture proceedings in Rule 1101 renders the whole question of application to civil forfeiture proceedings somewhat murky. If Rule 1101 were to be rewritten, it might be appropriate to specify whether, and at what stages, the Rules of Evidence are applicable in civil forfeiture proceedings. But any need to clarify the question of Rules applicability is probably not critical enough to warrant an amendment in itself.

*B. Criminal Forfeitures*

As with civil forfeitures, there are essentially two stages to a criminal forfeiture--a pre-trial seizure and a final determination of forfeitability. At the pretrial stage, the government can first move ex parte for restraint of assets. Because of the ex parte nature of this action, the Federal Rules are inapplicable. *United States v. Harvey,* 560 F.Supp. 1040 (S.D. Fla. 1982). Continuation of the pretrial restraint requires a post-seizure, pre-trial adversary hearing, at which the government must establish a likelihood of success on the merits. At this hearing, there has been some dispute over whether the Federal Rules of Evidence are applicable. The Second Circuit, in *United States v. Monsanto,* 924 F.2d 1186 (2d Cir. 1991), held that the Federal Rules were inapplicable to these pretrial proceedings. The Court relied on 21 U.S.C. 853, which specifically provides that the Federal Rules of Evidence are not applicable to pretrial proceedings on forfeiture. In contrast, the court in *United States v. Veon,* 538 F.Supp. 237 (C.D.Cal. 1982) held that the Federal Rules were applicable to these adversary hearings, on the ground that Rule 1101(d) did not specifically exempt them. But the *Veon* Court failed to account for the specific

stautory authority of 21 U.S.C. 853, which holds the Federal Rules inapplicable to pretrial criminal forfeiture proceedings. Moreover, the rationale of the statute is consistent with that for exempting similar kinds of proceedings from the Federal Rules--the judge is the factfinder, and can properly weigh evidence that might unduly sway a jury. So while there is some dispute on whether the Federal Rules are applicable to pretrial adversary hearings on forfeiture, the dispute appears to be based on one court's overlooking controlling statutory authority. It is for the Committee to decide whether this type of "conflict" is one that should be corrected by an amendment to Rule 1101.

As to the final determination of forfeiture in criminal cases, the applicability of the Evidence Rules appears to be dependent on the analysis in *Libretti v. United States,* 516 U.S. 29 (1995). The Court in *Libretti* held that forfeiture is a part of sentencing. Since that is so, it would follow that the Federal Rules of Evidence are not applicable in criminal forfeiture proceedings, for reasons discussed above in the section on sentencing. Any change in this principle would appear to require an overruling of *Libretti.*

It should be noted that the Criminal Rules Committee is currently considering an amendment that would provide for jury trial in criminal forfeiture proceedings — in effect altering the holding in *Libretti.* Any decision that the Evidence Rules Committee might make on the advisability of extending the Evidence Rules to criminal forfeiture proceedings could usefully await the determinations of the Criminal Rules Committee.

***15. Juvenile Transfer Proceedings***

The Evidence Rules have been held inapplicable to proceedings brought under 18 U.S.C. 5032 to determine whether a juvenile should be tried as an adult. Rule 1101 is silent as to such proceedings, but the courts have reasoned that a transfer proceeding "is of a preliminary nature and is consequently not comparable to a civil or criminal trial." *Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153 (3rd Cir. 1994). The court in *A.M.* stated that juvenile transfer proceedings were most analogous to preliminary examinations in criminal cases, which are specifically exempted by Rule 1101(d)(3). See also *United States v. Anthony Y,* 990 F.Supp. 1310 (D.N.Mex. 1998) (juvenile court records admissible even though hearsay, because the Evidence Rules do not apply to transfer hearings).

As with other types of hearings not specifically covered by Rule 1101(d), there appears to be two questions for the Committee to consider. First, should the Rule be amended to *extend* the Evidence Rules to these proceedings? If one assumes that the rationale as applied to other

preliminary determinations is sound--i.e. that judges can properly weigh all evidence whether it would admissible at trial or not--then there is no reason to distinguish juvenile transfer proceedings from other preliminary proceedings. If, on the other hand, the Committee believes that the justification for exempting preliminary hearings from the Evidence Rules is unsound, then the Committee should revisit all the preliminary hearings discussed in this memorandum to determine whether the Evidence Rules should apply to them.

The second question is whether Rule 1101(d) should be amended to specifically state that the Evidence Rules are *inapplicable* to juvenile transfer proceedings. Probably the best answer is that given with respect to supervised release proceedings and other proceedings not specifically mentioned as exempt, i.e., clarification would be useful, but the need to clarify is not itself so critical as to require an amendment to the Rule. But if the Rule is to be amended on other grounds, a clarification might usefully be added to that amendment.

### *16. Preliminary Injunctions*

Rule 1101 is silent on whether the Federal Rules are applicable to preliminary injunction proceedings. The rather sparse case law on the matter provides that the Evidence Rules are not applicable to such proceedings when they are held independently from the trial. There are at least three reasons for this exemption. First is the familiar principle that the Federal Rules are really designed to protect juries, and therefore they should not be used to hinder judges in making preliminary determinations, because judges can properly weigh inadmissible information. Second, when preliminary injunction hearings are held independently from a trial on the merits, there is a need for speed and flexibility that is inconsistent with the formal Rules of Evidence. Third, Civil Rule 65(a) appears to contemplate that a judge can and will consider inadmissible evidence in determining whether a preliminary injunction will be issued. Rule 65(a)(2) provides that where consolidation of the preliminary injunction proceeding and the trial is not ordered, "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." This provision presumes that some of the evidence considered at the preliminary injunction hearing would *not* be admissible if offered at trial. It also presumes, reasonably enough, that if the preliminary injunction proceeding *is* consolidated with a trial, then the Rules of Evidence will apply.

The court in *SEC v. General Refractories Co.*, 400 F.Supp. 1248 (D.D.C. 1975), summed it up as follows:

> Rule 65(a) of the Federal Rules of Civil Procedure contemplates the introduction

at a hearing on a preliminary injunction of evidence which would not be admissible in a final trial on the merits. This relaxation of the rule of evidence at the preliminary injunction stage is consonant with one of the key purposes of a preliminary injunction: the need for speedy relief. Sworn affidavits and investigatory transcripts of testimony taken under oath are properly admitted as probative evidence at a preliminary injunctive hearing, where, as here, testimony of numerous live witnesses is simply not practical and the magnitude of inquiry would preclude any meaningful "trial type" hearing at a preliminary stage.

Again there are two questions. First, should Rule 1101 be amended to extend the Evidence Rules to preliminary injunction proceedings that are held independently from a trial on the merits? The answer depends, again, on whether the Committee agrees with the premise that preliminary determinations by trial judges should be outside the scope of the Evidence Rules. If so, then there is no good reason at all to extend the Evidence Rule to preliminary injunction proceedings held independently from a trial on the merits. In fact, the argument for refusing to extend the Evidence Rules to preliminary injunction hearings is even stronger than other cases, given the need for speed and flexibility at such hearings, and given the implications of Civil Rule 65(a).

Second, should Rule 1101 be amended to specify that the Federal Rules are *inapplicable* to preliminary injunction proceedings, at least where they are not consolidated with a trial on the merits? Again the best answer appears to be that clarification would be useful, but the need to clarify is not itself so critical as to require an amendment to the Rule. But if the Rule is to be amended on other grounds, a clarification might usefully be added to that amendment.

### *17. Evidence Rule 1101(e)*

Evidence Rule 1101(e) sets forth a laundry list of proceedings in which the Evidence Rules are applicable to the extent that matters of evidence are not governed by other rules or statutes. It appears that this provision is devoid of substantive effect. All of the proceedings specified are civil actions or proceedings tried in the federal courts (e.g., habeas corpus proceedings). The Evidence Rules are already applicable to these proceedings under the provisions of Rule 1101(a) and (c). So the only apparent purpose for subdivision (e) is to highlight the fact that other rules and statutes might trump the Evidence Rules in particular circumstances. Yet this merely states the obvious. As indicated by the attached memorandum, there are a large number of statutes that trump the Evidence Rules in specific circumstances. Rule 1101(e) provides some (incomplete) guidance, but it appears to have no independent

content.

An argument can be made that Rule 1101(e) should be abrogated, given the fact that it makes no attempt to be comprehensive and has no substantive effect. On the other hand, it appears to be doing no harm, and can be said to usefully highlight the relationship between the Evidence Rules and the evidentiary law outside those Rules. As with other ambiguities in the Rule, any problem with Rule 1101(e) does not on its own appear to justify an amendment. Yet if a decision is made to amend the Rule on other grounds, the Committee might consider an abrogation of Rule 1101(e) as part of a larger amendment--with the proviso that an abrogation might send the wrong impression concerning the applicability of the Evidence Rules to proceedings where statutory law is also operative.

***17. Non-Jury Trials--An Anomaly?***

Many of the proceedings to which the Evidence Rules are inapplicable are preliminary proceedings in which the trial judge operates as a factfinder. As stated throughout this memorandum, the justification for exemption from the Federal Rules is that the trial judge will not be swayed unduly by evidence that would be inadmissible at trial. For example, a trial judge, unlike a jury, will be able to weigh inadmissible hearsay "for what it's worth." But if that premise is accepted, one might wonder why the Evidence Rules (or at least why certain Evidence Rules) should be applicable in bench trials.

As an initial matter, it should be noted that at least one Evidence Rule operates differently in bench trials, on the rationale that the trial judge can properly assess the evidence that might improperly affect a jury. Under Rule 403, evidence proffered in a bench trial cannot be excluded on grounds of prejudice or confusion. See *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981) ("Rule 403 assumes that a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence"). It should also be noted that this Committee's proposed amendment to Rule 703 will operate in jury trials only.

On the other hand, the hearsay rule has been held fully applicable in bench trials. As the court stated in *In re Oil Spill by Amoco Cadiz,* 954 F.2d 1279 (7th Cir. 1992):

> During the damages trial the district court admitted a great deal of evidence it characterized as hearsay. It did so because it thought that if the rule were to be applied the trial would be too cumbersome. Yet the hearsay rule applies in all trials -- jury and bench, big and small. Fed. R. Evid. 101, 1101; *Walton v. United Consumers Club, Inc.*,

786 F.2d 303, 313 (7th Cir. 1986). A defendant faced with a single $ 200 million claim is no less entitled to the protection of the rule than is a person defending against 200 claims for $ 1 million each, or 2,000 claims for $ 100,000. See, e.g., *UNR Industries, Inc. v. Continental Casualty Co.*, 942 F.2d 1101, 1107 (7th Cir. 1991) (enforcing the rules of evidence in a multi-million dollar case with approximately 100,000 claimants).

The *Amoco Cadiz* court has certainly read Rule 1101 correctly. But the question is why is the Rule as it is? If a trial judge can reliably consider hearsay in determining whether coconspirator testimony is admissible, or whether the defendant being sentenced sold a certain amount of cocaine, why can't the trial judge reliably consider the same evidence in a trial on the merits?

Of course, no reasonable person could advocate that *all* of the Evidence Rules should be abrogated in bench trials. For example, rules on sequestration of witnesses and the oath requirement, and the rules on judicial notice and presumptions, are necessary to promote accurate factfinding even in a bench trial. Still, if the Committee decides that it wants to investigate further whether Rule 1101 should be amended, it might well consider whether the exemption of bench trials from certain Evidence Rules (most importantly the hearsay rule) is justified. Certainly there is a tension under current law between the rationale for exempting preliminary determinations from the Evidence Rules, and the application of some of those Rules in bench trials.

## Conclusion

There are a number of ambiguities, and arguable inconsistencies, in Rule 1101. The problems in the language of the Rule include:

1. The Rule is silent about the applicability of the Evidence Rules to supervised release proceedings.

2. The Rule does not specifically mention suppression hearings, and there is a conflict in the case law as to whether the Rules apply at all to such hearings and, if so, which specific Rules are or should be applicable.

3. The Rule is silent about the applicability of the Evidence Rules to proceedings for psychiatric commitment and release.

4. The Rule does not specifically exempt arbitrations and administrative hearings from the Evidence Rules.

5. The Rule does not specifically mention forfeiture proceedings.

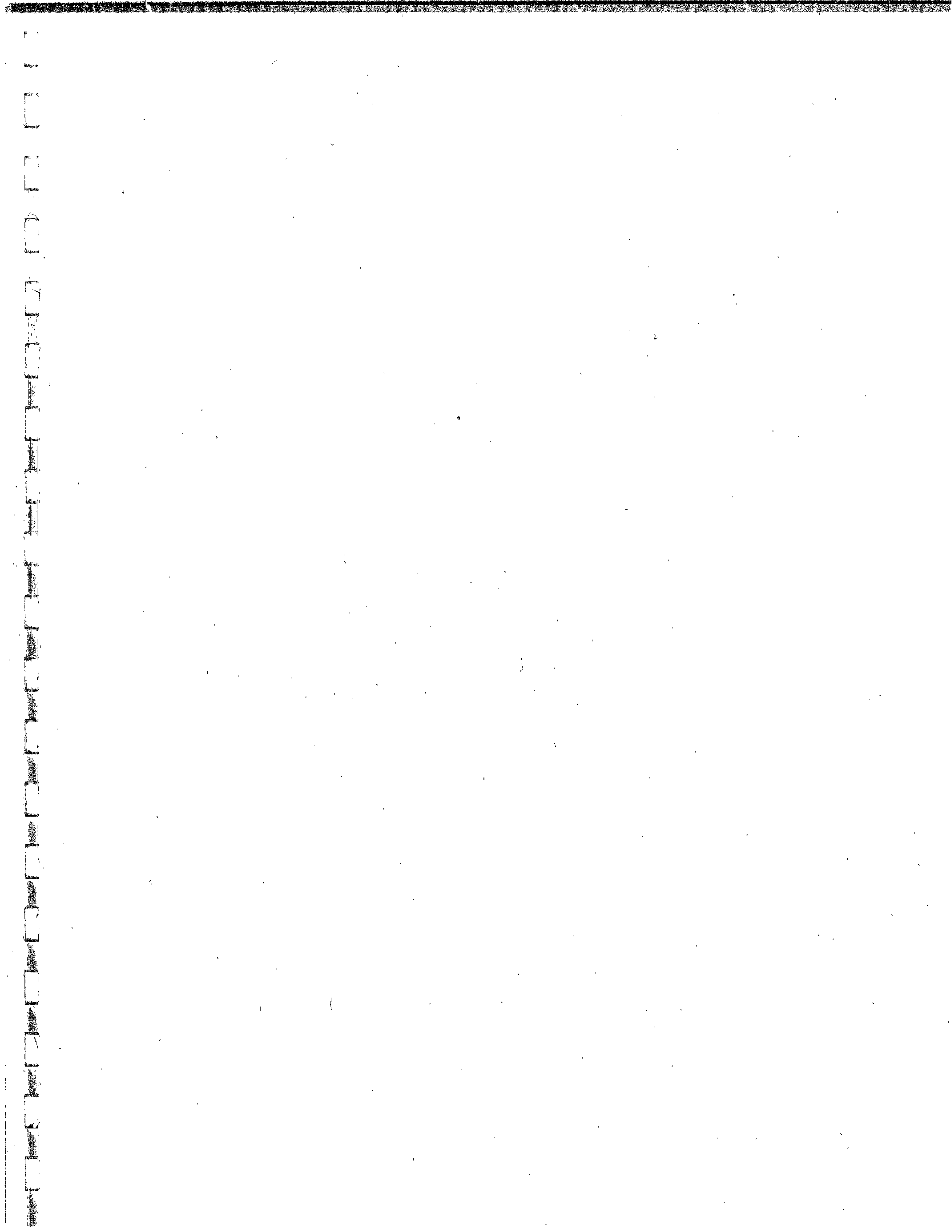
6. The Rule does not specifically mention juvenile transfer proceedings.

7. The Rule does not specifically mention preliminary injunction hearings.

8. Subdivision (e) of the Rule has no substantive effect, and is incomplete in its list of proceedings affected by other rules and statutes pertaining to evidence.

9. The Rule contains an inherent analytical tension. It exempts all preliminary determinations by trial judges from the Rules of Evidence, on the ground that trial judges need not be constricted by rules that are basically designed to shield the jury at trial. Yet it provides that virtually all of the Evidence Rules are fully applicable in a bench trial.

Whether these listed ambiguities and anomalies are, taken together, enough to justify an amendment of Rule 1101 is a determination for the Committee. The most intriguing, difficult, and far-ranging question is whether and to what extent the Rules of Evidence should remain applicable to bench trials. That is a difficult question of practice and policy that would call for another memorandum from the Reporter if the Committee is interested in pursuing the issue.



# Attachments to Rule 1101 Memorandum

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

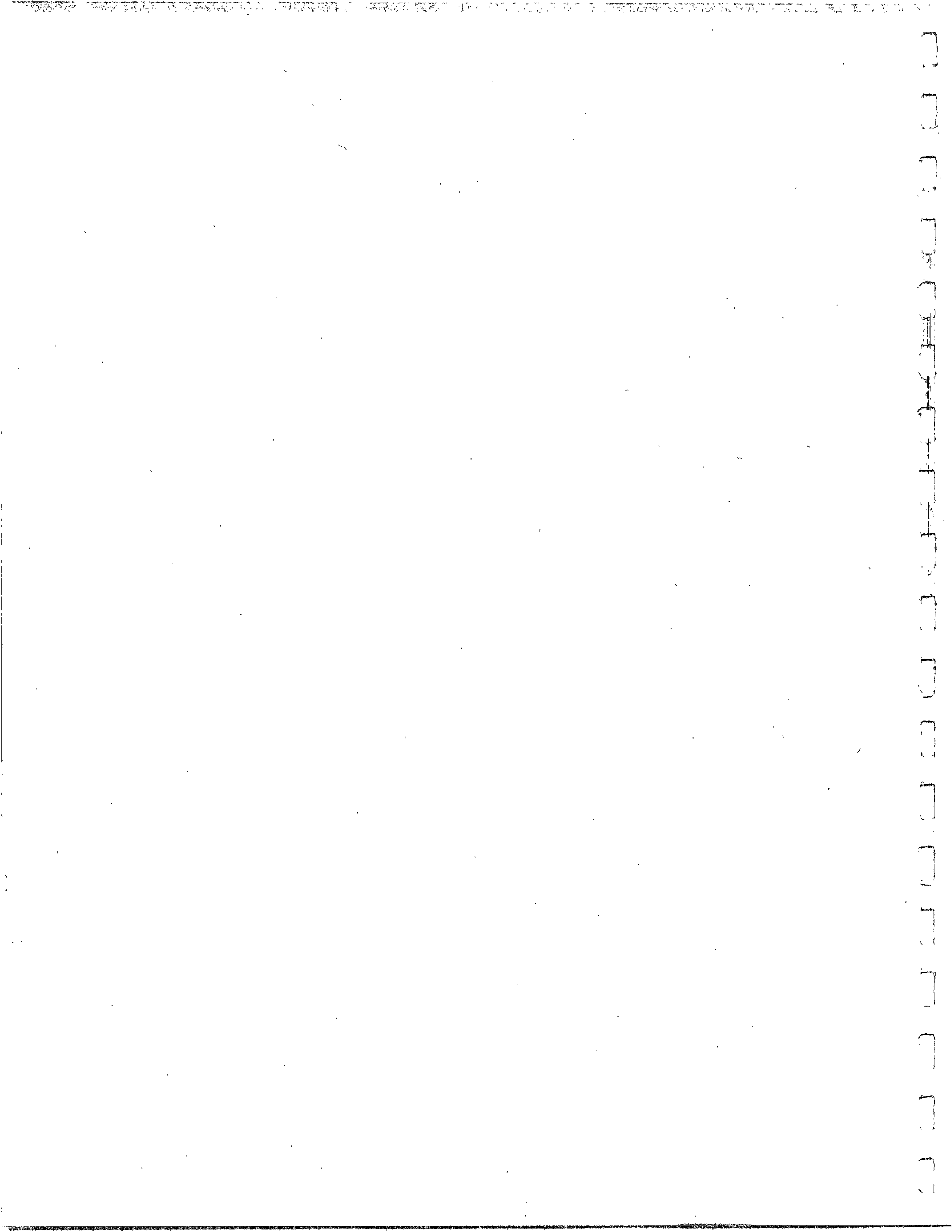
- **5 USCA § 574 Confidentiality** (bearing on relevancy in alternative dispute resolution proceedings, provides that communications disclosed in violation of this section are inadmissible in any proceeding relating to that issue).
- **8 USCA § 1252a Expedited deportation of aliens convicted of committing 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).



# THE LAW OF EVIDENCE IN FEDERAL SENTENCING PROCEEDINGS*

## I.

## Introduction

As its name suggests, the Sentencing Reform Act of 1984 ("SRA")[1] contains "sweeping reforms"[2] that "revolutionized"[3] the way in which federal defendants are sentenced. The SRA ended nearly a century of indeterminate sentencing in response to the perceived "dishonesty" of the extant regime in which, as a result of parole, defendants rarely served their full sentence.[4] More radical was elimination of the virtually unfettered discretion a sentencing judge had in choosing a sentence from within a broad statutory range, a response to criticisms of wide sentencing disparity. Instead, the judge is now generally required to sentence a convicted defendant to a specific sentence from within a narrow range set forth in the Federal Sentencing Guidelines ("Guidelines") written by the U.S. Sentencing Commission.

Fact-finding assumes a central, critical role under Guidelines sentencing. The crime of conviction is merely the starting point ("base offense level") to be adjusted after a series of factual determinations—each having a direct and identifiable impact on the ultimate sentence—regarding offense characteristics (*e.g.*, amount of drugs or money involved), defendant's role in the offense, harm to the victim, and other factors. A controversial feature of the Guidelines requires aggregation for sentencing purposes of all "relevant conduct"—even if the defendant has been acquitted of, or was never even charged with, committing that conduct.[5] The level calculated after these

* This report was prepared by the Federal Rules of Evidence Committee of the American College of Trial Lawyers. The Executive Committee and Board of Regents of the College have approved the report. Inasmuch as this Report addresses only the evidentiary and procedural aspects of sentencing, it should not be read as approval or disapproval by the College of the substantive aspects of federal guidelines sentencing, *e.g.*, the "relevant conduct" provisions.

1. Sentencing Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 1988, codified at 18 U.S.C. §§ 3551–3742 (1988) and 28 U.S.C. §§ 991–98 (1988).

2. *See Mistretta v. United States*, 488 U.S. 361, 366, 109 S.Ct. 647, 651–52, 102 L.Ed.2d 714 (1989).

3. *See Burns v. United States*, 501 U.S. 129, 132, 111 S.Ct. 2182, 2184, 115 L.Ed.2d 123 (1991).

4. Stephen Breyer, *The Federal Sentencing Guidelines And The Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 4 (1988) (citation omitted).

5. U.S.S.G. § 1B1.3(a). *See United States v. Watts*, 519 U.S. 148, ____, 117 S.Ct. 633, 638, 136 L.Ed.2d 554 (1997) (a jury verdict of acquittal "does not prevent the sentencing court from considering conduct underlying the acquitted charge"); *United States v. Edwards*, 105 F.3d 1179, 1180 (7th Cir. 1997) ("The 'Relevant Conduct' rule requires the judge to consider drugs that were part of the same plan or course of conduct, whether or not they were specified in

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adjustments marks the point on the vertical axis of a grid (the "Sentencing Table"), while defendant's criminal history (also requiring fact-finding) is measured along the horizontal axis. The point at which the two lines intersect yields the permissible range of sentence from which (absent an authorized departure) the judge must select.[6] Manifestly, the procedures for determining facts material to the Guidelines calculation may have a profound impact on a defendant's sentence.

Though the Commission's daunting task of writing guidelines for 681 criminal statutes took more than two years,[7] little attention was paid to the procedural aspects of fact-finding under this new and vastly different sentencing scheme. Since neither Congress (in the SRA) nor the Commission (in the Guidelines) addressed in any detail critical evidentiary issues such as burdens of proof, admissibility of evidence, confrontation rights and hearing procedures, by default the courts have had to step in to shape and resolve these matters. In so doing, courts have been greatly influenced by pre-Guidelines law on evidentiary issues, which freely permitted judges to consider all sorts of information and "evidence" at sentencing. The resulting state of affairs has prompted one circuit judge to remark that "[w]hen it comes to proof of facts undergirding guideline sentences, the principle courts often apply is that 'Anything Goes.' "[8]

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Because evidentiary issues relating to Guidelines sentencing have been greatly influenced by pre-Guidelines law, this Report first gives a brief historical sketch of sentencing in this country and the law of evidence that evolved alongside. The Report next examines the Guidelines and shows that pre-Guidelines law on evidentiary issues has essentially persisted, despite changes under the Guidelines which suggest that prior law might not be appropriate when applied in this different context. The Report concludes by examining various proposals for reform. The proposals discussed below are not limited to divining minimum constitutional standards and urging that sentencing courts adhere to such minimum requirements. Rather, the focus is on ways in which the sentencing process can be made more fair and appropriate. Thus, while due process should inform the evidentiary scheme at sentencing by establishing minimum standards, it should not be viewed as

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the indictment."); *United States v. Ritsema,* 31 F.3d 559, 564–65 (7th Cir. 1994) (the goal of the relevant conduct provision "is to allow a court to reflect in its sentence the actual seriousness of an offense, instead of strictly limiting it to the charge the prosecutor names in the indictment"); *United States v. McCaskey,* 9 F.3d 368, 376 (5th Cir. 1993) (trial court properly considered conduct not resulting in conviction where the presentence investigative report indicated it was relevant), *cert. denied,* 511 U.S. 1042, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994).

6. Departures are permitted where a court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). *See also* U.S.S.G. ch. 1, pt. A(4)(b) ("When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.") Departures are also permitted in other circumstances, for example, when the government makes a departure motion in recognition of a defendant's substantial assistance. U.S.S.G. § 5K1.1.

7. Breyer, *supra* note 4, at 3.

8. *United States v. Smiley,* 997 F.2d 475, 483 (8th Cir. 1993) (Bright, J., dissenting).

otherwise restricting the bounds of good public policy. "That a practice is constitutional does not make it wise."[9]

## II.

## Historical Overview of Evidence at Sentencing

### A. Background

Sentencing in this country has come full circle from determinate, nondiscretionary sentencing starting in colonial times, to indeterminate, discretionary sentencing (stressing "rehabilitation")[10] in later years, and now finally back toward determinate sentencing under the Guidelines. The current law of evidence at sentencing is better understood in light of this history.

In colonial times, pronouncement of sentence was purely ministerial: conviction of a felony led inexorably to a definite punishment, often death, unless the defendant could offer a legal reason, such as insanity or pregnancy, to excuse that penalty.[11] Courts therefore did not have meaningful discretion once a defendant was convicted,[12] and elaborate fact-finding procedures were unnecessary.

Imprisonment later became the dominant means of punishment for offenders. As inmate population grew, however, various methods were used to reduce overcrowding, such as pardons, good time, probation and parole, contributing to an increasing indeterminacy of sentences.[13] At the same time, the rehabilitative model of punishment gained wide acceptance. Under that model, convicts needed "treatment" to be "cured" of their criminal tendencies, and the primary goal of imprisonment was to rehabilitate the offender. Sentencing was viewed, therefore, as much as a treatment as it was punishment.[14]

The length of time necessary for rehabilitation could not, of course, be predicted in advance. Accordingly, the sentencing judge imposed an initial indeterminate sentence—for instance, "10 years to life"—but the precise time served was left to a board of "experts" (the parole board) which, after ongoing monitoring of the prisoner's progress, made the ultimate decision as

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9. *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996).

10. Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 Cornell L. Rev. 299, 307 (1994).

11. *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949) ("the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial"); Young, *supra* note 7, at 306.

12. Young, *supra* note 10, at 306.

13. William J. Powell and Michael T. Cimino, *Prosecutorial Discretion under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. Va. L. Rev. 373, 374–77 (1995).

14. *See, e.g.*, N.Y. Crim. Code § 482 (repealed) (in sentencing defendant, court may seek any information that will aid "in determining the proper *treatment* of such defendant") (emphasis added). *See also* Young, *supra* note 10, at 308; Kristen D. Sauer, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 95 Colum. L. Rev. 1232, 1234 (1995); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. Crim. L. & Criminology 679, 701 (1994).

to defendant's release.[15] The court's sentencing decision was a critical component of defendant's overall treatment, and had to be based not only on the nature of the crime but on the nature of the defendant. Courts were therefore encouraged to consider a broad variety of information before imposing sentence—without regard to rules of evidence—such as defendant's background, educational and employment history, family situation, criminal record, and allegations of uncharged criminal conduct.[16] In making its sentencing determination, the court had vast discretion, and was not obliged to explain why the particular sentence was chosen or to justify the exercise of discretion.

### B. Rules of Evidence Did Not Apply at Sentencing

Because courts were not required to find facts, rules of evidence typically did not apply at sentencing. *Williams v. New York*,[17] a Supreme Court decision rendered nearly a half-century ago, exemplifies the then-prevailing view that sentencing courts could consider any information regardless of its admissibility under evidentiary rules.

After convicting Williams of murder, the jury made a non-binding recommendation of life imprisonment. But pursuant to a New York statute that permitted the sentencing judge to consider the defendant's criminal record, reports of mental, psychiatric and physical examinations, and "any information that will aid the court in determining the proper treatment of such defendant," the court relied in part on a pre-sentence investigation report and instead imposed a death sentence. The court acknowledged that the report contained many material facts about defendant relevant to sentencing that were not admissible before a jury. Such information included defendant's alleged commission of thirty burglaries in the vicinity of the murder,[18] and "certain activities" (not described in the Supreme Court opinion) indicating that defendant had a "morbid sexuality," and was a "menace to society."[19]

Although Williams did not dispute the accuracy of any of the information or ask for cross-examination, on appeal he asserted that the statutory scheme deprived him of due process because he had no opportunity to confront or cross-examine the witnesses supplying the information in the report. As framed by the Supreme Court, the case presented a "serious and difficult" question relating to "the rules of evidence applicable to the manner in which a judge may obtain information" for sentencing purposes.[20]

15. *See* U.S.S.G. ch. 1, pt. A(3) (the pre-Guidelines sentencing regime "empowered the parole commission to determine how much of the sentence an offender actually would serve in prison").

16. Young, *supra* note 10, at 308.

17. 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

18. Defendant had not been convicted of any of those burglaries, but the judge had information that defendant had confessed to some and had been identified as the perpetrator of others. *Id.* at 244, 69 S.Ct. at 1081–82.

19. *Id.*

20. *Id.*

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The Supreme Court rejected defendant's challenge for a combination of historical, practical and penological reasons. The Court first noted that, historically, tribunals passing on the guilt of a defendant had been limited by strict evidentiary rules, but the opposite had been true of sentencing proceedings: judges had traditionally been accorded wide discretion in the sources and types of evidence used to assist in determining the appropriate sentence.[21] The Court also noted that practical reasons supported the distinction. When the "narrow" issue of guilt was at stake, rules of evidence served to confine the trial to information strictly relevant to the offense charged, and rested in part on a need to prevent a time-consuming and confusing trial of collateral issues. The task of the sentencing judge, however, was broader, and to make an appropriate determination the court needed "the fullest information possible concerning the defendant's life and characteristics."[22]

That need, explained the Court, was impelled by the modern penological approach to punishment, whereby reformation and rehabilitation—not retribution—had become the dominant objectives. The function of probation officers' reports was to "aid offenders,"[23] and to deny sentencing judges the kind of information contained therein would undermine contemporary penological policies. Indeed, said the Court, it would be totally impractical, if not impossible, to present open court testimony with cross-examination in connection with the type of information contained in presentence reports, and such a procedure could impose an administrative burden and delay.[24]

Congress codified the *Williams* holding in 1970, enacting the following statutory provision: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[25] That policy of liberally receiving all sorts of information and "evidence" at sentencing was consistent with the way most courts actually conducted their business. The significance of the statutory imprimatur, however, is that while *Williams* was a constitutional decision, establishing what *could* be done, the statute sets forth Congressional policy, prescribing what *must* be done.

Not surprisingly, when the Federal Rules of Evidence were enacted in 1975, sentencing proceedings were expressly exempt from those rules.[26] With respect to hearsay, however, some courts fashioned a requirement, in

21. *Id.* at 246, 69 S.Ct. at 1082–83.

22. *Id.* at 247, 69 S.Ct. at 1083.

23. *Id.* at 249, 69 S.Ct. at 1084.

24. *Id.* at 250, 69 S.Ct. at 1084–85.

25. 18 U.S.C. § 3577. This provision was renumbered 18 U.S.C. § 3661 by the SRA. The holding in *Williams* has been repeatedly confirmed by the Supreme Court. *See, e.g., United States v. Watts*, 519 U.S. 148, ____, 117 S.Ct. 633, 635, 136 L.Ed.2d 554 (1997); *Witte v. United States*, 515 U.S. 389, 397–99, 115 S.Ct. 2199, 2205, 132 L.Ed.2d 351 (1995).

26. Fed. R. Evid. 1101(d)(3). Privileges, however, may be invoked even at sentencing. Fed. R. Evid. 1101(c).

recognition of defendants' due process rights, mandating that the hearsay meet a "minimal indicium of reliability" standard.[27]

### C. Pre–Guidelines Burden of Proof

The question of applicable burdens of proof at sentencing did not frequently arise before the Guidelines. There were, however, some occasions when fact-finding under indeterminate sentencing schemes was required—for example, when mandatory minimum sentences were at issue. It was in that context that the Supreme Court considered burdens of proof at sentencing.

In *McMillan v. Pennsylvania*,[28] defendants challenged a Pennsylvania statute treating gun possession as a sentencing factor, rather than as an element of the offense. Under the statute, if the defendant was convicted of certain felonies and the court found at sentencing that defendant "visibly possessed a firearm" during the crime, a minimum five-year sentence had to be imposed.[29] The finding could be based on evidence introduced at trial and any additional evidence offered by either side at the sentencing hearing, and the prosecution's burden of proof was the low preponderance of the evidence standard. By contrast, defendants argued, due process required that elements of the offense be established by the far more stringent "beyond a reasonable doubt" standard.[30]

The Court, in a 5–4 decision, upheld the statute. Although acknowledging that there were constitutional limits to a state's ability to define facts as sentencing considerations as opposed to elements of the offense, the majority—while declining to explicate those limits—concluded that they were not transgressed in that case.[31] The Court reasoned that the statute operated solely to limit the sentencing court's discretion in selecting a penalty from within a range that was already available to it, but did not increase defendants' punishment.[32] The majority additionally opined that the statute had not been tailored to "permit the visible possession finding to be a tail which wags the dog of the substantive offense."[33] Hence, the beyond a reasonable doubt standard was not constitutionally mandated.

The Court likewise rejected the claim that the intermediate "clear and convincing evidence" standard was required. Citing *Williams*, the majority noted that sentencing courts have traditionally heard evidence and found facts "without any prescribed burden of proof at all,"[34] and declined to draw a distinction between background and character evidence and evidence

27. *United States v. Reme*, 738 F.2d 1156, 1167 (11th Cir.), *cert. denied sub nom. Pierrot v. United States*, 471 U.S. 1104, 105 S.Ct. 2334, 85 L.Ed.2d 850 (1985); *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982).

28. 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

29. 42 Pa. Cons. Stat. § 9712 (1982).

30. 477 U.S. at 83, 106 S.Ct. at 2414–15.

31. *Id.* at 86, 106 S.Ct. at 2416.

32. *Id.* at 88, 106 S.Ct. at 2417.

33. *Id.*

34. *Id.* at 91, 106 S.Ct. at 2418–19.

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relating to the charged crime. Indeed, while the Pennsylvania statute ordained a preponderance standard, the Court seemed to suggest even that was not constitutionally required.[35]

* * *

In sum, under indeterminate sentencing schemes stressing rehabilitation, rules of evidence did not apply (although a few courts required that hearsay be at least minimally reliable); indeed, courts considered and sentenced defendants based on all sorts of information, even of dubious reliability. Moreover, when findings of fact had to be made, the preponderance of the evidence standard passed constitutional muster.

## III.

## Fact-finding Under The Federal Sentencing Guidelines

### A. The Importance of Fact-finding

Unlike the previous discretionary sentencing regime, fact-finding under the Guidelines impacts upon the defendant's sentence in an easily identifiable manner. The difference in a convict's sentence resulting from a finding that he distributed, say, one gram as opposed to one kilo of cocaine is measured mathematically under the Guidelines.

The importance of factual findings at sentencing is underscored by the theory underlying the Guidelines. The Commission compromised between a pure "charge offense" system and a pure "real offense" system. Charge sentencing ties the punishment directly to the elements of the crime for which defendant was convicted, without considering aggravating or mitigating factors, such as the manner in which the crime was committed. A real offense system bases the sentence on "the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted."[36] The methodology settled upon contains elements of each: the offense for which defendant was convicted establishes the base offense level, which is adjusted in light of several "real" aggravating or mitigating factors particular to the type of crime (*e.g.*, quantity of drugs for narcotics crimes, or dollar amount of loss for fraud), several "real" general factors (*e.g.*, leadership role in the offense or harm to the victim) and defendant's criminal history.[37]

As an example, suppose a first-time offender, working solo, is convicted of bilking an elderly widow out of her life savings of $300,000 in an elaborate scheme using the mails. The base offense level for mail fraud is six. An additional eight points are tacked on for the "specific offense characteristic" relating to the amount of the loss, and another two for more-than-minimal planning. The sum is 16, to which another two is added for the vulnerable victim adjustment. Assuming defendant is recalcitrant and refuses to accept responsibility for his wrongdoing (and, therefore, is not entitled to a

35. "We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing." *Id.*

36. U.S.S.G. ch. 1, pt. A(4)(a).

37. Breyer, *supra* note 4, at 11–12.

reduction for "acceptance of responsibility"), the applicable guideline range is 27–33 months for this defendant, whose Criminal History Category is I.[38]

In accord with the "real offense" character of the Guidelines, the court is required to consider all of the defendant's "relevant conduct," even if that conduct was not charged or did not result in a conviction.[39] Thus, in making the Guidelines calculation, acts and omissions that were part of the "same course of conduct"[40] as the offense of conviction are aggregated. In the mail fraud hypothetical, if at the sentencing stage information was presented to the court showing that defendant had defrauded other victims in the same scheme for an additional loss of $450,000, 10 points would have been added for the dollar loss characteristic, instead of eight, yielding an increased sentencing range of 33 to 41 months. Or for a more extreme example, the defendant in *United States v. Ebbole*[41] pleaded guilty to distributing a gram of cocaine to an undercover agent, which ordinarily would have resulted in a 27–33 month sentence. But the sentencing court found by a preponderance of the evidence that defendant had possessed 1.2 kilograms as part of the same course of conduct, which more than tripled the range to 92 to 115 months.[42]

It is clear, therefore, that each fact material to the Guidelines calculation can directly impact upon defendant's sentence.

## B. How Facts Are Determined

In making the necessary factual findings, the judge's principal source of information about the defendant, the offense and the applicable guidelines—particularly in plea cases (which constitute the vast majority of criminal convictions)—is the presentence investigative report ("PSI").[43] The PSI has therefore been called "the single most important document in the guideline sentencing process."[44] Prepared under statutory direction by a probation officer operating as an "arm of the court,"[45] the PSI is intended to be a "single rendition of the offense" based on the officer's independent assessment of the relevant facts.[46] In practice, however, probation officers rely almost exclusively on government-provided information, and courts tend to

38. *See* U.S.S.G. §§ 2F1.1, 3A1.1, 3E1.1; U.S.S.G. ch. 4, pt. A; U.S.S.G. ch. 5 pt. A. Sentencing Table.

39. U.S.S.G. § 1B1.3; *see supra* note 5 and accompanying text.

40. U.S.S.G. § 1B1.3(a)(2).

41. 917 F.2d 1495, 1495–1496 (7th Cir. 1990).

42. *Id.* at 1496.

43. 1 ABA Section of Criminal Justice, Practice Under the New Federal Sentencing Guidelines ch. 8[C], at 8–25 (Robert D. Richman, ed. Supp. 1995) (hereinafter "Practice").

44. *Id. See also* Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 151 F.R.D. 153, 158 (1993); Note, *An Argument for Confrontation under the Federal Sentencing Guidelines*, 105 Harv. L. Rev. 1880, 1882 (1992).

45. *See, e.g., United States v. Belgard*, 894 F.2d 1092, 1097 (9th Cir.), *cert. denied*, 498 U.S. 860, 111 S.Ct. 164, 112 L.Ed.2d 129 (1990).

46. Administrative Office of the United States Courts, *Presentence Investigation Reports Under the Sentencing Reform Act of 1984*, at 7 (1987); Practice, *supra* note 43, at 8–25.

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presume the PSI to be reliable.[47] The net result is that information supplied by the government frequently becomes the basis for a sentence that exceeds the guidelines range for the offense of conviction.

The PSI must be disclosed to the parties at least 35 days before sentence is imposed, and the parties are required to communicate their objections to each other and the probation officer within two weeks thereafter. The probation officer may meet with the parties to try to resolve the objections, and any unresolved disputes are identified in a separate addendum given to the court along with the PSI. At sentencing, the court is required either to make findings on each controverted matter or to state that such a finding is unnecessary because the disputed issue will not be considered in, or will not affect, sentencing.[48] Under discretionary sentencing, a judge could easily avoid resolving factual disputes by simply saying that the controversy was immaterial to the chosen sentence. Under the Guidelines, however, given the nature and consequence of most factual disputes, the court will likely be obliged to resolve the dispute.[49]

In fact, while lack of evidentiary standards and broad judicial discretion under pre-Guidelines sentencing have been criticized, one strength of that structure was the correlative discretion judges had to disregard or discount evidence they deemed unreliable.[50] For example, if the PSI said that the probation officer interviewed the case agent who related that an unidentified jailhouse informant implicated defendant in other crimes, the judge was not obliged to ratchet up the sentence based on that multi-level hearsay. Anecdotal evidence supports the notion that judges operated in that fashion. Circuit Judge Edward R. Becker (a former district judge for twelve years under the old sentencing regime) asserts that judges typically discounted unreliable evidence, and at least one other federal judge has written that disputed facts at sentencing were routinely disregarded in imposing punishment.[51]

Judges have lost that flexibility under the Guidelines. They are no longer imbued with the freedom simply to ignore disputed facts and give the defendant the benefit of the doubt in close cases. Instead, courts are compelled to resolve all disputed facts material to the sentence.[52]

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**47.** Gerald W. Heany, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 173 (1991); *United States v. Sherbak*, 950 F.2d 1095, 1100 (5th Cir. 1992) ("A presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the Sentencing Guidelines").

**48.** *See* Fed. R. Crim. P. 32.

**49.** Practice, *supra* note 38, at 8–33.

**50.** *United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996) (in pre-Guidelines era, "a court had discretion to disregard [uncharged or acquitted conduct] entirely, even if proven.") *See also* Young, *supra* note 7, at 315 ("One of the generally unacknowledged merits of discretionary sentencing was that it permitted judges to weight evidence based on its reliability").

**51.** Becker, *supra* note 44, at 154. Judge Eisele, in *United States v. Clark*, 792 F.Supp. 637, 649 (E.D.Ark. 1992), noted, "[i]f a factor important to sentencing was, after discussion, still denied, *it simply was omitted from consideration. Id.* (emphasis added)."

**52.** See *United States v. Lombard*, 102 F.3d 1, 4 (1st Cir. 1996); *Gigante*, 94 F.3d at 56.

Courts, however, have not been given much statutory guidance in undertaking that task. The only allusion to evidentiary standards in the SRA is 18 U.S.C. § 3661, which is merely a renumbering without substantive change of 18 U.S.C. § 3557 (the codification of *Williams*).[53]

The Guidelines' consideration of evidentiary issues is only slightly more elaborate. In a Policy Statement, the Commission declared that the sentencing judge may consider relevant information without regard to the rules of evidence, so long as the information has "sufficient indicia of reliability to support its probable accuracy."[54] On its face, that standard is seemingly more stringent than the "minimal indicia of reliability" due process standard courts had applied before the Guidelines, and some courts have expressly said so.[55] But many courts continue to rely on the "minimal indicia" formulation.[56] In the Commentary, the Commission expressly stated that "[r]eliable hearsay" may be considered but that "[u]nreliable allegations" shall not.[57]

With respect to fact-finding procedures, the Commission commentary noted that under pre-Guidelines practice, sentencing factors were often determined informally, partially explainable because particular offense and offender characteristics "rarely had a highly specific or required sentencing consequence."[58] That situation, the Commission acknowledged, no longer exists under the Guidelines; to the contrary, resolution of disputed facts would, indeed, "have a measurable effect on the applicable punishment."[59] Consequently, said the Commission, "[m]ore formality" is unavoidable if sentencing is to be accurate and fair.[60]

The additional "formality" in sentencing hearings contemplated by the Commission does not include a right to confront adverse witnesses or even an absolute right to call one's own witnesses.[61] Moreover, as for burdens of proof, the Commission, in a 1991 commentary amendment, stated its belief

53. Young, *supra* note 10, at 322 & n.141.

54. U.S.S.G. § 6A1.3. Policy statements are generally binding on courts. *Williams v. United States*, 503 U.S. 193, 200–01, 112 S.Ct. 1112, 1119–20, 117 L.Ed.2d 341 (1992).

55. *United States v. Miele*, 989 F.2d 659, 663–664 (3d Cir. 1993) (*citing* U.S.S.G. § 6A1. 3(a); *United States v. Torres*, 926 F.2d 321, 324 (3d Cir. 1991)).

56. *See, e.g., United States v. Browning*, 61 F.3d 752, 756 (10th Cir. 1995); *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1994); *United States v. Silverman*, 976 F.2d 1502, 1506 (6th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 990, 113 S.Ct. 1595, 123 L.Ed.2d 159 (1993).

57. U.S.S.G. § 6A1.3, comment. The Commission's Official Commentary to the Guidelines is binding on courts unless inconsistent with the Constitution, federal statute, or a guideline itself. *Stinson v. United States*, 508 U.S. 36, 37–38, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

58. U.S.S.G. § 6A1.3, comment.

59. *Id.*

60. *Id.*

61. *United States v. Little*, 61 F.3d 450, 454 n.2 (6th Cir. 1995), *cert. denied*, 516 U.S. 1132, 116 S.Ct. 954, 133 L.Ed.2d 877 (1996); *Silverman*, 976 F.2d at 1511; *United States v. Wise*, 976 F.2d 393, 400 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 989, 113 S.Ct. 1592, 123 L.Ed.2d 157 (1993); *United States v. Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992).

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that the preponderance standard meets due process requirements and "policy concerns" in resolving disputed factual issues.[62]

## IV.

## Proposals for Reform

The pervasive use of hearsay at sentencing, lack of confrontation rights, and light burdens of proof have spawned arguments and proposals for change. Critics of the existing system are of one mind that pre-Guidelines law, which is the foundation for current doctrine, has been inappropriately extended to the Guidelines.

First, critics point out that rehabilitation as the paramount goal of sentencing has now been expressly repudiated.[63] The primary rationale of pre-Guidelines cases such as *Williams v. New York* was that courts needed access to as much information as possible about the offender to arrive at the most appropriate sentence in aid of his or her rehabilitation. Such wide-ranging inquiries are no longer necessary under, and in fact are severely circumscribed by, Guidelines sentencing.[64]

Indeed, under discretionary sentencing the information presented to the judge was generally not subject to scrutiny through adversarial procedures. By contrast, Rule 32 of the Federal Rules of Criminal Procedure now "contemplates full adversarial testing of the issues relevant to a Guidelines sentence."[65] Because the focus under Guidelines sentencing is on the offense of conviction and related crimes, rather than the offender, "the facts that are now relevant to sentencing are more susceptible to trial-type proof than those facts relevant under the rehabilitative scheme.... "[66]

Judges and scholars have propounded arguments to increase the reliability of fact-finding at sentencing. Some are examined below. In addition, some of our own ideas to remedy problems that have become prevalent under Guidelines sentencing are offered. Specifically, we address (i) the frequent use of hearsay allegations to increase a defendant's sentence; and (ii) prosecutors' use of "relevant conduct" to lengthen a defendant's sentence, even though that conduct may not have been charged or resulted in a conviction.

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**62.** U.S.S.G. § 6A1.3, comment.

**63.** The SRA lists punishment, deterrence, incapacitation and rehabilitation (in that order) as factors the court should consider in imposing sentence. 18 U.S.C. § 3553(a)(2)(A)-(D). U.S.S.G. ch. 1, pt. A(3), notes Congress' "basic objective" with regard to sentencing when it enacted the SRA: honesty, uniformity, and proportionality. *Id.* 28 U.S.C. § 994(k) instructs the Sentencing Commission to "insure that the guidelines reflect the *in*appropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed vocational training, medical care, or other correctional treatment."

*Id.* (emphasis added).

**64.** *See generally* U.S.S.G. ch. 5, pt. H.

**65.** *Burns v. United States*, 501 U.S. 129, 135, 111 S.Ct. 2182, 2185, 115 L.Ed.2d 123 (1991).

**66.** Note, *supra* note 44, at 1886.

### A. Confrontation Clause Rights

The Supreme Court has not yet decided whether the Sixth Amendment's Confrontation Clause applies to sentencing proceedings. The courts of appeals—sometimes over strong dissents[67]—have generally agreed that the Guidelines sentencing regime does not compel recognition of confrontation rights. Dissenting judges and scholars, however, have argued that defendants should have such rights. It may well be that the Supreme Court, when it ultimately confronts the issue, will decide against confrontation rights as a constitutional imperative. We nevertheless believe that evidentiary rules grounded in the policies underlying the Confrontation Clause should be adopted for use at sentencing.

The argument in favor of confrontation starts with the text of the Sixth Amendment, which confers such rights in "all criminal prosecutions." It would seem self-evident that a sentencing hearing is an integral part of a criminal prosecution, particularly in light of the fact that at the time the Sixth Amendment was adopted, trial and sentencing were part of a single proceeding.[68]

The confrontation argument is strengthened when one considers the apparent purpose of the Clause. Although the precise intent of the framers is unknown,[69] the Sixth Amendment operates to afford criminal defendants a fair opportunity to challenge and expose weaknesses in the prosecution's evidence at trial, principally through face-to-face cross-examination.[70] Under the Guidelines, where factual findings on disputed issues may be as consequential to defendants as the conviction itself, it may be cogently argued that defendants should be afforded similar rights.

*Specht v. Patterson*,[71] a Supreme Court case decided on due process grounds, also suggests that a defendant may be entitled to confront adverse witnesses at sentencing. Under the statutory scheme in that case, if a defendant was convicted of certain sex offenses, he was subject to an indeterminate sentence of one day to life upon a finding, in a separate proceeding, that he posed a threat of bodily harm to the public, or was a mentally ill, habitual offender. The Supreme Court held that that requisite finding was a "new finding of fact . . . that was not an ingredient of the offense charged" and defendant was therefore entitled, among other things, to be "confronted with witnesses against him" and "the right to cross-

67. *See Wise*, 976 F.2d at 406–410 (Arnold, C.J., concurring in part and dissenting in part); *Silverman*, 976 F.2d at 1524–27 (Merritt, C.J., dissenting).

68. "If 'plain meaning' is the criterion, this is an easy case [in favor of confrontation rights]." *Wise*, 976 F.2d at 407 (Arnold, C.J., concurring in part and dissenting in part). *But see United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990) ("As a textual matter, the sixth amendment, which refers to 'criminal prosecutions,' arguably applies only at trial.").

69. *See, e.g., White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part and concurring in the judgment); *California v. Green*, 399 U.S. 149, 99 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring).

70. *See, e.g., Coy v. Iowa*, 487 U.S. 1012, 1020, 108 S.Ct. 2798, 2802–03, 101 L.Ed.2d 857 (1988) (placing screen between defendant and witnesses at trial violates Confrontation Clause).

71. 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

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examine."[72] Under the Guidelines, courts frequently make new factual findings that are not elements of the charged offenses.[73]

When a defendant is at risk of an increased sentence based on hearsay allegations, he should have a right to confront and cross-examine his accuser under oath to expose bias, lack of perception, memory defects, motive to lie and other factors bearing on the reliability of the proffered testimony. In the typical case, where at best defendant is given the opportunity to cross-examine a law enforcement officer relaying the accusations, the defendant does not have a realistic chance to undermine the charges, even though the informant may be mistaken or—worse—lying.

We recognize, however, that in exceptional circumstances the government may have a compelling need to avoid face-to-face examination of the declarant. For example, an informant's life may be endangered or the integrity of an ongoing investigation may be compromised if the informant were forced to testify. Where the government shows that compelling interests are at stake, the court should have discretion to modify the right of confrontation to balance defendant's rights and the government's legitimate interests. The court may consider conducting an in-camera examination of the informant based on written questions submitted by the defendant, may demand affidavits and strict corroboration of the informant's accusations, or may devise other means to adequately balance the parties' respective interests.

In deciding the appropriate procedure, the court's discretion to depart from an absolute right of confrontation should be exercised in inverse proportion to the amount by which defendant's sentence would be increased were the accusations credited. In other words, if defendant's sentence would be significantly increased based on the hearsay, the court should be hesitant to entertain anything less than full confrontation; in these circumstances, the government may choose to forego an enhanced sentence altogether. But where the sentence would be lengthened by only a few months and the government can show a compelling need not to produce the witness, the court may wish to fashion an alternate procedure.

Recognizing confrontation rights at sentencing, albeit in modified form, would help assure that sentences are based on reliable evidence. The prosecution would not, of course, be required to produce the source of information for cross-examination if the evidence falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness.[74] But the common situation of a law enforcement officer relaying allegations made by an unidentified "confidential informant" would be obviated.

### B. Burdens of Proof

While recently reaffirming that "application of the preponderance standard at sentencing generally satisfies due process," the Supreme Court declined to address the question, on which it noted "a divergence of opinion among the circuits," of "whether, in extreme circumstances, relevant con-

72. *Id.* at 610, 87 S.Ct. at 1212–13.

73. *See supra* note 5 and accompanying text.

74. *Ohio v. Roberts*, 448 U.S. 56, 65–66, 100 S.Ct. 2531, 2538–39, 65 L.Ed.2d 597 (1980).

duct that would dramatically increase the sentence must be based on clear and convincing evidence."[75]

The arguments in favor of a higher burden of proof, such as the intermediate "clear and convincing" standard, distinguish the pre-Guidelines case of *McMillan v. Pennsylvania* on the ground that the defendants there were not exposed to a greater punishment range than already available to the sentencing judge. Indeed, the Supreme Court acknowledged that defendant's argument would have been stronger had that not been the case.[76] By contrast, under the Guidelines, defendants *are* exposed to greater punishment when critical disputed facts are found against them. That potential militates in favor of a higher burden of proof.

Judges and commentators have also argued that the *Matthews v. Eldridge*[77] due process test requires a higher evidentiary burden.[78] Under that test, the court must consider (i) the private interest at stake; (ii) the risk of an erroneous deprivation of that interest and the value of additional procedural safeguards; and (iii) the government's interest, including cost and administrative concerns.[79] Proponents argue that the balance of these factors mandates a burden of proof greater than the preponderance standard.

The Third Circuit, in *United States v. Kikumura,*[80] was the first court to impose a higher standard of proof in sentencing than the preponderance of the evidence standard. In rare cases, the *Kikumura* court explained, due process requires disputed facts at sentencing to be decided on the basis of a clear and convincing standard of proof.[81] In *Kikumura,* the trial court had departed upwards from a sentencing range of 27 to 33 months and imposed a 30 *year* sentence, based in part on allegations that defendant was a terrorist affiliated with the Japanese Red Army who was on a major terrorist bombing mission in this country. Citing *McMillan,* the Third Circuit observed that the case was a dramatic example of a sentencing hearing functioning as a " 'tail which wags the dog of the substantive offense.' "[82] The court concluded that it could not reflexively apply the same procedures that are adequate for "more mundane, familiar sentencing determinations"[83] and held that a clear and convincing evidence burden of proof was mandated (and satisfied) in that case.[84]

75. *Watts,* 519 U.S. 148, ___, 117 S.Ct. 633, 637, 136 L.Ed.2d 554 (1997).

76. *McMillan v. Pennsylvania,* 477 U.S. 79, 88, 106 S.Ct. 2411, 2417, 91 L.Ed.2d 67 (1986).

77. 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

78. *See, e.g.,* Note, *supra* note 44, at 1895–96.

79. *Matthews,* 424 U.S. at 335, 96 S.Ct. at 903.

80. 918 F.2d 1084 (3d Cir. 1990).

81. *Id.* at 1101.

82. *Id.* at 1100–01.

83. *Id.* at 1101.

84. *Id.*

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Several other courts have expressed a willingness to adopt *Kikumura's* clear and convincing standard in certain, extreme circumstances, or at least require a finding beyond a preponderance of the evidence.[85] Commentators have welcomed *Kikumura's* willingness to impose a higher burden of proof, but have questioned whether there is a principled basis for not imposing that higher burden when *any* increased sentence will result from fact-finding at sentencing.[86] We believe that the clear and convincing burden of proof is more appropriate than the low preponderance standard in at least two circumstances: (i) when the government seeks to increase defendant's sentence by *any* amount using uncharged "relevant conduct"; and (ii) when defendant's sentence, regardless of the circumstances, would be substantially increased based on evidence presented at sentencing.

At sentencing, defendants are stripped of important trial protections such as jury determination of facts, the reasonable doubt standard and confrontation rights. Presently, prosecutors have a tremendous incentive to charge a defendant with a single, easily provable count and then to seek additional punishment at the sentencing stage by establishing other "relevant conduct" by the relatively light preponderance standard. The manifest unfairness of such a practice would be mitigated by holding the government to a higher burden of proof when it seeks to add to defendant's sentence based on uncharged conduct. Although in recognition of the differences between trial and sentencing we do not advocate that the reasonable doubt standard apply, we think that in these circumstances the familiar, intermediate clear and convincing standard should be used instead of the preponderance standard.

Similarly, whenever a significant increase in punishment would result from evidence presented at the sentencing stage, the clear and convincing standard should apply. That is in accord with the *Kikumura* court's holding. When the consequences to a defendant are as profound as the loss of liberty for an extensive period, we should not be satisfied with having the relevant facts determined by the same standard that governs civil disputes.

### C. Rules of Evidence

Although we do not think that it is necessary to adopt the Federal Rules of Evidence in their entirety for use in sentencing proceedings, we believe that the rules relating to hearsay should be recognized when defendant's sentence would be materially affected. Similarly, certain other evidentiary rules, enumerated below, may appropriately be applied in the sentencing context.

The Rules define hearsay[87] and set forth the appropriate exceptions to the general principle that hearsay is inadmissible.[88] By definition, the Rules

85. *See United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996); *United States v. Mergerson*, 4 F.3d 337, 344 (5th Cir. 1993); *United States v. Corbin*, 998 F.2d 1377, 1387 (7th Cir. 1993); *United States v. Restrepo*, 946 F.2d 654, 656, n.1 (9th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 961, 112 S.Ct. 1564, 118 L.Ed.2d 211 (1992); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.C. Cir.), *cert. denied*, 506 U.S. 901, 113 S.Ct. 287, 121 L.Ed.2d 213 (1992).

86. *E.g.*, Young, *supra* note 7, at 339.

87. Fed. R. Evid. 801(c).

88. *See* Fed. R. Evid. 803–804.

filter out only unreliable allegations, for if there are "guarantees of trustworthiness" equivalent to the other exceptions, the hearsay is admissible under the catch-all exception.[89]

All this is closely related to confrontation rights, as the Supreme Court has recognized that defendants have no right of confrontation if a firmly-rooted hearsay exception applies or if the out-of-court statements bear particularized guarantees of trustworthiness.[90] Thus, if the hearsay meets an exception, there is likely no constitutional right of confrontation. Conversely, if the hearsay cannot meet an applicable exception, it is presumably the sort that requires probing by defendant to assure the court of its suitability for increasing a defendant's sentence. Adoption of the hearsay rules would therefore help identify when our proposed modified right of confrontation would be triggered and in any event would serve an independent value of helping to assure that sentences are based on reliable evidence.

Certain other rules of evidence can readily be applied at sentencing to enhance reliability of factfinding. For example: Rule 106, the "complete writing" rule;[91] Rule 602, requiring a witness to testify based on personal knowledge; article VII, relating to opinion and expert testimony; article IX, governing authentication; and article X, the rules relating to admissibility of duplicate documents and summaries of voluminous writings.

**D. Other Proposals**

A variety of other proposals for reform have been made. Judge Becker (the author of *Kikumura*), targeting hearsay that would elevate the sentencing range, proposes development of an "unfairness index" that would evaluate the government's evidence to determine which hearsay is so unreliable that the government must either produce the witness or do without the evidence. As part of his methodology, he proposes that certain devices, such as affidavits and discovery, may in some cases alleviate problems underlying hearsay.[92]

Professor Deborah Young argues that the best way to achieve needed, comprehensive reform is to adopt an amended version of the Federal Rules of Evidence for sentencing purposes. She notes that the Rules are generally neutral to both government and the defendant, are designed to insure reliable fact-finding, and are familiar to practitioners and judges. Moreover, since the Rules are not of constitutional magnitude, refinements can be made through amendments.[93]

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89. *See* Fed. R. Evid. 803(24).

90. *Idaho v. Wright*, 497 U.S. 805, 814–815, 110 S.Ct. 3139, 3145–47, 111 L.Ed.2d 638 (1990). *See also White v. Illinois*, 502 U.S. 346, 356–357, 112 S.Ct. 736, 742–43, 116 L.Ed.2d 848 (1992) (hearsay falling within an established exception *per se* not violative of Confrontation Clause).

91. Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

92. Becker, *supra* note 44, at 170–71.

93. Young, *supra* note 10, at 371–72.

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Less ambitious in her proposed reforms is Professor Margaret Berger, who suggests that certain specialized rules be adopted responding to some of the more troubling problems.[94] For example, she submits that hearsay statements made by individuals in custody, engaged in plea bargaining, or awaiting sentence may not be used to prove relevant conduct. As for other hearsay, it should not be used at sentencing unless corroborated by trial testimony, tangible evidence, or defendant's allocution.

We believe that, in general, evidentiary reforms in sentencing should be party-neutral, as are the Federal Rules of Evidence themselves. Thus, defendants seeking downward departures should be subject to the same evidentiary strictures and burdens as the government in seeking an upward modification. Implementation of reforms, however, may require reconsideration of the inherent presumptions in the Guidelines, for they affect who bears the burden of proving disputed facts.

## Conclusion

Although some may argue that more formalized evidentiary rules will make the sentencing process less streamlined and will consume precious judicial and prosecutorial resources, the reality is that in a criminal justice system where the overwhelming majority of prosecutions are resolved by guilty plea prior to trial, sentencing has become *the* critical stage of the proceeding. It seems to us, therefore, that the need for uniform, appropriate rules that courts are to follow at a proceeding in which decisions are made concerning whether and, if so, for how long, a person will be incarcerated outweighs any incremental societal cost of implementing such rules.

The legacy of the bygone era where courts sentenced to "rehabilitate" is an evidentiary scheme that in many instances does not afford Guidelines defendants adequate protection against enhanced punishment based on unreliable evidence. This Report has examined the past, the present, and proposals for the future. It seems clear that the unfairness inhering in the present systems should be remedied, and that a variety of tools are at the disposal of conscientious courts, legislators and commissioners.

April 1997

94. Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 Fed. Sent. R. 96 (1992).

**FORDHAM** Item IV B
University School of Law

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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public Comment on Rule 609(a)
Date: September 15, 1998

Attached is a letter from a law student at American University, suggesting an amendment to Rule 609(a). He contends that the two subdivisions of Rule 609(a) should be connected by "or" rather than "and". The Rule currently reads as follows:

**Rule 609. Impeachment by Evidence of Conviction of Crime**

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

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

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

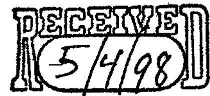
The letter contends that the use of the connector "and" makes it seem like "a two step process" and is therefore misleading. In fact, however, the use of "and" to connect subdivision (a)(1) and (a)(2) is not misleading. The Rule is not conjunctive or sequential in the problematic sense implied in the letter. Rather, each subdivision is self-contained. Each subdivision sets forth its own independent admissibility requirements that, if met, mandate the admissibility of the conviction. Because each subdivision contains its own admissibility requirements, the subdivisions are independent of each other. Arguably, the use of "or" would imply some connection that does not exist.

For example, if you want to provide that two kinds of evidence would be admissible--one meeting requirement A and one meeting requirement B--and you wish to use a connecting word, you would use "and". "This and this are both admissible" makes more sense than "this or this are admissible." That is why the drafters used the "and" connector in Rule 609(a).

The subdivisions are really best considered, therefore, as separate sentences, which happen to be set within the same Rule. While the use of "or" would not cause much damage, it seems awkward in the context of the run-on sentence that is Rule 609(a). Moreover, as the author of the letter admits, no court has had a problem in applying the subdivisions as separate provisions. Therefore, it does not seem necessary to amend the Rule to make the suggested change. The ultimate decision on the matter is, of course, for the Committee.

# Attachment to Rule 609 Memorandum

#4704



98-EV-A

3307 Willow Crescent Drive
#32
Fairfax, VA 22030
April 28, 1998

Peter G. McCabe
Secretary
Commission on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Room 4170
Washington, DC 20544

Dear Mr. McCabe:

I am a law student at American University's Washington College of Law and I am writing to you at the suggestion of my Evidence professor, David Aaronson.

While preparing for my Evidence final exam, I noticed what may be a potential problem in the Federal Rules of Evidence. FRE 609(a) contains two paragraphs that are joined by the conjunction "and." I believe that this is misleading and could lead to conflicting interpretations in the Rule in the future.

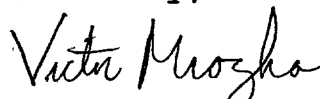
My understanding of this Rule is that the credibility of a witness can be attacked if the crime admitted carries with it a sentence of death of imprisonment of more than one year (and if it has probative value) OR if the crime involves dishonesty or a false statement. Inclusion of the conjunction "and" makes it seem like it is a two step process, which would not make any sense of the Rule as written.

Furthermore, according to the Advisory Committee notes that follow, the paragraphs were originally written to be connected by the conjunction "or" in all its previous versions, making this a process in which there was a choice of categories in which place evidence used to attack credibility.

Although, to my knowledge, the court has not construed the Rule to be a two-step process, I believe that it could cause confusion in the future. While this is a minor point, I believe that it warrants the Committee's attention.

Therefore, I propose that the Rule be amended to include the conjunction "or" in place of "and" so that the Rule can be correctly interpreted without any confusion as to its meaning.

Sincerely,



Victor Mroczka
WCL '99

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

# ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

PETER G. McCABE
Assistant Director
Office of Judges Programs

May 22, 1998

Mr. Victor Mroczka
3307 Willow Crescent Drive
#32
Fairfax, Virginia 22030

*Re: Proposed Amendments to Rule 609(a) of the Federal Rules of Evidence*

Dear Mr. Mroczka:

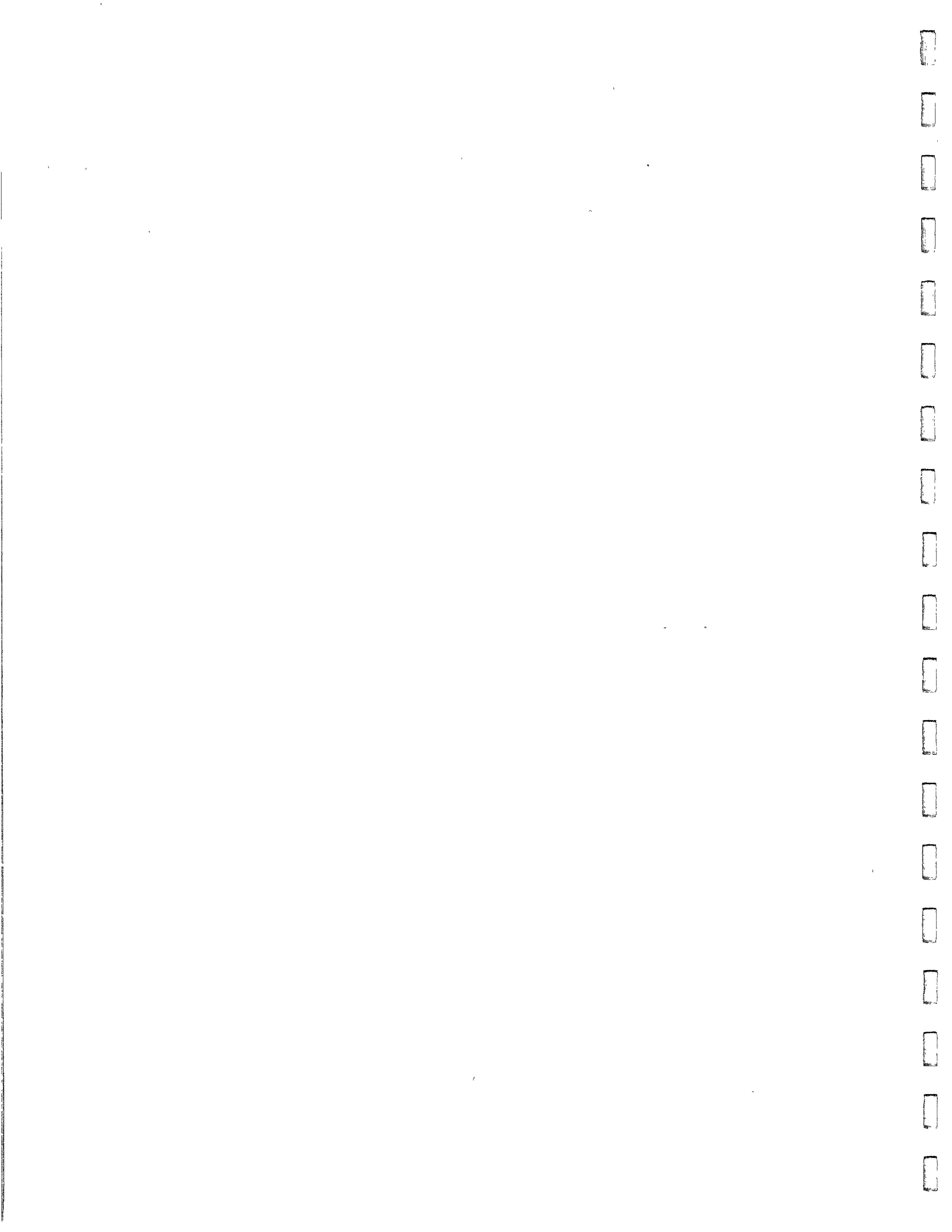
Thank you for your letter dated April 28, 1998, suggesting an amendment to Evidence Rule 609(a). A copy of your letter will be sent to the members of the Judicial Conference Advisory Committee on Evidence Rules for their consideration.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable Fern M. Smith
Professor Daniel J. Capra
Professor Daniel R. Coquillette



Item V - VII

# ORAL REPORTS