ADVISORY COMMITTEE
ON
EVIDENCE RULES

New York, New York
April 12-13, 1999

ADVISORY COMMITTEE ON EVIDENCE RULES

Agenda for Committee Meeting
New York, New York
April 12th and 13th, 1999

I. Opening Remarks of the Chair.

Including approval of the minutes of the October meeting, and a report on the last meeting of the Standing Committee. The Draft Minutes of the October 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. Proposed Amendments Released for Public Comment

A. Text of Rules. The text of each of the rules released for public comment is included in the agenda book

B. Summary of Public Comments. A memorandum containing a summary of all public comments received on all proposed amendments is included in the agenda book If a rule is referred to the Standing Committee for adoption, the summarized public comments for that rule will be included in an appendix to the rule.

III. Consideration of Proposed Amendments Released for Public Comment.

A. *Rule 103.* A memorandum discussing public comment on the proposed amendment, and possible changes to the proposal, is included in the agenda book.

B *Rule 404(a).* A memorandum discussing public comment on the proposed amendment, and possible changes to the proposal, is included in the agenda book

C *Rule 701.* A memorandum discussing public comment on the proposed amendment, and possible changes to the proposal, is included in the agenda book.

D. *Rule 702.* A memorandum discussing public comment on the proposed amendment, and possible changes to the proposal, is included in the agenda book. An outline on cases applying *Daubert* is also included. A memorandum discussing issues arising from the Supreme Court's decision in *Kumho Tire* will be sent under separate cover if the case is decided before the Committee meeting.

E. *Rule 703.* A memorandum discussing public comment on the proposed amendment, and possible changes to the proposal, is included in the agenda book.

F. *Rules 803(6) and 902.* A memorandum discussing public comment on the proposed amendments, and possible changes to the proposed amendment to Rule 902, is included in the agenda book.

IV. Consideration of Other Evidence Rules

A *Privileges.* A short report from the Subcommittee on Privileges is included in the agenda book.

V. Recent Developments.

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

B. Technology. Report on the work of the Standing Committee's Subcommittee on Technology.

VI. New Matters

VII. Next Meeting

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Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 22, 1998

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on October 22, 1998, in the Judicial Conference Center of the Thurgood Marshall Building in Washington, D.C.

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
Hon. Jeffrey L. Amestoy
Professor Kenneth S. Broun
Mary F. Harkenrider, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure
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
Hon. James K. Robinson, Justice Department
Roger Pauley, Esq., Justice Department
Professor Stephen A. Saltzburg, American Bar Association Representative
John K. Rabiej, Esq , Chief, Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center
Joseph Spaniol, Esq.

Opening Business

The Chair opened the meeting by welcoming two new members, Chief Justice Jeffrey Amestoy and David Maring. The Chair then asked for approval of the minutes of the April 1998 meeting. These minutes were unanimously approved.

The Chair reported on actions taken at the June 1998 Standing Committee meeting. The Standing Committee approved the Evidence Rules Committee's proposed amendments to Rules 701, 702, and 703 to be released for public comment. The proposed amendments to Evidence Rules 103, 404(a), 803(6), and 902 had been approved for release for public comment at a previous meeting of the Standing Committee. The Chair recommended that Committee members read the minutes of the Standing Committee meeting, as the minutes give a comprehensive account of all of the cutting edge issues that the Standing Committee is considering.

Public Hearing on Rules Released for Public Comment

The first part of the Evidence Rules Committee meeting was devoted to a public hearing on the Rules that have been released for public comment. The following members of the public gave testimony and engaged in dialogue with the Committee members.

1. *Professor James Duane*, Regent Law School (Rule 103)—Suggesting changes to the Committee Note to Rule 103, and deletion of the Rule's codification of *Luce v. United States* and its progeny.

2. *Roy Katriel, Esq.*, American University Evidence Project (Rule 702)—Suggesting separation of qualification and reliability standards, and articulation of the standard of proof in the text of the Rule.

3. *Libretta Porta, Esq.*, American University Evidence Project (Rule 703)—Suggesting that the Rule be amended to prohibit an expert from relying on inadmissible information, and that a new hearsay exception be added for reliable information used by an expert.

4. *Gerson Smoger, Esq.*, American Trial Lawyers Association (Rule 702)—Opposing the proposed amendment.

5 *Professor Laird Kirkpatrick,* University of Oregon Law School (Rules 103, 404, 701, 702, 703, 902)—Supporting Rule 103 but suggesting deletion of Rule 103's codification of *Luce* and its progeny; suggesting narrowing of character evidence that can be offered as rebuttal under the proposed amendment to Rule 404 and a change to the Committee Note; opposing proposed Rule 701; opposing proposed Rule 702; supporting but suggesting clarifying language for proposed Rule 703; generally supporting the proposed amendments to Rules 803(6) and 902.

6. *Professor Richard Friedman,* University of Michigan Law School (Rules 103, 404, 701, 702, 703, 902)—Suggesting deletion of Rule 103's codification of *Luce* and its progeny; suggesting narrowing of character evidence that can be offered as rebuttal under the proposed amendment to Rule 404; opposing proposed Rule 701; opposing proposed Rule 702; suggesting clarifying language for proposed Rule 703; generally supporting the proposed amendment to Rules 803(6) and 902.

7. *Stephen Morrison, Esq.*, Lawyers for Civil Justice (Rules 701, 702, 703)—Strongly supporting the proposed amendments to Rules 701, 702, and 703.

Committee Meeting

After the public hearing was concluded, the Committee met to discuss the public comments received both at the hearing and in writing. The Committee also discussed a public comment received concerning the need to amend another Evidence Rule. The discussion of the public comments and the specific rules was not intended to lead to definitive conclusions, because the public comment period is continuing and the Committee looks forward to receiving further suggestions and comments from members of the public. The Committee decided on a tentative basis, however, that certain changes to the proposals might be made in light of some of the public comments

Rule 103

The Committee considered the public comments received to date on the proposed amendment to Rule 103 One comment suggested that a citation in the Committee Note might be misleading and that a different citation might be more illustrative of why objections to definitive advance rulings need not be renewed. The Committee tentatively agreed to replace the current citation with the suggested one. Another comment suggested that the Committee Note should be amended to emphasize that an advance ruling cannot be relied on if the facts and assumptions underlying the trial court's advance ruling are materially changed at trial. The Committee tentatively agreed to address this matter in the Committee Note.

Each of the three public comments received on the proposed amendment (all from law professors) recommend that the language in the proposal codifying *Luce v. United States* and its progeny should be dropped. None of the commentators seriously suggest that the Rule should be amended to overrule *Luce*—thereby allowing a party to appeal from an adverse advance ruling even if the ruling is dependent on a trial event that never actually occurs. Rather, the commentators suggest that the second sentence of the proposed amendment should be dropped, and the Committee Note changed to state that the Committee was taking no position on whether *Luce* should be applied or extended.

The Committee engaged in an extensive discussion on whether the *Luce* rule should be dropped from the text of the proposed amendment. Some members thought, as they had when the

issue was previously discussed, that failing to include any reference to *Luce* in the text of the Rule might lead to the misconception that the *Luce* rule had been abrogated. Others noted that the *Luce* rule has never been questioned by the federal courts and indeed has been extended to comparable situations, e.g., prohibiting a criminal defendant from appealing a ruling that would admit evidence if the defendant pursued a certain defense, where the defendant never pursued that defense at trial

The Committee agreed to revisit the question of whether the *Luce* language should be retained at its April 1999 meeting, after the end of the public comment period. No motion was made to tentatively change the proposal at this point.

Rule 404(a)

The proposed amendment to Rule 404(a) provides that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" character trait of the accused. Two members of the public, both law professors, commented that the term "pertinent" is too broad. For example, in a criminal prosecution with multiple counts, a defendant who chose to attack the victim's character in a defense of one count would open himself up to an attack on a character trait that would be pertinent to a completely unrelated count.

After discussion, the Committee agreed in principle and on a tentative basis that the term "pertinent" was too broad. The Committee tentatively agreed that the word "pertinent" should be replaced with the word "same " Under this proposal, the prosecution could rebut an attack on the victim's character only with evidence of the same bad character trait of the defendant. Some concern was expressed that the use of the word "same" might unduly narrow the prosecution's ability to rebut an attack on the victim's character. The Committee agreed to consider any cases or hypotheticals brought to its attention that might indicate that the prosecution's rebuttal power would have to be broader.

Another public comment suggested that the Committee Note add a reference to the fact that an accused might introduce a negative character trait of the victim for a purpose other than to prove that the victim acted in accordance with the character trait. For example, an accused in a self-defense case might introduce the victim's reputation for violence to show that the accused was aware of that reputation and acted accordingly. In such a case, the door would not be opened to a character attack on the defendant. The Committee tentatively agreed that the Committee Note should be amended in accordance with the suggested comment.

Rule 701

Two public comments expressed concern that the proposed Rule's prohibition of lay testimony based on specialized knowledge would result in a change of practice The

commentators contended, for example, that under the proposal a witness who would testify that a certain substance was drugs would have to be qualified and disclosed as an expert.

The Committee considered whether the proposed amendment might have to be changed in light of these public comments. Some members believed that there are two different kinds of specialized knowledge that a witness might use. One type of knowledge is specialized in the sense that not everyone has it, but it is nonetheless something that one needs no training or expertise to attain. Examples include testimony that certain activity occurs on a corner, or that a certain substance is a drug. Another kind of specialized knowledge is that which is beyond common experience, and which requires experience and training to obtain. Examples are testimony that a product failed due to metal fatigue, or that coconspirators were speaking in code.

Several Committee members expressed the opinion that testimony based on particularized knowledge that any member of the public could obtain without training or expertise should be covered by Rule 701, while testimony based on specialized knowledge that is dependent on special skill or training should be covered by Rule 702. Many members thought that this distinction was already made by the proposed amendment to Rule 701, while others thought that a stylistic change might be made to the text to make it more clear that testimony based on common but particularized knowledge is covered by Rule 701 rather than Rule 702. One possibility considered was to state specifically in the Rule that if testimony is expert testimony within the meaning of Rule 702, then it cannot be admitted under Rule 701. The Committee agreed to revisit the possibility of a stylistic change to Rule 701 at the April 1999 meeting, and to consider new proposals in light of any intervening public comment.

Finally, the Committee considered the suggestion of the Style Subcommittee of the Standing Committee to change the title of Rule 701 so as to refer to witnesses in the singular rather than the plural. It was pointed out, however, that someone searching for the rule would probably be considering the question of witnesses in the plural sense rather than the singular. Moreover, if the title is to be changed, it should be changed in such a way as to indicate that the Rule governs not witnesses but testimony. For these reasons, the Committee decided not to adopt the Style Subcommittee's suggestion at this time.

Rule 702

The public comment received so far is, not surprisingly, divided on the merits of the proposal to amend Rule 702. A major intervening development is that the Supreme Court has granted certiorari in *Kumho Tire v. Carmichael*, where the issue is whether the *Daubert* gatekeeping standards apply to the testimony of a tire failure expert who testified largely on the basis of experience The Committee agreed that the result in *Kumho* could affect the viability of the proposed amendment to Rule 702 But it also agreed that it was premature to reconsider the Rule at this point, since the Supreme Court will not hear argument on the case until December. Several Committee members expressed the hope that the Supreme Court would decide *Kumho* before the April 1999 meeting, so that the Committee would have the opportunity to incorporate

the case into the proposed amendment to Rule 702, before that proposal is submitted to the Standing Committee.

The Committee considered the suggestion of the Style Subcommittee to amend the title of Rule 702 in the same manner as the proposed amendment to Rule 701. For the same reasons, the Committee decided not to adopt the Style Subcommittee's suggestion at this time.

One public comment suggested that the proposed amendment to Rule 702 might end up excluding the testimony of experts who purport to educate the factfinder on general background principles only, and who make no attempt to apply their expertise to the facts of the case. The proposed amendment requires that "the witness has applied the principles and methods reliably to the facts of the case." The Committee concluded that this language would not require exclusion of an expert who educates the jury on general principles. Such an expert will have applied the principles and methods reliably to the facts of the case if the testimony fits the facts. The Committee tentatively agreed, however, to amend the Advisory Committee Note to address this question.

The Committee considered and rejected a suggestion from a member of the public that the Rule focus only on the "case-specific" facts or data that are relied upon by the expert. The Committee unanimously concluded that the expert's reliance on *any* fact, whether or not case-specific, is a matter for scrutiny by the trial court. The Committee also considered and rejected a suggestion from a member of the public that the Committee Note be amended to provide more elaboration of the distinction between Rules 702 and 703. The Committee concluded that the distinction was already well set forth in the Committee Note.

Finally, the Committee tentatively agreed to make two minor changes to the Committee Note to Rule 702, in order to cite some recent case law and academic commentary.

Rule 703

The public comments on Rule 703 have been almost uniformly positive. Two commentators agreed with the Rule but suggested that language might be added to elaborate on why information relied on by an expert might be probative even though it is not in evidence, and why it might be prejudicial. The Committee considered these comments, and tentatively concluded that it was unnecessary to provide this elaboration in the text of the Rule. The Evidence Rules generally refer to probative value and prejudicial effect without elaboration, leaving the balancing of these factors to the discretion of the trial court. Moreover, the Committee Note to the Rule makes clear what the probative value and prejudicial effect are when the expert relies on information not in evidence.

One public commentator proposed that Rule 703 should be amended to prohibit the expert from relying on information not in evidence, and that a new hearsay exception be added to permit reliable information used by an expert to be admitted for its truth. The Committee

considered and rejected these suggestions. Committee members noted that the proposal was in one sense too narrow, because it only dealt with hearsay information relied on by an expert, when in reality an expert might use a wide variety of information not in evidence, e.g., character evidence and subsequent remedial measures. On the other hand, the proposal was too broad, because it could permit dubious hearsay to be considered for its truth.

The Committee considered and tentatively approved the changes to the text of the Rule suggested by the Style Subcommittee of the Standing Committee. These changes would make the language of the Rule more direct and concise. The Committee also tentatively agreed to a stylistic change that would clarify that the Rule covers all information not in evidence that is relied upon by an expert.

The Committee tentatively agreed to add language to the Committee Note that would indicate that the proponent of the expert might be permitted to disclose the information not in evidence relied on by the expert, if the opponent opens the door by attacking the expert's basis.

Finally, the Committee considered and rejected a proposal that the Committee Note be amended to add a laundry list of factors that a trial court might use in assessing the probative value and prejudicial effect of information not in evidence that is relied upon by an expert. The Committee agreed that these matters should be left to the discretion of the trial judge.

Rule 902

The Chair suggested that a stylistic change to proposed Rules 902(11) and 902(12) might be considered in order to provide for a more consistent use of the terms "certification" and "declaration." The Committee tentatively agreed to a stylistic change in each subdivision requiring that the qualified witness make a "written declaration of the custodian thereof or another qualified person certifying that the record" meets the requirements of the Rule. The Committee also tentatively agreed to a stylistic change that would replace a pronoun with a more definite term. Finally, the Committee tentatively agreed to add to the Committee Note a reference to the statute governing declarations filed in a federal court.

The Committee rejected a suggestion from a member of the public that the reference to admissibility under Rule 803(6) be deleted from the proposed amendment to Rule 902. The sense of the Committee was that records offered as self-authenticating under proposed Rules 902(11) and (12) would have to meet the admissibility requirements of Rule 803(6).

Rule 609

Evidence Rule 609 provides that certain convictions are admissible to impeach the character of a witness if a balancing test is met (subdivision (a)(1)), and that other convictions are automatically admissible (subdivision (a)(2)). A public comment was received suggesting that the use of the word "and" between these subdivisions was misleading; the argument was that the use

of the word "and" implies that a conviction must meet the requirements of both subdivisions to be admissible, when in fact the subdivisions provide independent paths to admissibility.

The Committee considered this comment and determined that it was not necessary to amend Rule 609. The use of the word "and" clearly indicates that the provisions are independent rather than related—i.e., that both subdivisions provide for admissibility of convictions if their requirements are met.

Rule 1101

At the April 1998 meeting, the Reporter was directed to prepare a memorandum describing the types of actions in which the Federal Rules do not apply. Then the Committee would consider whether it would be appropriate to amend Rule 1101 to either exclude certain actions from or include certain actions within the rubric of the Evidence Rules.

The Reporter submitted a memorandum indicating that there are several types of actions in which the courts have found the Evidence Rules inapplicable, even though the actions are not specifically excluded under Rule 1101. For example, the Evidence Rules are not applicable in suppression hearings, even though Rule 1101 does not specifically exempt them.

After considering the Reporter's memorandum, the Committee concluded that while Rule 1101 is not comprehensive, there is no need to amend it; the courts have had no problem in exempting certain actions from the Evidence Rules where the nature of the action warrants it. The Committee also concluded that it would not be appropriate to amend the Rule to apply the Evidence Rules to any actions that are currently exempted by Rule 1101. For example, it makes no sense to extend the Evidence Rules to grand jury proceedings, which are *ex parte* and necessarily less rigid than a trial court proceeding.

Privileges

The Committee once again discussed whether it should attempt to propose a codification of the privileges. The issue was considered again in light of Congressional activity. Congress recently passed a tax preparer privilege, and there are bills pending in Congress that would establish a parent-child privilege, a secret service privilege, and others.

Some Committee members expressed concern that recommending a set of privilege rules to Congress might spur even further piecemeal Congressional activity. Unlike other Evidence Rules, rules of privilege are not self-executing; they have to be passed by Congress. Other Committee members thought that the Committee might do a useful service in attempting to set forth rules embracing the current common law of privilege, even if those rules are never even submitted to Congress.

The Chair designated Greg Joseph and the Reporter to consider whether a proposed codification of the privileges would be a worthwhile project. They will report back to the Committee at the April, 1999 meeting.

Rule 902(6)

Evidence Rule 902(6) provides that "[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating. A Committee member pointed out that the Rule may not cover news wire reports that do not subsequently appear in print articles, such as electronic stock market reports. After discussion, the Committee resolved to consider this matter in the future, should another package of amendments to the Evidence Rules be deemed necessary.

Attorney Conduct Rules

Professor Coquillette informed the Committee that an ad hoc committee will soon meet to consider the draft of the attorney conduct rules. The ad hoc committee is composed of members of each of the Advisory Committees, two members of the Standing Committee, Professor Coquillette, and liaisons from the Committees on Federal/State Jurisdiction and Court Administration and Case Management. The ad hoc committee will proceed slowly so as not to get ahead of several developments that will affect the viability of any proposed attorney conduct rules for the federal courts. Among these developments are: the legislation recently passed in Congress that requires federal prosecutors to abide by state ethics rules; the ABA Ethics 2000 project; and the negotiations between the Justice Department and the Conference of Chief Justices concerning the proposed Rule 4.2.

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 occurred 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.

Professor Whinery noted that the working relationship that has been established between the Uniform Rules Drafting Committee and the Evidence Rules Committee has been most salutary and will continue in the future.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for April 12th and 13th, 1999, in New York City.

The meeting was adjourned at 5 p.m., Thursday, October 22nd.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

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

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

DATE: **December 1, 1998**

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

I. Introduction

The Advisory Committee on Evidence Rules met on October 22nd in Washington, D.C. The Committee held a public hearing on the proposed amendments that are currently released for public comment--proposals to amend Evidence Rules 103, 404(a), 701, 702, 703, 803(6) and 902. After the public hearing, the Committee convened to consider the comments received at the hearing as well as other written comments submitted. The Committee reached tentative agreement on some minor revisions to the text and notes of some of the proposed amendments. The Committee also considered, and decided not to act on, some proposals to amend other Evidence Rules. 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 October meeting, which are attached to this Report.

Given the fact that a package of proposed amendments to the Evidence Rules is currently in the public comment period, the Evidence Rules Committee will present no action items at the January, 1999 Standing Committee meeting.

II. Action Items

No Action Items

III. Information Items

A. Consideration of Possible Changes to Proposed Amendments Released for Public Comment.

1. Rule 103

The proposed amendment to Evidence Rule 103 provides: 1) that a party who loses an advance ruling on evidence need not renew an objection or offer of proof at trial, if the advance ruling is definitive; and 2) that if there is a condition precedent to the advance ruling, such as the pursuit of a certain claim or defense or the testimony of a certain witness, then an appeal cannot be taken on the ruling unless the condition precedent actually occurs at trial.

In light of the public comment received, the Committee tentatively agreed to change a citation in the Committee Note to one that more completely described the need to excuse a party from renewing objections to definitive rulings The Committee also tentatively agreed with a public comment suggesting that the Committee Note should be amended to emphasize that an advance ruling cannot be relied on if the facts and assumptions underlying the trial court's advance ruling are materially changed at trial

The second sentence in the proposed amendment, set forth above, would codify the Supreme Court's ruling in *Luce v. United States,* and the cases that have extended the logic of *Luce.* Academics have submitted comment that has been critical of *Luce*; they have suggested that the second sentence of the proposed amendment should be dropped, and the Committee Note changed to state that the Committee was taking no position on whether *Luce* should be applied or extended. After discussion, the Evidence Rules Committee remained in general agreement that the *Luce* principle should remain in the text of the Rule, though some members expressed concern that extending the *Luce* principle to all analogous situations might result in some unintended consequences. The Committee resolved to revisit the question of whether the *Luce* language should be retained at its April, 1999 meeting, after the end of the public comment period.

2. Rule 404(a)

The proposed amendment to Evidence Rule 404(a) provides that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" character trait of the accused Public comment has raised the concern that the term "pertinent" may be too broad. In a multiple count prosecution, the chosen language might permit the prosecution to attack a character trait of the defendant that is pertinent to a count different from the one on which the defendant attacked the character of the victim..

In light of the public comment, the Evidence Rules Committee has tentatively agreed that the word "pertinent" should be replaced with the word "same". Under this proposal, the prosecution could rebut an attack on the victim's character only with evidence of the same bad character trait of the defendant. The Committee has also tentatively agreed to add to the Committee Note a reference to the fact that an accused might introduce a negative character trait of the victim for a purpose other than to prove that the victim acted in accordance with the character trait; this would not open the door to a character attack on the accused.

3. Rule 701

The proposed amendment to Evidence Rule 701 would prohibit lay witness testimony where the witness is testifying on the basis of specialized knowledge. The goal of the amendment is to prohibit lay witnesses from testifying on matters that should be governed by the reliability requirements of Evidence Rule 702. While most public comment on the proposal has been favorable, some commentators have expressed concern that the amendment might prohibit testimony from lay witnesses who testify on the basis of ordinary experience, e.g , that a certain substance was cocaine. The Committee's position is that testimony based on particularized knowledge that any member of the public could obtain without training or expertise should be covered by Rule 701, while testimony based on specialized knowledge that is dependent on special skill or training should be covered by Rule 702. The Committee will consider whether a stylistic change to the proposal is necessary to clarify this distinction.

4. Rule 702

The proposed amendment to Evidence Rule 702 provides three reliability-based requirements that all expert testimony must meet: (1) the testimony must be sufficiently based upon reliable facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the principles and methods used by the witness must be applied reliably to the

facts of the case. The public comment received so far is, not surprisingly, divided on the merits of the proposal to amend Rule 702, though most commentary has been quite favorable. A major intervening development is that the Supreme Court will hear argument on December 7 in *Kumho Tire v. Carmichael*, where the issue is whether the *Daubert* gatekeeping standards apply to the testimony of a tire failure expert who testified largely on the basis of experience. The Evidence Rules Committee will continue to monitor the *Kumho* case and its effect, if any, on the proposed amendment to Rule 702. The Committee has also tentatively agreed to make two minor changes to the Committee Note to Rule 702, in order to cite some recent case law and academic commentary.

5. Rule 703

The proposed amendment to Rule 703 would limit the disclosure to the jury of information relied on by an expert, where that information is otherwise inadmissible. The amendment provides that this information cannot be disclosed unless its probative value (in assisting the jury to weigh the expert's opinion) substantially outweighs the risk of prejudice (from the jury's misusing the evidence). The goal of the amendment is to prevent a party from evading exclusionary rules of evidence through the simple expedient of having an expert rely on the inadmissible information

The public comments on Rule 703 have been almost uniformly positive. The Evidence Rules Committee has tentatively decided to reject suggestions that the text of the Rule be made more elaborate to specify the probative value and prejudicial effect that the trial judge must consider. The Evidence Rules generally refer to probative value and prejudicial effect without elaboration, leaving the balancing of these factors to the discretion of the trial court. Moreover, the Committee Note to the Rule makes clear what the probative value and prejudicial effect are when the expert relies on information not in evidence. The Committee has also decided to reject more radical proposals that would prohibit the expert from relying on information not in evidence, and that would add a new hearsay exception to permit reliable information used by an expert to be admitted for its truth.

The Committee considered and approved the changes to the text of Evidence Rule 703 suggested by the Style Subcommittee of the Standing Committee. These changes would make the language of the Rule more direct and concise. The Committee also tentatively agreed to a stylistic change that would clarify that the Rule presumptively prohibits disclosure of all information not in evidence that is relied upon by an expert. Finally, the Committee tentatively agreed to add language to the Committee Note that would indicate that the proponent of the expert might be permitted to disclose the information not in evidence relied on by the expert, if the opponent opens the door by attacking the expert's basis.

6. Rules 803(6) and 902

The proposed amendments to Rules 803(6) and 902 are interrelated. The amendment to Rule 803(6) would permit business records to satisfy the hearsay exception without the requirement of in-court testimony by a custodian or other qualified witness; such a person would be permitted to certify that the admissibility requirements of the exception are met. The amendment to Rule 902 would provide that a business record accompanied by such a certification can be self-authenticating. The goal of these amendments is to provide consistency in the proving up of business records. Current federal law permits proof of foreign business records in criminal cases by way of certification; but business records in civil cases and domestic business records in criminal cases must still be proven by the testimony of a qualified witness.

The Evidence Rules Committee has tentatively agreed to a stylistic change to proposed Rules 902(11) and 902(12) that would provide for a more consistent use of the terms "certification" and "declaration." Under this stylistic revision, each new subdivision would require that the qualified witness make a "written declaration of the custodian thereof or another qualified person certifying that the record" meets the requirements of the Rule. The Committee also tentatively agreed to a stylistic change that would replace a pronoun with a more definite term Finally, the Committee tentatively agreed to add to the Committee Note a reference to the statute governing declarations filed in a federal court.

B. Other Matters Considered

1. Rule 609

Evidence Rule 609 provides that certain convictions are admissible to impeach the character of a witness if a balancing test is met (subdivision (a)(1)), and that other convictions are automatically admissible (subdivision (a)(2)). A public comment was received suggesting that the use of the word "and" between these subdivisions was misleading; the argument was that the use of the word "and" implies that a conviction must meet the requirements of both subdivisions to be admissible, when in fact the subdivisions provide independent paths to admissibility.

The Evidence Rules Committee considered this comment and determined that it was not necessary to amend Rule 609. The use of the word "and" clearly indicates that the provisions are independent rather than related. That is, both subdivisions provide for admissibility of convictions if their requirements are met.

2. Rule 1101

Evidence Rule 1101 sets forth the actions and proceedings to which the Federal Rules of Evidence are applicable, and also excludes certain proceedings from the applicability of those Rules. The Evidence Rules Committee considered whether Evidence Rule 1101 should be amended to either exclude certain actions from or include certain actions within the rubric of the Evidence Rules.

The Committee determined that there are several types of actions in which the courts have found the Evidence Rules inapplicable, even though the actions are not specifically excluded under Rule 1101. The Committee also considered whether some of the proceedings currently excluded from the Rules by Rule 1101 should remain so.

Ultimately, the Committee concluded that there is no critical need to amend Rule 1101 at this time. First, the courts have had no problem in exempting certain actions from the Evidence Rules where the nature of the action warrants it, even if there is no explicit exclusion in Rule 1101. Second, the Committee found that it would not be appropriate to apply the Evidence Rules to any proceedings that are currently exempted by Rule 1101.

3. Privileges

The Evidence Rules Committee once again discussed whether it should attempt to propose a codification of the privileges, in light of substantial recent Congressional activity in this area. Committee members are divided on whether the project would be productive. The Chair designated a subcommittee to consider whether a proposed codification of the privileges would be a worthwhile project. The subcommittee will report back to the Evidence Rules Committee at the April, 1999 meeting.

4. Rule 902(6)

Evidence Rule 902(6) provides that "[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating. The Evidence Rules Committee has determined that the Rule may not cover news wire reports that do not subsequently appear in print articles, such as electronic stock market reports. The Committee resolved to consider this matter in the future, should another package of amendments to the Evidence Rules be deemed necessary.

C. Outmoded or Misleading Advisory Committee Notes

The Evidence Rules Committee has engaged in a two-year long project to identify those original Advisory Committee Notes that may be misleading because they comment on a version of the Rule that was either rejected or substantially changed by Congress. The culmination of the project was a report by the Committee's Reporter, setting forth the problematic Notes and providing editorial comment that can be used by publishers to alert the reader that the Note is commenting on a Rule different from that actually enacted

The Reporter's report has been published as a pamphlet by the Federal Judicial Center. The pamphlet has been distributed to all Federal judges, all publishers of the Federal Rules of Evidence, and other interested parties. The report has also been published in the supplement to Wright and Miller's treatise on federal courts, and will soon be published in Federal Rules Decisions.

IV. Minutes of the October, 1998 Meeting

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

Attachment:

Draft Minutes

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 1999
Marco Island, Florida

Draft Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Marco Island, Florida on Thursday and Friday, January 7-8, 1999. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
Professor Geoffrey C. Hazard, Jr.
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Phyllis A. Kravitch and Deputy Attorney General Eric H. Holder were unable to be present. The Department of Justice was represented at the meeting by Neal K. Katyal, Advisor to the Deputy Attorney General. Roger A. Pauley also participated in the meeting on behalf of the Department.

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, Mark D. Shapiro, deputy chief of that office, and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
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

Also participating in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, project director of the local rules project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

Alan C. Sundberg, former member of the committee attended the meeting and was presented with a certificate of appreciation, signed by the Chief Justice, for his distinguished service on the committee over the past six years.

INTRODUCTORY REMARKS

Judge Scirica reported that Judge Stotler was unable to attend the meeting because she had to participate in the dedication of the new federal courthouse in Santa Ana, California. He added that she would participate at the next committee meeting, to be held in Boston in June 1999.

Judge Scirica noted that he was participating in his first meeting as chair of the Standing Committee. He stated that it had been his great honor to have served for six years as a member of the Advisory Committee on Civil Rules under three extraordinary chairmen — Judges Pointer, Higginbotham, and Niemeyer.

Judge Scirica observed that it was very important for the rules committees to uphold the integrity of the Rules Enabling Act and be vigilant against potential violations of the Act. At the same time, he pointed out that the committees had to be careful in their work in distinguishing between matters of procedure and substance.

He emphasized the importance of establishing and maintaining good professional relations with members and staff of the Congress. He said that it would be ideal if these relationships were personal and long-lasting. But membership changes in the Congress and on the committees make it difficult as a practical matter to achieve that goal. Nevertheless, he said, it is possible to keep the Congress informed about the benefits of the Rules Enabling Act, the important institutional role of the rules committees, and ways in which the committees can be of service to the Congress.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 18-19, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej presented a list of 41 bills introduced in the 105th Congress that would have had an impact on the federal rules or the rulemaking process. (Agenda Item 3A) He pointed out that the Administrative Office had monitored the bills on behalf of the rules committees and the Judicial Conference, and it had prepared several letters for the chair to send to members of Congress commenting on the language of specific bills and emphasizing the need to comply with the provisions of the Rules Enabling Act. He noted that only three of the 41 bills had actually been enacted into law, and their impact on the federal rules would be comparatively minor. They included provisions: (1) establishing a new evidentiary privilege governing communications between a taxpayers and an authorized tax practitioner, (2) requiring each court to establish voluntary alternative dispute resolution procedures through local rules, and (3) subjecting government attorneys to attorney conduct rules established under state laws or rules.

Mr. Rabiej stated that comprehensive bankruptcy legislation had come close to being enacted in the 105th Congress, and it likely would be reintroduced in the 106th Congress. He pointed out that the legislation, if enacted, would create an enormous amount of work for the Advisory Committee on Bankruptcy Rules. He also predicted that legislation would also be reintroduced in the new Congress to federalize virtually all class actions.

Administrative Actions

Mr. Rabiej reported that the Rules Committee Support Office was now sending comments from the public on proposed amendments to the rules to committee members by electronic mail. He noted that the Administrative Office had received about 160 comments from the bench and bar on the proposed amendments to the bankruptcy rules, about 110 comments on the amendments to the civil rules, and about 65 comments on the amendments to the evidence rules. He added that all the comments, together with committee minutes, would be placed on a CD-ROM and made available to all the members of the advisory and standing committees.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary reported that Judge Rya Zobel had announced that she would be leaving her position as director of the Federal Judicial Center to return to work as a United States district judge in Boston. She noted that a search committee had been appointed by the Chief Justice to find a successor, and it was expected that the Center's board would name a new director by April 1999.

Ms. Leary presented a brief update on the Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that as a consequence of the comprehensive, ongoing studies of class actions and mass torts conducted by the Advisory Committee on Civil Rules and the Mass Torts Working Group, the Center had decided that revisions to the *Manual for Complex Litigation* were needed. To that end, the Chief Justice had appointed a board of editors to oversee the work, including Judges Stanley Marcus, John G. Koeltl, J. Frederick Motz, Lee H. Rosenthal, and Barefoot Sanders. The Chief Justice, she said, had also selected two attorneys to serve on the board of editors, and the Center was awaiting their response to his invitation. (Sheila Birnbaum and Frank A. Ray were later announced as the new members.) She added that staff of the Research Division would provide support for the work of the board of editors.

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 December 7, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had no action items to present to the standing committee. He noted, though, that the advisory committee had approved a number of additional amendments to the appellate rules, but had decided not to forward them to the standing committee for publication until the bar has had adequate time to become accustomed to the restyled body of appellate rules. He added that a package of amendments would probably be ready for publication by the year 2000.

Committee Notes

Judge Garwood pointed out that the Standing Committee had recommended previously that the notes accompanying proposed rules amendments be referred to as "Committee Notes," rather than "Advisory Committee Notes." He reported that the Advisory Committee on Appellate Rules, although accepting the recommendation, had discussed this matter at its last meeting and had concluded that the term "Advisory Committee Notes" was both more traditional and more accurate. Judge Garwood pointed out, for example, that "Advisory Committee Notes" had long been used by the Chief Justice

when transmitting rules amendments to Congress, by legal publications, and by the legal profession generally.

Professor Cooper and Mr. Rabiej responded that the use of the term "Committee Notes" had been selected over "Advisory Committee Notes" because the Standing Committee from time to time revises or supplements the notes of an advisory committee. As a result, the published notes will contain language representing the input of both the pertinent advisory committee and the standing committee, and it is often difficult to tell exactly what has been authored by each committee.

Judge Garwood pointed out that when the Standing Committee proposes that a change be made in a note *before publication,* the chair of the advisory committee will take the matter back to the advisory committee for consideration of the change. As a rule, the advisory committee will in fact agree with — and often improve upon — the proposed change and incorporate it into the publication distributed to bench and bar. Therefore, the note effectively remains that of the advisory committee. On the other hand, when changes in a note are made by the standing committee *after publication,* the chair of the advisory committee will normally accept the changes at the standing committee meeting on behalf of the advisory committee and thereby avoid the delay of returning them for further consideration by the advisory committee.

Professor Coquillette added that the standing committee has always been deferential to the advisory committees in the preparation of committee notes, and it normally will make only minor changes in the notes and obtain the agreement of the chair and reporter of the pertinent advisory committee in doing so. But, he said, when the standing committee proposes changes that are major in nature, or disputed, it will normally send the note back to the advisory committee for further consideration and redrafting. He concluded that the question of the appropriate terminology for the notes was an important matter that would be discussed further at the reporters' next luncheon.

Proposed Effective Date for Local Rules

Judge Garwood reported that the advisory committee at its April 1998 meeting had drafted a proposed amendment to FED. R. APP. P. 47(a)(1) that would mandate an effective date of December 1 for all local court rules, except in cases of "immediate need." After the meeting, however, the advisory committee was informed by the Advisory Committee on Civil Rules that the concept of having a uniform, national effective date for local rules may conflict with the Rules Enabling Act, which gives each court authority to prescribe the effective date of their local rules. 28 U.S.C. § 2071(b).

Judge Garwood said that the Advisory Committee on Appellate Rules had not considered this potential legal impediment at its April meeting. Rather, it had focused only on the merits of the proposal referred to all the advisory committees to fix a uniform national effective date for all local rules. Accordingly, he suggested that it would be appropriate for the standing committee to make a threshold decision on whether the Rules Enabling Act would permit amendments to the national rules to mandate effective dates for local rules. If the committee were to decide that there would be no conflict with the Rules Enabling Act, the Advisory Committee on Appellate Rules would recommend fixing a single annual date of December 1 for all local rules of court, except in the case of emergencies.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in his memorandum and attachments of December 3, 1998. (Agenda Item 6)

Pending Amendments to the Bankruptcy Rules

Judge Duplantier reported that a heavy volume of comments had been received from bench and bar in response to the "litigation package" of proposed amendments to the Federal Rules of Bankruptcy Procedure. He said that the great majority of the comments had expressed opposition to the package generally. The most common argument made in the comments, he said, was that the proposed amendments were simply not needed and would impose elaborate and burdensome procedures for the handling of a heavy volume of relatively routine matters in the bankruptcy courts. Most of the bankruptcy judges who commented, he said, had argued that FED. R. BANKR. P. 9013 and 9014 currently work well because they give judges flexibility — through local rules on motion practice — to distinguish among various types of "contested matters" and to fashion efficient and summary procedures to decide routine matters.

He added that many judges also had commented negatively about the requirement in revised Rule 9014 that would make FED. R. CIV. P. 43(e) inapplicable at an evidentiary hearing on an administrative motion. The proposed amendment would thus require witnesses to appear in person and testify — rather than give testimony by affidavit — when there is a genuine issue of material fact.

Judge Duplantier pointed out that the advisory committee would hold a public hearing on the proposed amendments on January 28, 1999, and it would meet again in March to consider all the comments and make appropriate decisions on the amendments.

Omnibus Bankruptcy Legislation

Professor Resnick reported that comprehensive bankruptcy legislation was likely to be introduced early in the new Congress. Among other things, it would probably add new provisions to the Bankruptcy Code to govern small business cases and international or transnational bankruptcies. In addition, the Congress may alter the appellate structure for bankruptcy cases and authorize direct appeals from a bankruptcy judge to the court of appeals. He said that the sheer magnitude of the expected legislative changes would likely require the Advisory Committee on Bankruptcy Rules to review in essence the entire body of Federal Rules of Bankruptcy Procedure and Official Forms in order to implement all the new statutory provisions.

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 December 10, 1998. (Agenda Item 7)

He pointed out that the committee was seeking authority to publish for comment proposed amendments that would abrogate the copyright rules and bring copyright impoundment procedures explicitly within the injunction procedures of FED. R. CIV. P. 65.

Copyright Rules

Professor Cooper noted that the proposed abrogation of the Copyright Rules of Practice had been proposed in 1964, but had been deferred for various reasons since that time. He explained that the advisory committee was now recommending:

1. abrogating the separate body of copyright rules;
2. adding a new subdivision (f) to FED. R. CIV. P. 65 to bring copyright impoundment procedures within that rule's injunction procedures; and
3. amending FED. R. CIV. P. 81 to reflect the abrogation of the copyright rules.

He noted that FED. R. CIV. P. 81 would also be amended both to restyle its reference to the Federal Rules of Bankruptcy Procedure and eliminate its anachronistic reference to mental health proceedings in the District of Columbia.

Professor Cooper explained that the language of the current Rule 81 was the starting point in considering the proposed amendments. RULE 81 states explicitly that the Federal Rules of Civil Procedure do not apply to copyright proceedings, except to the extent that a rule adopted by the Supreme Court makes them apply. Professor Cooper then pointed out that Rule 1 of the Copyright Rules of Procedure promulgated by the Supreme Court

specifies that copyright proceedings are to be governed by the Federal Rules of Civil Procedure. But that rule applies only to proceedings brought under the 1909 Copyright Act, which was repealed by the Congress in 1976. Thus, on the face of it, there appear to be no current rules governing copyright infringement proceedings.

Professor Cooper pointed out that the remainder of the copyright rules establish a pre-judgment procedure for seizing and holding infringing items and the means of making those items. But the procedure does not provide for notice to the defendant of the proposed impoundment, even when notice can reasonably be provided. Nor does it provide for a showing of irreparable injury as a condition of securing relief, nor for the exercise of discretion by the court. Rather, the Copyright Rules provide that an application to seize and hold items is directed to the clerk of court, who signs the writ and gives it to the marshal.

To that extent, he said, the rules are inconsistent with the 1976 copyright statute that vests a court with discretion both to order impoundment and to establish reasonable terms for the impoundment. Professor Cooper added that the pertinent case law leads to the conclusion that the procedures established by the copyright rules would likely not pass constitutional muster.

He stated that most of the courts have reacted to the lack of explicit legal authority for copyright impoundment procedures by applying the Federal Rules of Civil Procedure, especially FED. R. CIV. P. 65, which sets forth procedures for issuing restraining orders and authorizing no-notice seizures in appropriate circumstances. He added that the amendments proposed by the advisory committee would regularize the current practices of the courts and provide them with a firm legal foundation.

He also noted that another important advantage of the proposed amendments is that they would make it clear that the United States will meet its responsibilities under international conventions to provide effective remedies for preventing copyright infringements. To that end, the proposed changes would give fair and timely notice to defendants, vest adequate authority in the judiciary, and provide other elements of due process. He said that the proposed amendments would let the international community know that the United States has clear and effective procedures against copyright infringements. He added that the copyright community had expressed its acceptance of the advisory committee's proposal.

The committee approved abrogation of the copyright rules and adoption of the proposed amendments to the civil rules for publication without objection.

Discovery Rules

Judge Niemeyer reported that the standing committee had approved publication of a package of changes to the discovery rules at its last meeting. He noted that the volume of public comments received in response to the proposed amendments had been heavy. The majority of the comments, he said, were favorable to the package, but there had also been many negative comments. He added that the advisory committee had conducted one public hearing on the amendments in Baltimore, and it would conduct additional hearings in San Francisco and Chicago. Following the hearings and additional review of all the comments at its next business meeting, he said, the advisory committee could present a package of proposed amendments to the standing committee for final action in June 1999.

Mass Torts

Judge Niemeyer reported that the Chief Justice had authorized a Mass Torts Working Group, spearheaded by the Advisory Committee on Civil Rules, to conduct a comprehensive review of mass-tort litigation for the Judicial Conference. The group held four meetings in various parts of the country to which it invited prominent attorneys, litigants, judges, and law professors to discuss mass tort litigation. Judge Niemeyer stated that the legal and policy problems raised by mass torts were both numerous and complex. He added that the group had prepared a draft report identifying the principal problems arising in mass torts and suggesting a number of possible solutions that might be pursued by the Judicial Conference, in cooperation with the Congress and others. The final report, he said, would be presented to the Chief Justice in February 1999.

Special Masters

Judge Niemeyer noted that the Advisory Committee on Civil Rules had appointed a special subcommittee, chaired by Chief Judge Roger C. Vinson, to study the issues arising from the use of special masters in the courts.

Local Rules of Court

Judge Niemeyer reported that the advisory committee would address a number of concerns raised by the proliferation of local rules of court. He noted that the Civil Justice Reform Act had encouraged local variations in civil procedure, with a resulting erosion of national procedural uniformity among the district courts. He noted that the advisory committee was giving preliminary consideration to two alternative amendments to FED. R. CIV. P. 83.

The first suggested amendment would provide that a local rule of court could not be enforced until it is received in both the Administrative Office and the judicial council of the

circuit. The second alternative would go much further and provide that a court could not enforce a new local rule or amended rule — except in case of "immediate need" — until 60 days after the court has: (a) given notice of it to the judicial council of the circuit and the Administrative Office; and (b) made it available to the public and provided them with an opportunity to comment. Under this alternative, the Administrative Office would be required to review all new local rules or amendments and report to the district court and the circuit council if it finds that they do not conform to the requirements of Rule 83. If a new rule or amendment has been reported by the Administrative Office, enforcement of it would be prohibited until the judicial council has approved the provision.

Judge Niemeyer pointed out that the advisory committee would like to see greater national procedural uniformity and fewer local rules. He added that proposed changes in the provisions dealing with local rule authority would have to be coordinated among the other advisory committees under the supervision of the standing committee.

One of the members responded that there was a legitimate need for local rules of court, especially to govern matters that necessarily have to be treated individually in each district — such as issues flowing from geographic considerations. In addition, he said, local rules help to reduce variations in practice among the judges within a district. He pointed out that the Rules Enabling Act requires the circuit councils to review and, if necessary, modify or abrogate local rules. Accordingly, he said, the most appropriate way to deal with problems that may arise from local rules of court is not to limit the authority of the courts to issue local rules, but to persuade the respective circuit councils to review the rules adequately. He added that the council in his own circuit had been very conscientious in reviewing and commenting on the local rules of the courts within the circuit.

Judge Scirica said that the proposed amendments were very helpful, and he suggested that they be referred to the local rules project for consideration in connection with a new, national study of local rules.

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 December 3, 1998. (Agenda Item 8)

FED. R. CRIM. P. 32.2 - *Criminal Forfeiture*

Judge Davis reported that the proposed new FED. R. CRIM. P. 32.2 — together with proposed conforming amendments to FED. R. CRIM. P. 7, 31, 32, and 38 — would govern criminal forfeiture in a comprehensive manner. He noted that an earlier version of the new rule had been presented to the standing committee at its June 1998 meeting but rejected by a

vote of 7 to 4. He said that much of the discussion at the standing committee meeting had focused on whether a defendant would be entitled to a jury trial on the issue of the nexus between the offense committed by the defendant and the property to be forfeited. In addition, concerns had been raised at the meeting regarding the right of the defendant to present evidence at the post-verdict ancillary proceeding over ownership of the property.

Judge Davis explained that the advisory committee had considered the rule anew at its October 1998 meeting, taking into account the concerns expressed by the standing committee. As a result, the advisory committee had made changes in the rule to accommodate those concerns, and it had made a number of other improvements in the rule as well. The advisory committee, he said, recommended approval of the revised version of Rule 32.2, and he directed attention to a side-by-side comparison of the June 1998 version and the revised version of the rule. He then proceeded to summarize each of the principal changes made by the advisory committee since the last meeting.

First, he pointed out that the principal change made by the advisory committee had been to paragraph (b)(4) of the rule. The revised language would specify that either the defendant or the government may request that the jury determine the issue of the requisite nexus between the property to be forfeited and the offense committed by the defendant.

He said that the advisory committee had also added language to paragraph (b)(1) to provide explicitly that both the government and the defendant have the right to present evidence to the court on the issue of the nexus between the property and the offense. To that end, the revised rule provided specifically that the court's determination may be based on evidence already in the record, including any written plea agreement, or — if the forfeiture is contested — on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

Judge Davis stated that the advisory committee had amended paragraph (b)(1) to include a specific reference to money judgments. He noted that the courts of appeals of four circuits had held that the government may seek not only the forfeiture of specific property, but also a personal money judgment against the defendant. He said that there was no reason to treat a forfeiture of specific property in the same manner as a forfeiture of a sum of money. Thus, paragraph (c)(1) had also been amended to provide that an ancillary proceeding is not required to the extent that the forfeiture consists of a money judgment.

Judge Davis noted that the advisory committee had amended Rule 32.2(a) to make it clear that the government need only give the defendant notice in the indictment or information that it will seek forfeiture of property. The earlier version had required an allegation of the defendant's interest in property subject to forfeiture.

Paragraph (b)(2) had been revised to make it clear that resolution of a third party's interest in the property to be forfeited had to be deferred until the ancillary proceeding. Paragraph (b)(3) had been amended to allow the Attorney General to designate somebody outside the Department of Justice, such as the Department of the Treasury, to seize property.

Judge Davis noted that paragraph (c)(2) had been simplified to make it clear that if no third party is involved, the court's preliminary order of forfeiture becomes the final order if the court finds the defendant had an interest in the property that is forfeitable under the applicable statute. He said that under subdivision (e) there would be no right to a jury trial on the issue of subsequently located property or substitute property

Judge Davis said that the advisory committee had spent more than two and one-half years in considering the rule and had devoted two hearings and several meetings to it. He said that the committee was very comfortable with the revised rule and believed that it would bring order to a complicated area of the law.

Judge Wilson moved to approve the revised rule, subject to appropriate restyling, and send it to the Judicial Conference. He added that he had opposed the rule at the June 1998 meeting, but said that inclusion of a provision for the jury to determine the issue of the nexus between the property and the offense had led him to support the current proposal.

One of the members expressed continuing concern over the jury trial issue and suggested that the revised rule was internally inconsistent in that it provided for a jury's determination in certain situations, but not in others. He said that he was troubled over the issue of money judgments, in that the government would be given not only a right to forfeit specific property connected with an offense, but also a right to restitution for an amount of money equal to the amount of the property that would otherwise be seized. He suggested that the money judgment concept constituted a improper extension beyond what is authorized by the pertinent forfeiture statutes.

Judge Davis responded that at least four of the circuits had authorized the practice. He added that the advisory committee was only attempting to provide appropriate procedures to follow in those circuits where money judgments are authorized under the substantive law of the circuit. The underlying authority, he said, is provided by circuit law, not by the rule. At Judge Tashima's request, Judge Davis agreed to insert language in the committee note to the effect that the committee did not take a position on the correctness of those rulings, but was only providing appropriate procedures for those circuits that allowed money judgments in forfeiture cases.

One member expressed concern about the concept of seizure in connection with a money judgment. He noted that paragraph (b)(3) of the revised draft provided that the

government may "seize the property," and he suggested that the word "specific" be added before the word "property." Thus, the government could not "seize" money. It could only seize the "specific property" specified in paragraph (b)(2). Judge Davis agreed to accept the language change.

Another member questioned why a jury trial would be required to determine the nexus of the property to the offense, but not when substitute property is involved. Judge Davis responded that it would be very difficult to do so, since substitute property is usually not found until after the trial is over and the original property has been converted or removed. Mr. Pauley added that the pertinent case law had been uniform in holding that there is no jury-tial right as to substitute and later-found property.

Chief Justice Veasey expressed support for the substance of the revised amendments submitted by the advisory committee. But he pointed to a letter recently received from the National Association of Criminal Defense Lawyers, which had been distributed to the members before the meeting. The letter argued that the advisory committee had made major changes in the original proposal, had approved the rule by a vote of 4 to 3, and should be required to republish it for additional public comment. He said that he was concerned about forwarding the revised new rule to the Judicial Conference without further publication. **Accordingly, Chief Justice Veasey moved to republish proposed new Rule 32.2 for additional public comment.**

Professor Schlueter responded that the 4-3 vote in the advisory committee had been on the question of whether a right to a jury determination should be preserved in light of the Supreme Court's decision in *Libretti v. United States.* In that case, the Court held that criminal forfeiture is a part of the sentencing process. He added that considerable sentiment remained in the advisory committee that a jury determination is simply not required.

Judge Davis and three members of the committee added that it was unlikely that any additional, helpful information would be received if the proposed rule were to be published again. They recommended that the committee approve the revised rule and send it to the Conference.

The motion to republish the rule for further comment was defeated by a vote of 9 to 2.

Judge Tashima moved to adopt the proposed Rule 32.2 and the companion amendments to Rules 7, 31, 32, and 38 and send them to the Judicial Conference, subject to: (a) making appropriate style revisions, and (b) adding language to the committee note stating that the committee takes no position on the merits of using money judgments in forfeiture proceedings. The committee thereupon voted to approve the proposed new rule without objection.

Judge Davis and Professor Schlueter presented the committee with an additional sentence that would be inserted at line 277 of the committee note. After accepting suggestions from Mr. Sundberg and Judge Duplantier, they agreed to add the following language: "A number of courts have approved the use of money forfeiture judgments. The committee takes no position on the correctness of those rulings."

Professor Schlueter added that the advisory committee wished to delete the words "legal or possessory" from line 422 of the committee note. Thus, the pertinent sentence in the note would read: "Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had an interest in the property such that it was proper to order the forfeiture of the property in a criminal case."

Presence of Defense Attorneys in Grand Jury Proceedings

Judge Davis reported that the congressional conference report on the Judiciary's appropriations legislation required the Judicial Conference to report to Congress by April 15, 1999, on whether Rule 6(d) of the Federal Rules of Criminal Procedure should be amended to allow a witness appearing before a grand jury to have counsel present.

He noted that the time frame provided by the Congress was extremely short and simply did not permit a comprehensive study of the issues. The Advisory Committee on Criminal Rules, he said, had appointed a special subcommittee to consider the matter and make recommendations. The subcommittee reviewed earlier studies, including: (a) a comprehensive report by the Judicial Conference to the Congress in 1975 that declined to support a change to Rule 6(d); and (b) a 1980 report by the Department of Justice to the Congress opposing pending legislation that would have allowed attorney representation in the grand jury room. He noted that the subcommittee had decided that the reasons stated in the past for declining to amend Rule 6(d) remained valid today. In summary, he said, the three principal reasons for not allowing a witness to bring an attorney into the grand jury were that the practice would lead to:

1. loss of spontaneity in testimony;
2. transformation of the grand jury into an adversary proceeding; and
3. loss of secrecy, with a resultant chilling effect on witness cooperation, particularly in cases involving multiple representation.

Judge Davis said that the subcommittee had concluded by a vote of 3 to 1 not to recommend any changes Rule 6(d). The full advisory committee was then polled by a mail vote, and it concurred in the recommendation of the subcommittee by a vote of 9 to 3.

Judge Davis reported that members of the advisory committee had been concerned that allowing attorneys in the grand jury without a judge present would create problems and prolong the proceedings. He pointed out that about half the states that have retained a grand jury system do in fact permit lawyers in grand jury proceedings, but he noted that there were other ways to indict defendants in these states.

One member stated that he was in favor of amending Rule 6 to relax the restriction on the presence of attorneys. He suggested that it was not necessary to allow individual lawyers for every witness, but at least one attorney might be present to protect the basic rights of witnesses and prevent abuse and mistreatment by prosecutors. A second member expressed support for the suggestion and added that it would be fruitful to establish pilot districts to test out the concept and see whether a limited presence of attorneys for witnesses would lead to improvements in the grand jury system.

A third member concurred with the suggestion to establish pilot projects. He said that the advisory committee might wish to explore an amendment to Rule 6(d) to allow an attorney for a witness in the grand jury room upon the express approval of the court or the United States attorney. He added, however, that the time given by the Congress to respond was unreasonably short and did not allow for thoughtful consideration of alternatives. As a result, the committee would have to take a quick "up or down" vote at this time, but it could at a later date consider the advisability of further research and the establishment of pilot projects. Judge Scirica added that the judiciary had inquired informally as to whether the Congress would be amenable to giving additional time to respond, but had been informed that a request along those lines would not be well received.

Mr. Pauley expressed the strong support of the Department of Justice for the advisory committee's report and recommendation. He pointed out that the proposal to amend Rule 6(d) was not new and had been rejected in the past. He added that the Department was very much opposed to a change in the rule and feared that it would adversely impact its ability to investigate organized crime. He concluded a prerequisite for consideration of any change in the rule should be the demonstration of an "overwhelming" case of need for the change.

Mr. Pauley also emphasized that the Department of Justice had taken effective steps against potential prosecutorial abuses and had set forth effective safeguards in the United States attorneys' manual. Among other things, the manual requires prosecutors to give *Miranda* warnings to witnesses who may be the target of grand jury proceedings. He added that the Department enforced the manual strictly.

Chief Justice Veasey moved to approve the report of the advisory committee.

Judge Wilson moved, by way of amendment, to have the committee inform the Judicial Conference that it did not support changes in Rule 6(d) at this time, but that it would enthusiastically support the establishment of pilot studies to test the impact of the presence of lawyers for witnesses in the grand jury.

Another member said that empirical data would be needed to test the concerns expressed on both sides of the issue and how they would play out in practice. He suggested that, rather than establishing a pilot program, it would be advisable at the outset to research the practice and experience in the states that permit lawyers into the grand jury room.

Three other members said that the advisory committee might well study the issues further and make appropriate recommendations for change in the future, but they emphasized that the Judicial Conference had been required by legislation to provide a quick response to the Congress. Therefore, the committee had to take a "yes or no" vote on whether to amend Rule 6(d) at this time.

Judge Scirica proceeded to call the question, noting that the committee could discuss at a later point whether any pilot projects or additional research were needed. He noted that the Advisory Committee on Criminal Rules would be responsible for taking the lead on giving any additional consideration to the matter.

The committee voted to reject Judge Wilson's amendment by a voice vote.

It then approved Chief Justice Veasey's motion to approve the report of the advisory committee by a vote of 7 to 2. Judges Wilson and Tashima noted for trhe record their opposition to the motion.

One of the members said that there was no need to discuss the matter of pilot projects further since the chair and reporter of the Advisory Committee on Criminal Rules had just participated in the discussion and could take the issues and suggestions back to the advisory committee for any additional consideration. Judge Davis concurred and noted that the Rules Committee Support Office had already begun to gather information on state practices regarding attorneys for witnesses in grand jury proceedings.

Restyling of the Criminal Rules

Professor Schlueter reported that the advisory committee had been working with the style subcommittee to restyle the Federal Rules of Criminal Procedure. He said that the committee would spend a substantial amount of time on the restyling project at its next several meetings, and it would address other matters only if they were found to be essential. He added that Professor Stephen Saltzburg had been engaged by the Administrative Office to work with the advisory committee and the style subcommittee on the restyling project.

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 December 1, 1998. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present to the standing committee. She noted that a substantial number of public comments had been received in response to the package of rule amendments published in August 1998 and that:

1. eight commentators had appeared before the committee at its October 1998 hearing in Washington;
2. the December 1998 hearing in Dallas had been canceled; and
3. at least 15 people had filed requests to date to testify at the San Francisco hearing in January 1999.

Judge Smith said that most of the comments received had been directed to the proposed amendments to FED. R. EVID. 701-703, dealing with expert testimony.

FED. R. EVID. 701-703

Judge Smith noted that the proposed amendment to FED. R. EVID. 701 was designed to prohibit the use of expert testimony in the guise of lay testimony. The Department of Justice, she said, had submitted a negative comment on the proposal, but the other public comments in response to the rule had been positive. She added that the advisory committee was listening to the Department's concerns and was open to refining the language of the amendment further, particularly with regard to drawing a workable distinction between lay testimony and expert testimony.

Judge Smith explained that the proposed amendment to FED. R. EVID. 702 would provide specific requirements that must be met for the admission of all categories of expert testimony. She said that the public comments received in response to the proposed amendments to Rule 702 were about evenly divided, with defense lawyers strongly in favor of the amendments and plaintiffs' lawyers strongly opposed to them.

She noted that the Supreme Court had recently granted certiorari in *Kumho Tire v. Carmichael,* where the issue was whether the gatekeeping standards set down by the Supreme Court in the *Daubert* case apply to the testimony of a tire failure expert who had testified largely on the basis of his personal experience. She said that the Department of Justice had cautioned against making amendments in the rule before the Court renders its decision in the *Kumho* case. But, she said, the advisory committee wanted to continue receiving public comments on the merits of the proposed amendment to Rule 702. The

advisory committee, though, would await the outcome of the *Kumho* case before forwarding any amendment to the Standing Committee.

Judge Smith pointed out that the amendment to FED. R. EVID. 703 would limit the ability of an attorney to introduce hearsay evidence in the guise of information relied upon by an expert. She said that the advisory committee wanted to admit the opinion of the expert into evidence but have a presumption against admitting the underlying information relied upon by the expert unless it is independently admissible. She reported that the public comments on Rule 703 had been uniformly positive.

FED. R. EVID. 103

Judge Smith noted that the proposed amendment to FED. R. EVID. 103 would provide that there is no need for an attorney to renew an objection to an advance ruling of the court on an evidentiary matter as long as the court makes a "definitive ruling" on the matter. She said that some public comments had questioned whether the term "definitive ruling" was sufficiently explicit.

FED. R. EVID. 404

Judge Smith pointed out that the proposed amendment to FED. R. EVID. 404 would provide that if an accused attacked the character of a victim, evidence of a "pertinent" character trait of the accused may also be introduced. She explained, however, that use of the term "pertinent" in the proposed amendment might allow the introduction of more matters than the advisory committee believes advisable. Accordingly, she said, it was inclined to refine the language of the proposed amendment to allow the introduction only of evidence bearing on the "same" character trait of the witness. She added that the issue arises most frequently in matters of self-defense. Thus, for example, if the defendant were to attack the aggressiveness of a witness, the witness could in turn raise the question of the aggressiveness of the defendant.

FED. R. EVID. 803 AND 902

Judge Smith said that the proposed amendments to FED. R. EVID. 803(g) and 902 would allow certain business records to be admitted into evidence as a hearsay exception without calling the custodian for in-court testimony. She said that the proposed rule would provide consistency in the treatment of domestic business records and foreign business records. Currently, she noted, proof of foreign business records in criminal cases may be made by certification, but business records in civil cases and domestic business records in criminal cases must be proven by the testimony of a qualified witness.

DISCLOSURE OF FINANCIAL INTERESTS

Professor Coquillette stated that recent news accounts had focused attention on the need to provide federal judges with assistance in meeting their statutory responsibility of recusing themselves in cases of financial conflict. He said that the Judicial Conference's Committee on Codes of Conduct had suggested that it would be beneficial to "revis[e] the Federal Rules of Civil Procedure or local district court rules to require corporate parties to disclose their parents and subsidiaries (along the lines of FED. R. APP. P. 26.1) and possibly also to require periodic updating of such affiliations." The Codes of Conduct Committee had reported to the Conference in September 1998 that it would coordinate with the standing committee on the possible addition of corporate disclosure requirements in the federal rules.

Professor Coquillette reported that the reporters had discussed this matter collectively at their luncheon and had agreed to coordinate with each other in drafting common language for the advisory committees that might be used as the basis for proposed amendments to the various sets of federal rules on corporate disclosure. He pointed out, though, that bankruptcy cases presented special problems and that some adjustments in the common language might be needed in proposed amendments to the Federal Rules of Bankruptcy Procedure.

Mr. Rabiej pointed out that FED. R. APP. P. 26.1 was quite narrow in scope and did not apply to subsidiaries. He suggested that the advisory committees might seek some guidance from the Standing Committee as to whether a proposed common disclosure rule should include subsidiaries or in other respects be broader than the current FED. R. APP. 26.1.

Judge Garwood said that the Advisory Committee on Appellate Rules had considered Rule 26.1 recently and had concluded that it would simply not be possible to devise a workable disclosure statement rule that would cover all the various types of conflicting situations and financial interests that require recusal on the part of a judge. He said that the rule should focus on those categories of conflicts that require automatic recusal under the statute, rather than the conflicts that entail judicial discretion.

PROPOSED RULES GOVERNING ATTORNEY CONDUCT

Professor Coquillette referred to his memorandum of December 6, 1998, and reported that each of the five advisory committees had appointed two members to serve on the Special Committee on Rules Governing Attorney Conduct. He said that Judge Stotler had named Chief Justice Veasey and Professor Hazard to serve on the committee as representatives of the standing committee and that the Department of Justice would also be asked to name participants.

He said that the special committee would hold a meeting in Washington on May 4, 1999. At that time, the members would review the pertinent empirical studies and consider the major recommendations submitted to date by various organizations and individuals. All options would be discussed at the May meeting, but no decisions would be made at that time.

The special committee would then meet again in the fall of 1999. At that time, it would be expected to approve concrete proposals to bring before the respective advisory committees for a vote at their fall meetings. The standing committee at its January 2000 meeting could then consider the final attorney conduct recommendations of the special committee and the advisory committees.

Professor Coquillette said that the options at this point appeared to be either:

1. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; or
2. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; except for a small number of "core" issues to be governed by uniform, national federal rules. These would be limited to matters of particular concern to federal courts and federal agencies, such as the Department of Justice.

He pointed out that there was considerable disagreement over these options within the legal community.

SHORTENING THE RULEMAKING PROCESS

Judge Scirica reported that the Executive Committee of the Judicial Conference had asked the committee to consider ways in which the length of the rulemaking process might be shortened without adverse effect. He said that there were, essentially, two basic options that might accomplish that objective — either eliminating the participation in the rules process of one of the bodies presently required to approve rule amendments or shortening the time periods now prescribed by statute or Judicial Conference procedures. He said that neither alternative was attractive and added that most of the members of the standing committee had already expressed opposition to shortening the time allotted for public comment on proposed amendments.

Some members added that it was apparent that the Supreme Court wanted to continue playing a significant role in the rulemaking process. They said that it would be very difficult, in light of the Court's schedule, to reduce the amount of time that the justices currently are given to review proposed rules amendments. Nevertheless, they said, it might

be useful to take a fresh look at all the time limits currently imposed by statute or Judicial Conference procedures.

Judge Scirica reported that it had been suggested that the committee consider adopting an emergency procedure for adopting amendments on an expedited basis when there is a clear need to do so. Several members pointed out that the rules committees had, in fact, acted on an expedited basis on several occasions in response to pending action by the Congress. Most recently, they noted, the committees had acted outside the normal, deliberative Rules Enabling Act process in responding to the Congressional mandate for their views on the advisability of amending FED. R. CRIM. P. 6(d) to permit witnesses to bring their lawyers into the grand jury room.

But several members also cautioned against establishing a regularized procedure for handling potential amendments on an expedited basis. They said that the Rules Enabling Act process, as protracted as it may seem, ensures the integrity of the rulemaking process. It assures careful research and drafting, thorough committee deliberations, and meaningful input by the public. They added that only a few selective matters require expedited treatment, and these exceptions can be dealt with expeditiously on a case-by-case basis. They said that the very establishment of a regularized "fast track" procedure would only encourage its use and undermine the effectiveness of the rulemaking process.

Judge Scirica said that the committee might respond to the Executive Committee by stating that the present deliberative process serves the public very well, but that the rules committees are prepared to respond to individual situations on an expedited basis whenever necessary. The members agreed with his observation and suggested that he explore it with the chairman of the Executive Committee.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the restyling of the body of the Federal Rules of Criminal Procedure was the major task pending before the style subcommittee. He noted that soon after the Supreme Court had promulgated the revised Federal Rules of Appellate Procedure, Bryan Garner, the Standing Committee's style consultant, prepared a first draft of a restyled set of criminal rules. That draft, he said, was then revised by each member of the style subcommittee and by Professor Stephen Saltzburg, who had been engaged specially by the Administrative Office to assist in the restyling task. Mr. Garner then prepared a second draft of the criminal rules, and the style subcommittee met in Dallas to begin work on reviewing the product.

Judge Parker reported that the style subcommittee had completed its review of FED. R. CRIM. P. 1-11, 54, and 60, and it planned to complete action on another dozen rules

by mid-February 1999. Judge Davis added that the Advisory Committee on Criminal Rules was working closely with the style subcommittee on the project. He stated that one of the great challenges was to avoid making inadvertent, substantive changes in the rules as they are restyled.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that the technology subcommittee was monitoring developments in technology with a view towards their potential impact on the federal rules. He noted that the subcommittee was concentrating its efforts on considering rules amendments that might be needed to accommodate the judiciary's Electronic Case Files (ECF) initiative. He said that, among other things, ECF will permit: (a) electronic filing and service of court papers, (b) maintenance of the court's case files in electronic format, (c) electronic linkage of docket entries to the underlying documents, and (d) widespread electronic access to the court's files and records. The project, he added, was being tested in 10 pilot courts and was expected to be made available by the Administrative Office to all federal courts within one to two years.

Mr. Lafitte reported that the subcommittee had met the afternoon before the standing committee meeting to review the status of ECF and identify any federal rules that might need to be changed to accommodate electronic processing of case papers. He said that the subcommittee had been aided substantially in that effort by a comprehensive policy paper prepared by Nancy Miller, the Administrative Office's judicial fellow.

Mr. Lafitte said that the 1996 amendments to the rules had authorized a court by local rule to "permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference . . . establishes." [FED. R. CIV. P. 5(e); FED. R. BANKR. P. 5005; FED. R. APP. P. 25(a)(2). *See also* FED. R. CRIM. P. 49(d).] The rules, however, do not authorize service by electronic means. Accordingly, he said, the ECF pilot courts have relied on the consent of the parties in experimenting with electronic service in the prototype systems.

Mr. Lafitte reported that the subcommittee had concluded that it was necessary to legitimize the experiments taking place in the pilot courts and amend the federal rules to provide an appropriate legal foundation for electronic service. To that end, he said, the subcommittee would like the advisory committees to consider a common amendment to the rules that would authorize courts by local rule to permit papers to be *served* by electronic means — just as they may currently authorize papers to be *filed, signed, or verified* by electronic means. He said that the subcommittee had asked Professor Cooper to prepare a draft rule, using as a model the proposed amendment to FED. R. BANKR. P. 9013(c) published in August 1998.

He added, however, that the proposed amendment to authorize electronic service through local rules should be identified as an interim solution, necessary because of rapid advances in technology and local experimentation. The ultimate objective, he said, should be to fashion a uniform set of national rules that will govern electronic files and filing in the federal courts.

Mr. Lafitte also reported that the subcommittee would meet again in February 1999 — together with judges, clerks, and lawyers from the ECF pilot districts and Administrative Office staff — to consider procedural issues raised by the change from manual to electronic processing of case papers and files.

Judge Scirica recommended that Nancy Miller's paper be sent to all members of the standing committee.

LOCAL RULES PROJECT

Professor Coquillette reported that the first local rules project had been mandated by the Congress in response to widespread concern over the proliferation of federal court local rules. He explained that Professor Mary Squiers, the director of the project, had reviewed the local rules of every district court and reported back to those courts on inconsistencies and other problems with their rules. The process, he said, had been voluntary, and it led a number of courts to improve and reduce their local rules.

Professor Squiers then described the original project in detail and pointed out that the review of all the local rules had also been beneficial in that it revealed many subjects covered by local rules that were later determined to be appropriate subjects to be included in the national rules. The project, she said, had also considered the possibility of drafting a set of model local rules, but it decided instead simply to compile several samples of effective local rules for the courts to consider. Professor Squiers added that the 1995 amendments to the federal rules required courts to renumber their local rules to conform with the numbering systems of the national rules.

Professor Coquillette said that a new study of local rules was needed. He pointed out that the Civil Justice Reform Act had greatly complicated the picture by encouraging local procedural experimentation and de facto "balkanization" of federal procedure. In addition, he said, several courts had not yet complied with the requirement to renumber their local rules.

One of the members added that recently-enacted legislation requires each district court to establish an alternative dispute resolution program under authority of local rules. He suggested that a new local rules project consider the advisability of having certain uniformity among the courts in this area.

Professor Coquillette said that it was important for the committee to decide in advance as a matter of policy what it would do with the results of a new national study of local rules. He said, for example, that the committee might consider the following options:

1. developing model local rules;
2. proposing new national rules to supersede certain categories of local rules; or
3. encouraging more vigorous enforcement of FED. R. CIV. P. 83.

One of the members suggested that the committee draft model local rules and use them as a vehicle for judging the local rules of the courts.

NEXT COMMITTEE MEETING

The committee will hold its next meeting in Boston on Monday and Tuesday, June 14-15, 1999. Judge Scirica pointed out that the agenda for the meeting would be very heavy and may require the scheduling of a working dinner for Sunday night, June 13.

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. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **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 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory committee for further study 10/97 — Request to publish revised version 1/98 — Approved for publication by ST Cmte. 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV104] — Preliminary Questions		9/93 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 105] — Limited Admissibility		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Remainder of or Related Writings or Recorded Statements		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **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 10/97 — No action necessary **COMPLETED**
[EV 201] — Judicial Notice of Adjudicative Facts		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to amend **COMPLETED**
[EV 201(g)] — Judicial Notice of Adjudicative Facts		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided to take no action **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) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
[EV 302] — Applicability of State Law in Civil Actions and Proceedings		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **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 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **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 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**
[EV 405] — Methods of Proving Character. (Proof in sexual misconduct cases.)		9/93 — Considered 5/94 — Considered 10/94 — Considered with EV 404 as alternative to EV 413-415 **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 406] — Habit; Routine Practice		10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. **COMPLETED**
[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. 9/93 — Considered 5/94 — Considered 10/94 — Considered 5/95 — Considered 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Enacted **COMPLETED**
[EV 408] — Compromise and Offers to Compromise		9/93 — Considered 5/94 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 409] — Payment of Medical and Similar Expenses		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
EV 410] — Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 — Considered and recommended for CR Rules Cmte. **COMPLETED**
[EV 411] — Liability Insurance		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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. 10/92 — Considered by CR Rules Cmte. 10/92 — Considered by CV Rules Cmte. 12/92 — Published 5/93 — Public Hearing, Considered by EV Cmte. 7/93 — Approved by ST Cmte. 9/93 — Approved by Jud. Conf. 4/94 — Recommitted by Sup. Ct. with a change 9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action) 12/94 — Effective **COMPLETED**
[EV 413] — Evidence of Similar Crimes in Sexual Assault Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 414] — Evidence of Similar Crimes in Child Molestation Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 415] — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **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 1/95 — Considered 11/96 — Considered 1/97 — Considered by ST Cmte. 3/97 — Considered by Jud. Conf. 4/97 — Reported to Congress **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 501] — Privileges, extending the same attorney-client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel 10/98 — Subcomte appointed to study the issue **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied 10/98 — Comte. reconsidered and appointed a subcomte to further study the issue **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 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**
[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 10/98 — Comte declined to act **COMPLETED**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **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) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **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 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. 4/98 — Sup Ct approved **COMPLETED**
[EV 615] — Exclusion of Witnesses	Kennedy-Leahy Bill (S. 1081)	10/97 — Response to legislative proposal considered; members asked for any additional comments **COMPLETED**
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication 6/98 — Stg. Comte approves request to publish 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Comte approves request to publish 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **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. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Comte approves request to publish 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Committees 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] — Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 9/95 — Published for public comment **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 **PENDING FURTHER ACTION**
[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 1/95 — Considered by ST Cmte. 5/95 — Considered draft proposed 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 802] — Hearsay Rule		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(1)-(5)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(6)] — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change)	Roger Pauley, DOJ 6/93	9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 11/96 — Considered 4/97 — Draft prepared and considered. Subcommittee appointed for further drafting. 10/97 — Draft approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**
[EV 803(7)-(23)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **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. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 10/97 — Effective **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 10/97 — Declined to act **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. 6/92 — Considered by ST Cmte. for publication 1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(1)-(4)] — Hearsay Exceptions		10/94 — Considered 1/95 — Considered and approved for publication by ST Cmte. 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(5)] — Hearsay Exceptions; Other exceptions		5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 10/97 — Effective **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. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **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 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **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). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Self-Authentication		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 10/98 — Comte considered comments and statements from witnesses **COMPLETED**
[EV 902(6)] — Extending applicability to news wire reports	Committee member (10/98)	10/98 — to be considered when and if other changes to the rule are being considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 902 (11) and (12)] — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change)		4/96 — Considered 10/97 — Approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered **PENDING FURTHER ACTION**
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/98 — Considered 10/98 — Reporter submits report; committee declined to act **COMPLETED**
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**
[Attorney-client privilege for in-house counsel]	ABA resolution (8/97)	10/97 — Referred to chair 10/97 — Denied **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 4/97 — Considered 4/98 — Considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**
[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 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC 6/98 — Reporter's Notes published **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 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**

II-A

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendments to Federal Rules of Evidence That Were Released for Public Comment
Date: March 1, 1999

Attached is the complete text and Committee Note of each of the proposed amendments to the Evidence Rules, as they were released for public comment. As you will recall, the Committee agreed on tentative changes to be made to either the text or the Committee Note of Rules 103, 404(a), 702, 703 and 902. These "working drafts" are set forth in the memorandum that discusses each particular rule, as found *infra* in this agenda book

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.— In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

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

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

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

(2) Character of victim. — Evidence of a pertinent

trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

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

* * * * *

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of a victim under subdivision (a)(2) of this Rule, the door is opened to an attack on a corresponding character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the defendant offers proof of self-defense, this permits proof of the victim's character trait for peacefulness, but it does not permit proof of the defendant's character trait for violence).

The amendment makes clear that the accused cannot attack the victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the accused's own corresponding character trait. For example, in a murder case where the defendant

claims self-defense, the defendant, to bolster this defense, might offer evidence of the victim's allegedly violent disposition. If the government has evidence that the defendant has a violent character, but is not allowed to offer this evidence as part of its rebuttal, then the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor This may be the case even if evidence of the defendant's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the defendant's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when the accused chooses to attack the character of the victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion. Finally, the amendment does not permit proof of the defendant's character when the defendant attacks the victim's character as a witness under Rules 608 or 609.

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b)

helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge.

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 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) .

Rule 702. Testimony by Experts

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~~,~~ 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 reliably to the facts of the 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 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) whether 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).

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or

data need not be admissible in evidence in order for the opinion or inference to be admitted. If the facts or data 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.

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 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.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting

certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * * * *

COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. See, e g., *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases

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 which, 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.

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases. The notice requirements in Rules 902(11) and (12) are intended to

give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the certification.

II-B

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Summary of Public Comments Received on the Proposed Amendments to the Federal Rules of Evidence
Date: March 1, 1999

Below is a summary of all public comments received on the proposed amendments You will notice that some of the summaries are simply stated "opposes" or "supports". This is usually because the commentator simply stated something like "I oppose [or support] all the amendments to the Evidence Rules." Most commonly this occurred when a commentator stated general opposition to Evidence Rules 701-703, then spent the rest of the comment attacking the proposed amendment to Evidence Rule 702.

The summaries of these comments by rule will be placed after each proposed rule change that the Committee decides to send on to the Standing Committee. But I thought it would be helpful to the Committee to have all the comments summarized in a single document.

Rule 103

Professor James J. Duane (98-EV-005) states that the first sentence of the proposed amendment to Evidence Rule 103 "is an excellent proposal, and exactly the right response to a situation that is desperately in need of clarity and reform." He argues for some changes in the Advisory Committee Note to more clearly reflect the import of the amendment. Professor Duane opposes the sentence in the proposed amendment that would codify the Supreme Court's decision in *Luce v. United States*, 469 U.S. 38 (1984). . He suggests that the *Luce* rule violates the criminal defendant's constitutional right to testify. Professor Duane argues that if the reason for including *Luce* in the Rule is to avoid the perception that *Luce* was being overruled by negative implication, the less onerous alternative would be to mention in the Committee Note that there is no intent to overrule *Luce*.

Professor Richard Friedman (98-EV 007) agrees with the proposal excusing renewal of objection or offer of proof when the trial court has made a definitive advance ruling, subject to the proviso that when a party who makes the unsuccessful objection or offer of proof does not renew the matter at trial, then that party "should not be allowed to argue on appeal on the basis of information or changes of circumstances that arose after the initial objection or offer of proof." Professor Friedman opposes the language in the proposed amendment to Evidence Rule 103 that would codify the Supreme Court's decision in *Luce v. United States*. He argues that *Luce* is an unfair and controversial rule that should not be codified and, a fortiori, should not be extended beyond its fact situation.

Professor Laird Kirkpatrick (98-EV 011) agrees with the Committee's decision to excuse the requirement of a renewed objection or offer of proof when the trial court's advance ruling is definitive. He contends, however, that there will be "recurring disputes" about whether a particular advance ruling is definitive. He notes that the Advisory Committee Note is "wise" to place the burden on counsel to clarify whether the ruling is definitive, but argues that there may be a tension between how lawyers want to have a ruling characterized and how judges may want it characterized.

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment.

Professor Lynn McLain (98-EV-030) supports the codification of *Luce* but opposes the first sentence of the proposed amendment to Evidence Rule 103. He argues that the proposal will create "grist for arguments as to whether a particular ruling was 'definitive'." He also states that a rule requiring renewal of objections or offers of proof at trial ensures that the trial judge, if wrong

in the pretrial ruling, is given an opportunity to correct that ruling in the light of trial. Thus, Professor McLain would "far prefer" a rule that clearly required a renewal of the objection or proffer at trial."

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 103, noting that it is "extremely well justified by the Committee's accompanying commentary."

Prentice H. Marshall, Esq. (98-EV-071) states that "the amendment to Rule 103 encouraging the use of pre-trial evidence motions/rulings is long overdue."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) notes the "laudable purposes" of the proposed amendment: "to clarify when and how often a party must object to evidentiary rulings to preserve them for appeal, to preclude distracting formal objections to evidence already disposed of pre-trial, and to prevent unintended waivers of objections." The Committee does not believe, however, that "the current draft achieves the desired clarity." It objects that the term "definitive ruling" is undefined. The Committee also concludes that the "condition precedent" language in the second sentence of the proposal released for public comment "may force litigants into untenable choices at trial." Plaintiffs, for example, may be forced to forego a claim if an advance ruling provided that the pursuit of the claim would open the door to damaging evidence. The Committee believes that a plaintiff in such circumstances "should be allowed to attack the *in limine* ruling . . . without having to sabotage her trial."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 103.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed change to Evidence Rule 103. The Association concludes that the proposal "will clear up the confusion about timely objections when dealing with motions *in limine.*

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed change to Evidence Rule 103 "is an important and desirable amendment which would clarify a constant point of confusion and would eliminate a procedural trap."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079)

endorses the proposed amendment to Evidence Rule 103.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 103.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the first sentence of the proposal released for public comment, "since it provides litigants and the courts with some certainties as to when and under what circumstances a party must renew an objection." The Association opposes the second sentence of the proposal released for public comment "as being confusing in its application." The Association asserts that "the second sentence as written appears to permit testimony over an objection if the proponent promises to introduce subsequent testimony establishing the propriety of the testimony to which his opponent objects." In such a case, "if the proponent does not produce such testimony, the condition precedent is not satisfied, but the objector cannot rely on his objection unless he renews it. This is contrary to the salutary purpose of the first sentence" of the proposal, and "places an unfair burden on counsel who has made a timely objection when the burden should actually be placed on the proponent of the testimony to show that he did not make a misrepresentation to the court."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) states that the proposed amendment to Evidence Rule 103 "would be a salutary addition to the Federal Rules of Evidence for two principal reasons. First, it would clarify existing law, which . . . varies among the Circuits. Second, it has the added virtue of establishing certainty by placing lawyers on notice of the circumstances under which it is necessary to renew pretrial objections. At present, counsel may place unwarranted reliance on a pretrial ruling, only to learn after the fact that the failure to renew an objection at trial has foreclosed appellate review." The Committee believes that "a major benefit of the proposed addition to Rule 103(a) is that it is likely to stimulate counsel to inquire of the Court — or stimulate the Court *sua sponte* to remark — on the record whether a pretrial ruling is final." The Committee considers this notice function of the proposal to be "quite valuable "

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) supports the proposed amendment to Evidence Rule 103, for a number of reasons. First, "there is a substantial interest in having a uniform rule to address the effect of *in limine* motions that will be applicable in all federal courts." Second, "the proposed amendment is a sensible resolution of the circuit split", because the requirement imposed by some Circuits that a litigant must always renew an objection to evidence at the time of trial "has resulted in the inadvertent sacrifice of substantial rights by parties who think they have done enough by raising the issue pretrial." Third, "the requirement that a party renew an objection or an offer of proof at

the time of trial serves no real substantial purpose in those cases where the issue can be resolved pretrial and the court has made a definitive ruling. . . . Indeed, such a requirement may result the unnecessary expenditure of resources both by the litigants and by the court." The Committee concludes that "the Rule would eliminate the wasteful and unnecessary practice of renewing objections and offers of proof as to issues that can be and have been definitively resolved. On the other hand, the requirement that the ruling be 'definitive' will give the district court flexibility to provide guidance to the litigants as to its initial view with respect to the admissibility of evidence in those cases where a definitive ruling cannot be made without depriving itself of the ability to reconsider the decision in the developed context of the trial." The Committee suggests "that the Advisory Committee consider adding some commentary further defining the term 'definitive.'"

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "number of attendees" objected to the proposed amendment insofar as it would codify and extend the principles of *Luce v. United States*, 469 U.S. 38 (1984).

Professor Myrna Raeder (98-EV-106) opposes the second sentence of the proposed amendment to Evidence Rule 103, and argues that applying the *Luce* rule to civil cases "will have unintended consequences and provide another procedural weapon for litigators to avoid decisions on the merits."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 103.

The Philadelphia Bar Association (98-EV-118) supports the adoption of the first sentence of the proposed amendment to Evidence Rule 103 (concerning whether objections to advance rulings must be renewed when the evidence is to be introduced). The Association states that the proposal "seems to strike an appropriate balance between the need for a detailed factual record for the consideration of errors on appeal and the need to avoid overly formalistic procedures in the conduct of a trial." The Association objects, however, to the second sentence of the proposed amendment, which would codify the principles of *Luce v. United States*, 469 U.S. 38 (1984). It argues that the rule could be inconsistent with the decision in *New Jersey v. Portash*, 440 U.S. 450 (1979) (refusing to override a state rule of evidence permitting a defendant to preserve a fifth amendment objection to impeachment evidence without testifying at trial). The Association observes that if the second sentence of the proposal is deleted, the Committee Note to the Rule should be amended to indicate that there is no intent to overrule *Luce*.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 103.

The International Academy of Trial Lawyers (98-EV-134) is in favor of the proposed amendment to Evidence Rule 103 "insofar as it eliminates the need for further objection or offer of proof once the court has made a definitive ruling on the record admitting or excluding evidence." The Academy is also in favor of the proposed amendment "insofar as it provides that where the court rules that there is a condition precedent to the admission or exclusion of the evidence, no claim of error may be predicated on the ruling unless the condition precedent is satisfied." However, the Academy suggests that language be added to the proposed amendment "to make it clear that if the court rules that evidence is admissible subject to the eventual introduction by the proponent of the evidence of a foundation for the evidence, the opponent of the evidence cannot claim error based on the failure of the proponent to establish the foundation unless the opponent calls that failure to the court's attention in a timely fashion in a motion to strike or other suitable motion."

Hon. Tommy E. Miller (98-EV-140), United States Magistrate Judge for the Eastern District of Virginia, is "in favor of the spirit of the proposed change" to Evidence Rule 103, but states that the proposal "does not take into consideration the procedures set forth in 28 U.S.C. 636(b)(1)(A) and F.R.Civ.P. 72(a) for objecting to rulings by Magistrate Judges." Under those provisions, if a Magistrate Judge makes a nondispositive ruling in a case not tried by the Magistrate Judge pursuant to the consent of the parties, the objecting party to preserve a claim of error on appeal must file an objection to that ruling within 10 days and have the ruling considered by a District Judge. Judge Miller suggests that a cross-reference to these statutory and Rules provisions be included in Rule 103 "so that parties will be alerted to their duty to timely object."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 103.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 103. He has "always found it disconcerting how the rules have allowed parties and courts to be mired in so much uncertainty on this issue when a clarifying rule, such as the proposed amendment, could provide fair guidance to all parties."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 103.

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 103.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 103 as a desirable means of establishing "a uniform practice regarding the finality of rulings on motions concerning the admissibility of evidence."

Rule 404(a)

Professor Richard Friedman (98-EV 007) states that the proposed amendment to Evidence Rule 404(a) "makes sense, at least up to a point." He believes that it should be "altered to make the evidence of defendant's character admissible only to the extent necessary to rebut an implication that may be drawn from the evidence of the alleged victim's character." He argues that allowing the defendant's character to be attacked is only justifiable when it is necessary to provide a balanced presentation after the defendant attacks the victim's character. This occurs only when the case is "symmetrical in nature", such as where there is a "mutually provocative altercation" and the defendant claims that the victim is the first aggressor.

Professor Laird Kirkpatrick (98-EV 011) states that a rule permitting the accused to be attacked on any "pertinent" character trait, after an attack on the victim's character, would be "overbroad." He argues that there is "no justification for opening the door to character traits of the defendant other than the one corresponding to the character trait of the victim about which the defendant offered evidence." He also urges that the Committee Note should provide that "if evidence of the victim's character is offered by the defendant for a non-propensity reason, such evidence is not being offered pursuant to FRE 404(a) and does not open the door to evidence of the defendant's character."

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 404(a), noting that it is "extremely well justified by the Committee's accompanying commentary."

Professor Douglas E. Beloof (98-EV-066) supports the proposed amendment to Evidence Rule 404(a). He states that the proposal promotes the interests that victims of crime have in the pursuit of truth. He concludes that the proposal rectifies the inequity in the current rule, which "permits the defendant to savage the character of the crime victim while assuring the defendant that he has complete immunity from even the possibility that his character can be put at issue."

Prentice H. Marshall, Esq. (98-EV-071) states that "the proposed amendment to Rule 404(a)(1) is reasonable."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 404(a).

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 404(a).

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 404(a), so long as it is limited to admitting the same character trait that the accused has raised with respect to the victim. In the Committee's view, the current rule "unfairly tilts the 'playing field' in favor of the accused" and "may lead to unjust acquittals." The Committee concludes that it is not an impingement on any fundamental right to permit the prosecution to "complete the picture of what occurred" by proving the accused's violent disposition, "particularly when it is the accused who 'opens the door' to the issue of violent character."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) believes "that evidence of the character trait of the accused should be admitted under the proposed rule *only* if there is a logical nexus between the character evidence with respect to the victim and the character evidence with respect to the accused, i.e., that the character evidence pertaining to the defendant is relevant to rebut the character evidence offered with respect to the victim." The Committee asserts that the proposed amendment "raises constitutional problems with respect to a defendant's rights under the confrontation clause of the Sixth Amendment" because the proposal "could be construed as imposing an unwarranted penalty upon the defendant for presenting a defense and offering evidence attacking the character of the victim."

Professor David P. Leonard (98-EV-092) opposes the proposed amendment to Evidence Rule 404(a). He argues that the "balance" sought by the proposed amendment is "illusory" and concludes that "[t]he effort to create a kind of symmetry between the rights of the defendant to foreclose inquiry into character and the rights of the government to respond to the defendant's choice actually upsets the delicate balance maintained by the current rule."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes " Nonetheless, the professors report that the "overwhelming majority of those present at the Committee meeting expressed the view that the proposed changed to Federal Rule of Evidence

404(a)(1) should not be implemented "

A Number of Professors of Evidence and Others Interested in Evidentiary Policy (98-EV-104) "respectfully urge the Standing Committee not to adopt the proposed amendment to Federal rule [sic] of Evidence 404(a)(1)."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 404(a).

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) believes that the proposed amendment to Evidence Rule 404(a), as it was released for public comment, "raises issues of constitutional fairness to the Defendant " The Committee "would like clarification on whether the trait offered by the prosecution is limited to the same trait as offered by the Defendant The concern is that without such clarification, the prosecution could try to introduce evidence of a *different* trait, thus opening the door to prejudicial testimony and chilling a Defendant's trial strategy."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 404(a).

Hon. William J. Giovan (98-EV-160) Judge for the Circuit Court for the Third Judicial Circuit of Michigan, believes that "in order to remedy the problem perceived by the Committee, it is preferable, instead of significantly expanding an exception to a favored rule of exclusion, to cut Rule 404(a)(2) back to the limited scope of the common law exception as it related to the victim of homicide."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 404(a).

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed changes to Evidence Rule 404(a).

The Federal Magistrate Judges Association (98-EV-173) states that the proposed amendment to Evidence Rule 404(a) "would make the current practice more even handed, however, the impact of the potential to punish a defendant for pursuing highly relevant

information can not be overlooked."

Rule 701

The Product Liability Advisory Council (98-EV-001) supports the proposed amendment to Evidence Rule 701 as necessary to prevent "surprise expert testimony or to thwart the expert disclosure rules." The Council concludes that "the proposed amendment is consistent with the federal courts' interpretation of Rule 701" and that in the absence of specialized knowledge or training, "no witness should be able to offer a personal opinion on scientific or technical subjects."

Peter B. Ellis, Esq. (98-EV-002) 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." Mr. Ellis 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 states that the proposed 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."

Professor Richard Friedman (98-EV 007) argues that the proposed amendment is "likely to be counterproductive." He contends that the proposal draws "too sharp a dichotomy between testimony that is and is not based on specialized knowledge." He concludes that any possibility of discovery abuse should be handled by amendment of the Civil and Criminal Rules, "not by a potentially restrictive and confusing limitation on the lay opinion rule."

Lawyers for Civil Justice (98-EV-009) support the proposed amendment to Evidence Rule 701 as necessary to eliminate a "growing and very troubling prospect: that expert testimony is being 'sneaked in' under the guise of a lay witness because of the lower threshold standards for lay witnesses."

Professor Laird Kirkpatrick (98-EV 011) opposes the proposed amendment, contending that many types of lay opinions that routinely have been admitted would be excluded

under the proposal--such as testimony of a lay witness that a certain substance was cocaine.

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 701

The Committee on Federal Procedure of the New York State Bar Association (98-EV-017) supports the proposed amendment to Evidence Rule 701, as being necessary to prevent an "end run" around the requirements for expert testimony imposed by Evidence Rule 702 and the discovery provisions of the Civil and Criminal Rules.

The Defense Research Institute (98-EV-020) states that the proposed amendment to Evidence Rule 701 "should help eliminate increasing attempts to present expert testimony through lay witnesses without subjecting the testimony to *Daubert* scrutiny or the disclosure requirements of Fed.R.Civ.P 26."

E. Wayne Taff, Esq. (98-EV-021) states that the proposed amendment to Rule 701 is not only beneficial, but also "critical to ensuring the integrity of testimony presented in the United States District Courts."

Kevin J. Dunne, Esq. (98-EV-025) favors the proposed revision to Rule 701 because it "helps prevent expert testimony from inappropriately 'coming in the back door.'"

Diane R. Crowley, Esq. (98-EV-029) states that "[t]he changes to Rule 701 will prevent subterfuge involving experts who cannot meet the reliability test of Rule 702 and attempt to bring in their opinions as a lay witness not subject to such judicial scrutiny. Without the revised Rule 701 to prevent such conduct, the benefits to be derived from the revised Rule 702 will be greatly diminished."

Harold Lee Schwab, Esq. (98-EV-033) states that the Advisory Committee "properly notes the very real risk factor" that "expert witnesses might proffer opinions under the guise of lay testimony and thereby evade the reliability requirements of FRE 702 and the disclosure requirements of Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16." He concludes that the proposed amendment "properly reinforces the original intent of [Evidence Rule] 701."

James A. Grutz, Esq. (98-EV-036) opposes the proposed amendment to Evidence Rule 701.

Thomas A. Conlin, Esq. (98-EV-037) is in favor of the proposed amendment. He states: "Under the changes proposed by the committee, there will be a bright line between opinion testimony which is coming in as expert testimony — and must therefore meet the expert foundational requirements — and that which is coming in as a lay opinion."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 701, asserting that it would "impair the rights of aggrieved parties" by prohibiting lay witnesses from expressing opinions based on specialized knowledge.

Richard L. Duncan, Esq. (98-EV-044) is opposed to the proposed change to Evidence Rule 701.

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) support the proposed amendment to Evidence Rule 701, noting that it is "designed to prevent lay witnesses from testifying as experts and thereby circumventing the reliability requirements of Rule 702 and the disclosure requirements relating to expert witnesses" and that these "salutary purposes fully justify the Proposed Amendment insofar as it would apply in civil litigation."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 701 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence."

Jay H. Tressler, Esq. (98-EV-055) favors the proposed amendment to Evidence Rule 701. He states that "all too often" a person described as a lay witness "is called upon to offer expert opinions never before disclosed under Rule 26." He concludes that "[t]estimony of lay witnesses should not be admitted under Rule 701 if the testimony is based upon 'scientific, technical, or other specialized knowledge.' Lay witnesses testimony on matters of common knowledge which have been traditionally admitted can and should be allowed under Rule 701."

The Committee on Civil Litigation of the United States District Court for the

Eastern District of New York (98-EV-056) opposes the proposed amendment, because the proposal "would not enlighten the courts on the difference between lay and expert testimony."

The Minnesota Defense Lawyers Association (98-EV-057) "strongly supports" the proposed change to Evidence Rule 701. The Association has found "so-called 'expert' testimony routinely being offered, on both sides of the litigation, which is not based on scientific, technical, or other specialized knowledge." The Association concludes that the evidence rules "must require proper foundation before this 'evidence' finds its way to a jury."

Charles F. Preuss, Esq. (98-EV-062) states that the proposed amendment "would appropriately limit lay witness testimony to matters of common knowledge" and that this limitation would prevent "expert testimony from coming in the back door."

Professor Michael H. Graham (98-EV-063) supports the proposed amendment to Evidence Rule 701.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 701, noting that it is "extremely well justified by the Committee's accompanying commentary." Judge Becker does not believe that the term "specialized knowledge" is vague, and predicts that review of trial court rulings in this area "will be largely deferential "

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment to Evidence Rule 701.

William A. Coates, Esq. (98-EV-068) states that the proposed amendment to Evidence Rule 701 "appropriately" limits lay witness testimony to opinions or inferences not based on scientific, technical or other specialized knowledge. He concludes that the proposal "is consistent with the federal court's interpretations of Rule 701 in which persons have been permitted to testify as a lay witness only if their opinions or inferences do not require any specialized knowledge and cannot be reached by any ordinary person."

Prentice H. Marshall, Esq. (98-EV-071) states that the proposed amendment to Evidence Rule 701 is "appropriate."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) believes that the proposed amendment to Evidence Rule 701 responds to a "non-problem." The Committee would, in any event, "expect district courts to temper the revised rule with common sense. For instance, we would not expect that every treating physician would have to be qualified as an expert witness or that an auto mechanic who worked on a defective car would be barred from testifying about the repair record, even if the testimony is based partly on specialized knowledge."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 701.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed change to Evidence Rule 701. The Association concludes that the proposal would "eliminate the practice of proffering an expert as a lay witness thereby avoiding both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony."

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 701.

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 701, on the ground that it "would prevent the offering of expert testimony from a lay witness, which would otherwise circumvent the reliability requirements of Rule 702 and the corresponding disclosure requirements of expert testimony."

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 701.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 701, "with the exception of the inclusion of the words 'specialized knowledge' which we contend should be eliminated." The Association expresses concern that the "specialized knowledge" limitation in the proposed amendment would require witnesses who would testify to the identity of handwriting or to the speed of a vehicle to be qualified as experts. The Association believes "that the words 'scientific' and 'technical' sufficiently demonstrate the type of testimony which should not be permitted by a lay witness."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 701, stating that it will help to prevent "the inappropriate admission of expert evidence under the guise of lay testimony, often to the surprise of adverse parties."

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 701 is an "important and necessary and appropriate" revision.

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 701.

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 701.

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 701. He states that "individuals with hands-on, real-life experience are quite frequently more qualified to testify on scientific, technical or other specialized matters" and that they should be allowed to do so under Rule 701.

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) states that "the integrity of the amendments to FRE 702 calls likewise for the adoption of the proposed amendment to FRE 701 to avoid the possibility of 'end runs' around FRE 702."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that "[t]hose present at the meeting split evenly on the question of whether Rule 701 should be amended, particularly if Rule 702 is not changed "

The Association of American Trial Lawyers (98-EV-108) opposes the proposed amendment to Evidence Rule 701, on the ground that it would "extend the Rule 702 restrictions into yet another area." The Association also states that the "potential breadth of this proposal leads us to wonder if even high-school-level coursework used in developing an opinion could excluded [sic] on the ground that it is 'specialized'!"

The Board of Governors of the Oregon State Bar (98-EV-110) states that the proposed amendment to Evidence Rule 701 "appropriately distinguishes lay witnesses from experts whose testimony is based on scientific, technical, or other specialized knowledge."

The New Hampshire Trial Lawyers Association (98-EV-111) opposes the proposed change to Evidence Rule 701 as "a further effort to unreasonably restrict and constrain the trial as a search for truth."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 701.

James B. Ragan, Esq. (98-EV-113) objects to the proposed amendment because "[b]y making the addition proposed almost any lay witness opinions can be excluded through careful cross-examination."

The Ohio Academy of Trial Lawyers (98-EV-114) opposes the proposed amendment to Evidence Rule 701.

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 701 does "not seem objectionable."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Evidence Rule 701.

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 701, but recommends that the Committee Note be revised to clarify the meaning of "specialized" knowledge "and should address directly whether the amendment would change the result in cases that have traditionally regarded certain opinions as nonexpert, even though based on knowledge that could be considered 'specialized' in some sense — e.g., the opinion of the owner of a business on its value or anticipated profits." The Association states that the amendment "appears to be a beneficial change to reestablish the distinction between lay and expert opinions. It would also discourage evasion of the requirement for pretrial disclosure of expert opinions through characterizing the opinions as 'lay' rather than 'expert'."

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 701.

The Board of Governors of the Maryland Trial Lawyers Association (98-EV-120) opposes the proposed amendment to Evidence Rule 701.

The Lawyers' Committee for Civil Rights Under Law (98-EV-123) has "serious concerns" regarding the proposed amendment to Evidence Rule 701

The Arizona Trial Lawyers Association (98-EV-124) opposes the proposed amendment to Evidence Rule 701

The Washington Legal Foundation (98-EV-125) states that "some courts have been too lenient in permitting lay witnesses to testify on complicated, technical subjects" and that the result of admitting such testimony "is to defeat Rule 702's carefully established limitations on use of testimony on technical subjects." The Foundation "wholeheartedly supports this proposed revision, which makes explicit what should have been clear (but apparently was not) from the current text of Rule 701: parties seeking to introduce opinion testimony of a technical nature may do so *only* if they can meet the requirements of Rule 702 regarding testimony by experts."

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) is concerned "that the Rule, as drafted, may actually preclude lay testimony based upon specialized knowledge, where the testimony does not rise to the level of expert testimony."

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 701.

Michael A. Pohl, Esq. (98-EV-133) opposes the proposed amendment to Evidence Rule 701.

The International Academy of Trial Lawyers (98-EV-134) is in favor of the proposed amendment to Evidence Rule 701, contending that there is "no justifiable reason for not requiring that testimony based on scientific, technical or other specialized knowledge should not be treated as expert opinion, subject to the requirements of Rule 702, and subject to the disclosure

requirements of the Criminal and Civil Rules . . ."

Rod D. Squires, Esq. (98-EV-136) opposes the proposed amendment to Evidence Rule 701.

B.C. Cornish, Esq. (98-EV-137) opposes the proposed amendment to Evidence Rule 701.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 701.

Jon B. Comstock, Esq. (98-EV-142) strongly supports the proposed change to Evidence Rule 701. He states that this "simple modification will have a significant and commendable effect on trial practice."

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 701.

Pamela O'Dwyer, Esq. (98-EV-147) opposes the proposed amendment to Evidence Rule 701.

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 701, on the ground that it is "an unnecessary limit on the discretion of the court, which is well suited to control the presentation of this type of evidence."

J. Michael Black, Esq. (98-EV-153) is opposed to the proposed amendment to Evidence Rule 701.

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 701.

P. James Rainey, Esq. (98-EV-156) opposes the proposed amendment to Evidence Rule 701.

Daniel W. Aherin, Esq. (98-EV-157) opposes the proposed amendment to Evidence Rule 701, on the ground that it is "geared towards preventing individual litigants from presenting reasonable expert testimony."

The Atlantic Legal Foundation (98-EV-158) supports the proposed amendment because it favors "improving the reliability of opinion evidence generally."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed amendment to Evidence Rule 701.

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 701.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 701.

Anthony Tarricone, Esq. (98-EV-166) opposes the proposed amendment to Evidence Rule 701.

Annette Gonthier Kiely, Esq. (98-EV-167) opposes the proposed amendment to Evidence Rule 701, opining that "it effectively eliminates a whole sector of our society, those whose hands-on experience has given them a superior knowledge in a technical, skilled or other specialized area from giving an opinion which is reliable, well-founded and of assistance to the trier-of-fact in determining the facts in issue."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 701.

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 701, stating that it "will allow the courts to determine which testimony needs to be scrutinized under the *Daubert* guidelines, thus precluding expert testimony from so-called lay witnesses to be 'back-doored' without the proper scrutiny."

The Section on Courts, Lawyers and the Administration of Justice of the District of

Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 701.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 701 as a helpful "loophole-closing change."

Rule 702

The Product Liability Advisory Council (98-EV-001) supports the proposed amendment to Evidence Rule 702 "without reservation." The Council states: "As set forth in the Advisory Committee Notes to this proposed rule, these amendments would ensure that before expert testimony can be presented to a trier of fact, it has met a threshold test of its reliability, which precisely expresses the intent of the Supreme Court as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 591, 594 (1993), and *General Electric Co. v. Joiner,* 118 S Ct. 512 (1997)."

Bert Black, Esq., and Clifton T. Hutchinson, Esq. (98-EV-003) would prefer that no changes be made to Evidence Rule 702. To the extent the proposed amendments go forward, they suggest that the rule refer to an expert's "reasoning" rather than "principles or methods " They also argue that the proposal "misses what we believe is an important distinction between validity and reliability."

Professor Edward J. Imwinkelreid (98-EV-004) supports the proposed amendment to Evidence Rule 702 insofar as it requires that expert testimony must be the product of reliable principles and methods, and that the witness must have applied the principles and methods reliably to the fact of the case. He approves the proposal's requirement of "sound procedure" which is a "fundamental guarantee of the value of scientific testimony." Professor Imwinkelreid suggests, however, that the proposed subpart (1) of the rule be amended to require that "expert testimony is sufficiently based upon reliable case specific facts or data."

Professor Richard Friedman (98-EV 007) believes that the proposed amendment to Evidence Rule 702 is unnecessary. He also fears that "requiring a non-scientific expert to speak in terms of reliable principles and methods creates too rigorous a demand."

James D. Bartolini, Esq. (98-EV-008) fears that the proposed amendment "will result in expensive and protracted *Daubert* hearings before the case is reached for trial" and "will be primarily a hammer used against all claimants and all experts, however innocuous their expert opinions are."

Lawyers for Civil Justice (98-EV-009) state that the "proposed revisions to Rule 702 will strengthen judicial decision making by ensuring that scientific expert testimony will have a greater degree of reliability before it is presented to the jury. By enhancing the trial court's role as gatekeeper for the admission of expert evidence, the proposed revisions add emphasis to the

principles articulated" in *Daubert* and *Joiner*. The group concludes that the proposed amendment "enforces the important principles of *Daubert*, clarifies ambiguities and conflicts in interpretations and wisely affirms the vital role of the trial judge as gatekeeper for all expert testimony."

The Evidence Project (98-EV-010) agrees that Rule 702 should be amended but argues that the Advisory Committee's proposed amendment suffers from "a number of flaws" that are "both structural and substantive in nature." The perceived structural flaw is that Evidence Rule 702 "lumps two separate issues--qualifications of the testifying expert and the reliability of the principles underlying the testimony--under the rubric of a single rule." The perceived substantive flaw is that the amendment "does nothing to assist judges in discerning what is meant" by reliable expert testimony." Finally, the Evidence Project recommends that the preponderance of the evidence standard of admissibility should be placed explicitly in the Rule, rather than in the Committee Note.

Professor Laird Kirkpatrick (98-EV 011) states that the proposed amendment is likely to have a "problematic application" with respect to experts who rely mainly on experience. He states that a witness's "experience may not include much in the way of 'principles and methods' but may still be helpful to the jury if based on repeated observations of similar events."

The Association of Trial Lawyers of America (98-EV-012) is opposed to the proposed amendment to Evidence Rule 702. The Association states that the proposal "would render inadmissible the testimony of many experts who have testified without controversy since the inception of the Federal Rules of Evidence." Also, "it would massively increase the costs to the courts and the litigants, requiring interminable Rule 702 hearings."

Hon. Myron Bright (98-EV-013), Judge of the Eighth Circuit Court of Appeals, believes that the current Evidence Rule 702 is operating well and should not be amended. He argues that the proposed amendment unjustifiably shifts power from the jury to the judge, "without any true standards." The confusion in the courts over the meaning of *Daubert* should, in Judge Bright's view, be handled by adjudication rather than by rulemaking.

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment

The Committee on Federal Procedure of the New York State Bar Association (98-EV-017) generally supports the proposed amendment to Evidence Rule 702, stating that the standard imposed "is sufficiently particular to provide guidance over the range of expert opinion

testimony . . . While sufficiently general so that it does not impose a specific test obviously inapplicable to certain forms of expertise today, much less to those that may be invented in the next ten or twenty years." However, the Committee is opposed to subpart (1) of the proposed proviso to Rule 702 (that the expert's testimony must be "sufficiently based on reliable facts or data"), on the ground that this standard "improperly impinges on the role of the trier of fact " The Committee concludes that "Courts addressing reliability issues should only examine the methodology and the application of the methodology to the facts, not the facts themselves."

Charles D. Weller, Esq. (98-EV-018) submitted an article that was useful to the Advisory Committee in its analysis of whether proposed expert testimony is the product of reliable principles and methods.

William Petrus, Esq. (98-EV-019) objects to the proposed amendment to Evidence Rule 702 insofar as it extends the *Daubert* analysis to mechanical engineering experts. He argues that the rule would work a particular "hardship" on plaintiffs in automobile product liability litigation because "the only people with the means to design a new car, test that new car and crush its roof to determine roof strength would be employees of automobile manufacturers."

The Defense Research Institute (98-EV-020) states that the proposed amendment to Evidence Rule 702 "will add greater clarity regarding the duties of the trial judge and require a greater degree of reliability before the testimony is presented to the jury." The Institute states that "proper exercise by the court of its expert witness gatekeeper function on an early and continuing basis will facilitate earlier reasonable resolution of the court action, thereby reducing cost and delay rather than increasing it."

E. Wayne Taff, Esq. (98-EV-021) states that the proposed amendment to Evidence Rule 702 is not only beneficial, but also "critical to ensuring the integrity of testimony presented in the United States District Courts." He states that the proposal "will insure that the finder of fact has a reliable basis upon which to make a determination, without resort to conjecture or speculation "

Hon. D. Brock Hornby (98-EV-023), Chief Judge of the United States District Court for the District of Maine, argues that the proposed amendment to Evidence Rule 702 will impose substantial litigation costs due to "the proliferation of motions to preclude expert testimony and *voir dire* hearing held in advance of trial that the growing elaborateness of the gatekeeping rules entails." Judge Hornby asks. "Where is the evidence that lawyers are not able to cross-examine effectively and show whatever limitations there are on the bases for expert opinion testimony that is not scientific?"

Professor Eileen A. Scallen (98-EV-024), suggests that "the Committee explicitly make the admissibility of expert testimony an issue to be determined under Fed.R.Evid. 104(b) . . . as an issue of relevancy conditioned on fact." She argues that "[g]iving the sole power to the judge to determine reliability usurps the jury's traditional role in evaluating the credibility of evidence." She concludes that "text, precedent, historical and constitutional concerns, as well as pragmatic considerations, suggest that the Advisory Committee should take the opportunity of amending the expert testimony rules to clarify that the admissibility of expert testimony is to be determined under Federal Rule of Evidence 104(b) "

Kevin J. Dunne, Esq. (98-EV-025) supports the proposal to amend Evidence Rule 702. In his view, complaints that the proposal deprives the jury of its role in assessing the weight of the evidence are unfounded. He states: "The phrase, 'it goes to the weight' has become synonymous with *laissez-faire* judging and a license for admissibility of junk science Indeed, this . . . argument can be used to eliminate all rules of evidence . . ."

Thomas E. Carroll, Esq. (98-EV-027) opposes the proposed amendment insofar as it would embody the principles of *Daubert*. He contends that *Daubert* has "tripled the cost of litigation in matters involving significant issues of expert testimony." He concludes that the proposal overlooks "the ability of juries, good lawyers who subject testimony of experts to extensive cross-examination, and the ability of judges to rules under FRE 702 as it now stands."

Norman W. Edmund (98-EV-028) suggests that the proposed amendment make a more specific reference to, and explication of, the scientific method.

Diane R. Crowley, Esq. (98-EV-029) "wholeheartedly" supports the proposed amendment to Evidence Rule 702. She states that "[i]t is important to point out to the critics of change that the proposed version of Rule 702 does not impose the full *Daubert* criteria on every opinion offered by every expert witness. . . . The proposed change asks for nothing more than indications of reliability . . ."

Professor Lynn McLain (98-EV-030) opposes the proposed amendment to Evidence Rule 702. He complains that the proposal "would make the court, in every case involving expert testimony, go through a time-consuming tripartite preliminary fact-finding exercise." He also objects that the proposal "seems to push the judge into a 104(a) role that impinges on the jury's fact-finding." Professor McLain claims that the sufficiency of an expert's basis should be decided under the conditional relevance standard of Evidence Rule 104(b).

Pamela F. Rochlin, Esq. (98-EV-032) objects to the proposed changes to Evidence Rule 702. She declares that the proposal would "allow judges, whose decisions will be reviewable on an abuse of discretion standard only, to eliminate plaintiff's experts and similarly dismiss plaintiff's cases." She also expresses concern that the proposed rule "will require a *Daubert* hearing in every case where experts are proffered" thus adding "another layer of time and expense to already crowded court dockets."

Harold Lee Schwab, Esq. (98-EV-033) states that the Advisory Committee "properly decided not to codify the *Daubert* guidelines in the [text] of the rule since it is obvious that one or more of the factors articulated in that case might not apply to some other expert and his/her discipline whereas other non-enumerated factors might be relevant. The standards set forth in the amendment are broad enough to encompass one or more of the *Daubert* factors but also other factors where appropriate." Mr. Schwab concludes that "[t]here can be no valid objection to this amendment."

Henry G. Miller, Esq. (98-EV-034) opposes the proposed change to Rule 702 on the ground that it is "autocratic and less than egalitarian to so distrust the jury's determination of which expert to believe "

Robert M. N. Palmer, Esq. (98-EV-035) opposes the proposed amendment's extension of the *Daubert* gatekeeping function to non-scientific expert testimony. He argues that application of "the *Daubert* principles to all expert opinion would work to the benefit of large corporations and to the very serious detriment of injured consumers even where the expert opinions and principles underlying them are not seriously disputed."

James A. Grutz, Esq. (98-EV-036) is opposed to the proposed amendment to Evidence Rule 702 on the ground that it places "far too much discretion in the trial court's hands" leaving the potential for "eroding away a litigant's right to trial by jury."

Thomas A. Conlin, Esq. (98-EV-037) opposes the proposed amendment to Evidence Rule 702, stating that the proposed amendatory language is "superfluous." He declares that courts can use existing rules to "weed out testimony which is — essentially — without *foundation*." Mr. Conlin encourages the Advisory Committee to "let cross-examination work its wonders, and let jurors, not judges, decide cases."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 702, asserting that it would "impair the rights of aggrieved parties" by applying the *Daubert*

principles to non-scientific experts.

John Borman, Esq. (98-EV-039) opposes the proposed amendment to Evidence Rule 702 as an unwarranted expansion of the trial court's gatekeeping role. He concludes: "The proposed rule will permit trial judges to choose between opposing witnesses, exclude expert testimony where the judge disagrees, and infringe on the litigant's constitutional right to a jury trial."

Donald A. Shapiro, Esq. (98-EV-040) is opposed to the proposed amendment to Evidence Rule 702. He states that the proposal provides "too much discretion to the trial judges to exclude expert testimony" and might allow trial judges "to pick and choose which experts they dislike and to bar their testimony as opposed to letting juries decide the credibility and reliability of experts."

Michael J. Miller, Esq. (98-EV-042) is opposed to the proposed amendment, on the ground that it will empower federal judges to "arbitrarily" determine the admissibility of expert testimony. He concludes that the proposal "will ultimately add an enormous amount of litigation to the courts as defendants will assert every plaintiff's expert is outside of the perceived defense mainstream."

M. Robert Blanchard, Esq. (98-EV-043) states that "the proposed change to Rule 702 will permit trial judges to simply choose which side of the case they want to win, as happens too often already, and will infringe on the litigants' constitutional right to a jury trial."

Richard L. Duncan, Esq. (98-EV-044) is opposed to the proposed change to Evidence Rule 702. He argues that the proposed amendment would "infringe a litigant's constitutional right to a jury trial and create unequal justice" because it would "invite the wealthier litigant to raise the standards of proof to an impossibly high level which a poor litigant will be unable to afford and will encourage the tendency of hourly paid attorneys to substitute Motions in Limine for a trial on the evidence."

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) "fully support" the proposed amendment to Rule 702, on the grounds that it "clarifies the trial court's function as gatekeeper with respect to the admissibility of all types of expert testimony, not just scientific testimony, and sets some

meaningful standards for determining the reliability and the admissibility of such testimony." These organizations suggest, however, "that the Committee consider adding language to the Note emphasizing the need for focus on the expert's reasoning; the need for a valid explanatory connection between the information relied upon and the conclusion reached; and the need to clarify the relationship between 'validity' and 'reliability.'"

The National Board of the American Board of Trial Advocates (98-EV-049) "opposes the proposed amendment to Evidence Rule 702 because it invades the province of the jury, adversely impacts and even preempts the fact-finding and decision-making powers of the jury, places an onerous burden on the judiciary, litigants and counsel and does not promote the efficient administration of justice."

The Lawyers' Club of San Francisco (98-EV-050) opposes the proposed amendment to Evidence Rule 702. It contends that "the proposed amendment is a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony." The Club concludes that under the amendment, the trial court could "choose between two opposing witnesses, and exclude the testimony of the witnesses with which they disagree, thereby taking away the right to a jury trial on the opinion governing the outcome of the case."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 702 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence." He observes that "[t]he uniformity in having all circuits apply the same threshold requirements prior to the admission of expert testimony will ensure at least some basic level of reliability prior to the admission of expert opinion", and that the proposed amendment "will allow the courts to embark on a simple three-part analysis prior to the admission of any expert testimony."

Jay H. Tressler, Esq. (98-EV-055) is in favor of the proposed amendment to Evidence Rule 702. He states that the proposal "offers a necessary extension of the gatekeeper function" which is needed to "avoid unreliable, untested opinions which have not been predicated upon reliable methodology or subjected to adequate peer review scrutiny."

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary." The Committee states that the proposal "would not clarify the *Daubert* test; it merely changes the vocabulary that would be used."

Weldon S. Wood, Esq. (98-EV-058) supports the proposed amendment to Evidence Rule 702.

Michael S. Allred, Esq. (98-EV-059) opposes the proposed amendment on the ground that it will "place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony."

Russell W. Budd, Esq. (98-EV-061) opposes the proposed revision to Evidence Rule 702. He believes that the proposal "will license the trial judge to usurp the role of the jury" by permitting the judge to determine the sufficiency of the expert's facts or data, and by permitting the judge to determine whether the expert applies reliable principles and methods to the facts of the case.

Charles F. Preuss, Esq. (98-EV-062) supports the proposed amendment and observes that the Committee Note "appropriately acknowledges the relevance of the non-exclusive checklist of factors discussed in *Daubert* and other cases for assessing the reliability of scientific expert testimony, but no attempt is made to codify them as part of Rule 702."

Professor Michael H. Graham (98-EV-063) supports the proposed amendment to Evidence Rule 702. He states that the proposal "correctly asks whether *any* expert's explanative theory is 'the product of reliable principles and methods.' Thus the focus is switched from whether the explanative theory actually 'works' . . . to whether the explanative theory is the product of, i.e., is derived applying, reliable principles and methods . . . thereby providing the court with sufficient confidence that it 'may work.'" Professor Graham argues that the position taken by the proposal is consistent with the position taken by "many Courts of Appeals."

Frank Stainback, Esq. (98-EV-064) supports the proposed amendment to Evidence Rule 702 and states that it is "important that an attempt be made to provide a more uniform interpretation of *Daubert* in the federal courts."

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 702, noting that it is "extremely well justified by the Committee's accompanying commentary."

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment toEvidence Rule 702.

William A. Coates, Esq. (98-EV-068) supports the proposed amendment because it helps to "insure that scientific expert testimony must have some measure of reliability before it is presented to a jury."

William Petrus, Esq. (98-EV-070) opposes the proposed amendment to Evidence Rule 702. He contends that the proposal imposes unnecessarily strict limitations on the admissibility of expert testimony, under which "hundreds of thousands of dollars would be required to satisfy pedantic concerns."

Prentice H. Marshall, Esq. (98-EV-071) states that the proposed amendment to Evidence Rule 702 is "appropriate" although he wonders whether the proposal will "increase the proliferation of motions for summary judgment based upon a motion to strike under the *Daubert* case."

Trial Lawyers for Public Justice (98-EV-072) oppose the proposed amendment to Evidence Rule 702. They argue that the rule "will pose undue restrictions on the admissibility of expert testimony"; that it would "unwisely expand trial judges' gatekeeping role, by permitting them to substitute their judgments on reliability of expert testimony for that of the experts' peers"; and that "the text of the rule and the Advisory Committee Note are unclear as to how courts should determine evidentiary reliability."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) contends that the proposed amendment "raises the bar" on such "historically probative evidence" as police and mechanics' testimony

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 702.

The Seventh Circuit Bar Association (98-EV-076) believes that the proposed amendment to Evidence Rule 702 is "warranted" and "will bring greater rigor and uniformity to a trial judge's application of the Supreme Court's *Daubert* decision.

The National Association of Railroad Trial Counsel (98-EV-077) states that the proposed amendment to Evidence Rule 702 "would be a welcomed change considering the confusion in this area."

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 702

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 702

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 702.

The Pennsylvania Trial Lawyers Association (98-EV-081) opposes the proposed amendment to Evidence Rule 702. It fears that under the proposal, "courts may feel compelled to evaluate expert testimony under a unitary, rigid standard that does not take into account the nature of the opinions being offered."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) states that the proposed amendment to Evidence Rule 702 "accurately and clearly states the three-pronged reliability requirement for establishing admissibility of expert evidence under *Daubert, General Elec. v. Joiner,* 118 S.Ct. 512 (1997), and the better reasoned opinions of the lower federal courts." The Committee also "strongly supports the proposal to make explicit that the reliability premise of *Daubert* applies to all expert evidence." The Committee notes that "a number of difficult issues have and will arise with respect to the reliability of evidence proffered by 'experts by experience,' particularly in those instances in which there is adverse expert testimony based upon apparently reliable scientific or technical knowledge." The Committee concludes, however, that "the Advisory Committee is right to leave those issues for resolution by the courts over time."

Professor Adina Schwartz (98-EV-085) states that "[b]y allowing admissibility to be based not on stature among scientists but on judges' own scientific views or extra-scientific biases, proposed Rule 702 licenses unjustified encroachment on the jury's role."

Professor Victor Gold (98-EV-086) criticizes the proposed amendment as imposing "an enormous burden on trial judges to evaluate the reliability of expert testimony in all fields of knowledge." Such a burden "may encourage judicial resort to arbitrariness and bias on issues that can be outcome determinative but usually will be rubberstamped by appellate courts under a toothless standard of harmless error."

John R. Lanza, Esq. (98-EV-087) states that the proposed amendment "now places the trial court not as 'a gatekeeper' but as a 'super juror'. This results in costly evidentiary hearings and in preclusion of case determinant expert testimony, based upon the trial judge's interpretation of facts."

Dr. Michael A. Centanni (98-EV-089) urges that the Committee Note to the proposed amendment to Rule 702 "include two basic questions that are fundamental to determining reliable science— 'Does the science work, and Why?'"

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 702 is an "important and necessary and appropriate" revision.

The Oregon Trial Lawyers Association (98-EV-091) opposes the proposed amendment to Evidence Rule 702 The Association contends that "[t]his substantial change to Rule 702 would render inadmissible the testimony of many experts who have testified without controversy since the creation of the Federal Rules of Evidence." It concludes that the proposed amendment "would result in an additional layer of litigation, more complex than a summary judgment proceeding, where the court is to determine not only whether there are material facts in dispute, but also to make a determination regarding the reliability of those facts, a task which will prove expensive and time consuming for the litigants and the court."

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 702, arguing that "more discretion given to the trial court judges on the allowance of expert testimony" will result in "inequitable treatment."

Shawn W. Carey, Esq. (98-EV-094) states that the proposed amendment "would be unduly burdensome and would prevent doctors whose diagnosis are based on years of training and experience to be second guessed unless they performed scientific experiments."

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 702 on the ground that it "would trample the rights of Plaintiffs who would be denied their day in Court."

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 702. He states that "[r]ather than codifying *Daubert* the Committee should formulate a rule which does away with *Daubert* and allows new, cutting edge, but reliable scientific expert testimony to assist

triers of fact in civil trials."

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) states that "although the current Rule could remain 'as is' . . . it would be rather anomalous not to reflect the substance of the Supreme Court's decision in the very Rule that deals with the matter raised in *Daubert*. Accordingly, the Committee supports the proposed amendment's purpose to incorporate the gatekeeper function announced in *Daubert* into FRE 702." The Committee asserts that the proposed amendment "correctly focuses on the reliability of the facts, the principles or methods of analysis, and the application of such principles or methods to the facts." It believes that "it is impractical to seek more precise formulations." The Committee also asserts that the proposed amendment's application to non-scientific expert testimony "is highly desirable" and that :the gatekeeping function announced in *Daubert* is even more important in the 'soft' disciplines than in the hard sciences." The Committee notes that under *Daubert*, as under the proposed amendment, it is possible that more experienced-based expert testimony will be excluded than had previously been the case. However, where that testimony is in fact unreliable, "the exclusion of such testimony should be regarded as the desirable and intended consequence of a vigorous application of the *Daubert* principles."

The Montana Trial Lawyers Association (98-EV-098) opposes the proposed amendment to Evidence Rule 702, stating that the reliability requirements set forth in the proposal "go way beyond judicial gatekeeping and usurp the fact finder and jury roles." The Association states that "[t]he very term 'reliability' is inherently a credibility determination" and that the factors bearing on reliability set forth in the Committee Note should not be dispositive.

Kelly Elswick, Esq. (98-EV-099) objects to "the additional criteria in proposed Rule 702 as applied to non-scientific expert testimony. The problem with this rule is that a great deal of expertise, in fact most expertise, is based upon experience. . . . Therefore, there are no delineated formulas to follow."

The Trial Lawyers Association of Metropolitan Washington, DC (98-EV-100) strongly opposes the proposed change to Evidence Rule 702. The Association believes that the proposal "raises the bar of admissibility on expert opinions to a height that totally usurps the jury's traditional role as the fact-finder. By requiring that federal judges make 'reliability' findings about the facts and methods used by experts, the proposed rule would have judges become the real triers of fact concerning experts." The Association asserts that the proposal is based on a factual assumption that jurors are incompetent--a reflection of "an elitist bias." It concludes that the proposed amendment also creates "a bias against experienced-based experts by trying to measure them against standards that have no bearing on their work."

The Michigan Trial Lawyers Association (98-EV-101) opines that the proposed amendment "does not adequately define 'reliable facts or data,' 'reliable principles and methods,' or the manner in which the judge is supposed to determine whether the expert has 'applied the principles and methods reliable [sic] to the facts of the case." The Association asserts that the "lack of clarity in the proposed amendment will spawn protracted litigation, creating a significant burden on litigants and the courts." It concludes that "[t]rial judges do not, and should not, have the authority to exclude experts merely because the expert, for example, represents the minority view in his or her field, or disagrees with the leading authority on a particular subject. The proposed amendment, however, would do just that "

Peter S. Everett, Esq. (98-EV-102) objects to the proposed amendment on the ground that it is "designed to apply the *Daubert* decision more broadly." Mr. Everett declares that *Daubert* is premised upon "an unhealthy disrespect for the abilities of jurors to sort out meritorious claims from those that lack merit."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that some Committee members at the meeting expressed the view that "the attempt to codify the *Daubert* decision . . . created more problems than it solved."

A Number of Professors of Evidence and Others Interested in Evidentiary Policy (98-EV-105) state that the "proposed changes to Federal Rule of Evidence 702 may upset settled practices and expectations, have unintended consequences and create more problems than they solve. The new rule will not increase the predictability of the outcome of challenges to the admissibility of expert testimony. Instead, the changes in the rule may incur high costs in the form of unintended consequences and increased litigation."

Professor Myrna Raeder (98-EV-106) opposes the proposed amendment as containing "amorphous language." She suggests instead that the Committee adopt a proposal that would employ the *Frye* test as a rebuttable presumption of admissibility.

Timothy W. Monsees, Esq. (98-EV-107) states that the proposed amendment to Rule 702 represents "a very bad change for plaintiffs."

The Association of American Trial Lawyers (98-EV-108) opposes the proposed

amendment to Evidence Rule 702. It expresses concern with the factors bearing on reliability set forth in the Committee Note, and asserts that "all of them have the potential, if they are adopted by a court as a focus of expert testimony scrutiny, to become unfairly outcome-determinative."

Michigan Protection and Advocacy Service (98-EV-109) opposes the proposed amendment to Evidence Rule 702, on the ground that it will "invade the province of the jury, denying parties a fair opportunity to present a complete case or defense " The Service expresses concern that the proposal "affords greater likelihood that one party's expert might be barred simply because the other side's expert followed a more conventional — albeit not necessarily more reliable — method to support the opinion."

The Board of Governors of the Oregon State Bar (98-EV-110) opposes the proposed change to Evidence Rule 702 The Board concludes that the proposed amendment "would result in a substantive change in the law without a sufficient analysis or justification having been demonstrated or consensus obtained to support the amendment." In the Board's view, the result of the proposal "would be that more experts would be excluded under the amendment than would ever have been excluded under *Frye*, a result inapposite to the Supreme Court's objectives when it held in favor of the proponents of the scientific evidence in *Daubert*." The Board's conclusion is word-for-word identical to the conclusion set forth by the Oregon Trial Lawyers Association (98-EV-071).

The New Hampshire Trial Lawyers Association (98-EV-111) believes that the proposed amendment to Evidence Rule 702 poses "a significant threat to the trial as a truth-finding process" and "will foster an extensive and extremely expensive practice of trying to limit or prevent outright the testimony of virtually any witness who has not submitted his or her opinions to some scientific journal or peer review."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 702.

James B. Ragan, Esq. (98-EV-113) objects to the part of the proposed amendment to Evidence Rule 702 that requires the trial judge to determine that the expert reliably applied the principles and methods to the facts of the case. This question, in his view, "is more appropriately decided by the jury."

The Ohio Academy of Trial Lawyers (98-EV-114) opposes the proposed amendment to Evidence Rule 702, arguing that the proposal "may extend the trial, as there will be a hearing

within the trial to determine if the experts can testify."

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 702 "would no doubt encourage litigants to file more *Daubert* motions."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Evidence Rule 702, arguing that it would bar "much experience-based or specialized knowledge opinion evidence by non-scientists that is currently admitted routinely in the courts."

John P. Blackburn, Esq. (98-EV-117) opposes the proposed amendment to Evidence Rule 702. He is concerned that the proposal will make it more difficult for plaintiffs to "prove their cases."

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony" and that it "seriously alters the right of the litigants to a trial by jury."

The Board of Governors of the Maryland Trial Lawyers Association (98-EV-120), opposes the proposed amendment to Evidence Rule 702, on the ground that the Committee should adopt a "wait and see" attitude in light of the Supreme Court's recent consideration of expert evidence issues. The Board also declares that "[t]estimony of experts, that has always been admissible, both before and after the adoption of Rule 702 would be excluded by the proposed changes adopting and applying the *Daubert* restrictions "

James B. McIver, Esq. (98-EV-121) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a change not needed and would have adverse effects on obtaining truth and justice in America."

Stephen M. Vaughan, Esq. (98-EV-122) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a change not needed and would have adverse effects on obtaining truth and justice in America."

The Lawyers' Committee for Civil Rights Under Law (98-EV-123) has "serious

concerns" regarding the proposed amendment to Evidence Rule 702.

The Arizona Trial Lawyers Association (98-EV-124) opposes the proposed amendment to Evidence Rule 702 and believes that "the efforts to expand *Daubert* beyond the limits of scientific causation testimony is ill advised and contrary to the constitutional rights of citizens to a trial by *jury*." The Association declares that under the proposed amendment, "experts testifying based on their experience or knowledge are prohibited." It states that "perhaps" the Advisory Committee "thinks that it was appropriate that Galileo was blinded for his radical ideas".

The Washington Legal Foundation (98-EV-125) "applauds the proposed amendment to Rule 702; it will make clearer that the district court's gatekeeping function is as fully applicable to proposed nonscientific expert testimony as it is to proposed scientific expert testimony " As to experience-based experts, the Foundation agrees with the Advisory Committee's position that "[a]t the very least, any expert ought to be able to explain his/her methodology, such that others could attempt to follow the same path . . ."

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) has three concerns about the proposed amendment to Evidence Rule 702. First, "the Rule needs to address more specifically, in some fashion, the expert who is qualified through on-the-job training and experience (as opposed to formal schooling). Second, the Rule or the Committee Note should clarify that "trial testimony can include expert testimony based on contradictory principles used by different experts." Third, the words "the product of" in proposed subpart (2) should be changed to "based upon"; the concern is that the proposed language "would seem to suggest that some empirical studies have been made to support the expert testimony when, in fact, this may not be the case with specialized knowledge expert testimony, for example."

The Connecticut Trial Lawyers Association (98-EV-127) opposes the proposed amendment to Evidence Rule 702, on the ground that it would "massively expand the judge's 'gatekeeping' role beyond what the Supreme Court required in *Daubert*."

Eliot P. Tucker, Esq. (98-EV-128) opposes the proposed amendment to Evidence Rule 702, contending that it is "another erosion on the right to trial by jury that the federal courts seem hell-bent on fostering."

The Law Firm of Shernoff, Bidart, Darras & Arkin (98-EV-129) opposes the proposed amendment to Evidence Rule 702, arguing that the proposal "will expand the already-

existing danger to consumer actions arising from *Daubert* itself and inappropriately limits the jury's power to make the very determination it was designed and intended by the framers of the Constitution to make."

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 702, on the ground that it "will help curtail 'junk science' testimony by unqualified experts."

Hon. Stanwood R. Duval, Jr. (98-EV-131), District Judge for the United States District Court of the Eastern District of Louisiana, is opposed to the proposed amendment to Evidence Rule 702. He contends that the proposal will encourage "*Daubert* motions in every case where there's an expert." Judge Duval states that "although the Advisory Committee notes are helpful, the text of the rule shall be law if passed."

George Chandler, Esq. (98-EV-132) believes that "the restriction of the right to call experts by making the *Daubert* case a rule of evidence would have a devastating effect on the right of a fair trial to individual claimants."

Michael A. Pohl, Esq. (98-EV-133) opposes the proposed amendment to Evidence Rule 702. He asserts that applying *Daubert* to the testimony of experts in cases such as those involving family physicians, securities issues or employment-related matters "would tend to stack the deck against the proponent of the evidence when issues of the credibility of the witnesses in those type cases should normally be left to the trier of fact."

The International Academy of Trial Lawyers (98-EV-134) is unable to reach a consensus with regard to "the wisdom of adopting the proposed amendment to Rule 702." Those in favor of the proposal assert that "it will remove any confusion over whether the principles of *Daubert* apply to all expert testimony rather than only scientific testimony" and that there is "no reason why an engineer should not be subject to the same scrutiny as an epidemiologist although not all of the *Daubert* factors may apply to a particular expert." Those opposed to the proposal point out "that a substantial number of circuits have held that *Daubert* applies only to expert testimony based on scientific principles."

Barry J. Nace (98-EV-135) opposes the proposed amendment to Evidence Rule 702, concluding that "if we are going to have any opportunity for a jury to decide the credibility and the weight to be given to opinion testimony, then reliability should not be something decided by the trial court." He also asserts that the proposal's reliability requirements are in conflict with

Rule 703, which "requires only that the experts use facts or data reasonably relied upon by experts."

Rod D. Squires, Esq. (98-EV-136) opposes the proposed amendment to Evidence Rule 702, on the ground that "extending *Daubert* any further will result in more injured people's claims being adversely affected and the cost of litigation unnecessarily increasing."

B.C. Cornish, Esq. (98-EV-137) opposes the proposed amendment to Evidence Rule 702, asserting that "the application of the *Daubert* ruling to all opinion testimony defies common sense." He claims that under the proposal, professional counselors could not testify to mental anguish, and treating physicians could not testify about what caused a patient's condition.

Tyrone P. Bujold, Esq. (98-EV-138) opposes the proposed amendment to Evidence Rule 702. He contends that the proposal rests on the unjustified premise that jurors "are frequently confused by charlatan experts." He concludes that "[w]e need not fear the jury system. And we need not create pinched rules which give trial judges far more than they need, want, or is required."

Martin M. Meyers, Esq. (98-EV-139) opposes the proposed amendment to Evidence Rule 702 insofar as it purports to extend *Daubert* principles to nonscientific expert testimony. He asserts that a consequence of the proposed amendment "is that run of the mill professionals will be further discouraged from testifying because the burden upon them to justify their testimony at pre-trial *Daubert* hearings will be more that they can reasonably be expected to undertake and keep up with their other professional duties. This will drive both plaintiffs and defendants further into the hands of professional testifiers, something that the rules should discourage rather than encourage."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 702.

Jon B. Comstock, Esq. (98-EV-142) strongly supports the proposed change to Evidence Rule 702. He states that "Courts need uniform direction as to how to be a gatekeeper for 'expert' testimony." He would go "one step further" and delete all references to "experts" in the text of the Rule.

Tony Laizure, Esq. (98-EV-143) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary" and "will put those challenging the status quo at a distinct disadvantage."

Edward D. Robinson, Jr., Esq. (98-EV-144) "agrees with the Committee's concern that junk science should not form the basis of expert opinion." He opposes the proposed amendment, however, on the ground that it does not provide "sufficient guidance for a district judge to determine whether an expert with a broad experiential base (as opposed to data driven base) should be permitted to offer an opinion."

Karl Protil, Esq. (98-EV-145) strongly opposes the proposed amendment to Evidence Rule 702, and states that "*Daubert* was never intended to apply to standard of care opinions — these are not subject to the scientific method." He concludes that the proposal usurps the role of the jury.

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 702, arguing that its effect "will be to raise the cost of litigation to the average citizen and limit his or her access to the court system."

Pamela O'Dwyer, Esq. (98-EV-147) opposes the proposed amendment to Evidence Rule 702, arguing that it will "increase the costs to litigants."

Jesse Farr, Esq. (98-EV-148) opposes "evidentiary changes that would disallow experience based consideration and/or expert testimony."

The Prison Law Office (98-EV-149) opposes the proposed amendment to Evidence Rule 702.

Martha K. Wivell, Esq. (98-EV-150) opposes the proposed amendment because it "gives no guidance as to how trial judges should assess the adequacy of an expert who is relying principally on experience." She also concludes that the proposal "makes litigation in Federal courts more expensive because it would require a *Daubert* hearing in virtually every case."

Jeffrey P. Foote, Esq. (98-EV-151) opposes the proposed amendment to Evidence Rule

702, and does not believe "that the gatekeeper function of *Daubert* should be extended to all expert testimony." He also takes issue with the Committee Note's reference to opinions developed expressly for the purposes of testifying, stating that if this reference is strictly construed, "it will eliminate a substantial amount of helpful expert testimony."

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary, overly restrictive, and will serve to bar much opinion evidence based on specialized knowledge or experience of non-scientists."

J. Michael Black, Esq. (98-EV-153) is opposed to the proposed amendment to Evidence Rule 702, declaring that "our form of government . . . has become a plutocracy and the proposed rules changes, if enacted, will only act to further the control of special interests over our government."

Anthony Z. Roisman, Esq. (98-EV-154) states that the proposed amendment to Evidence Rule 702 is "ill-advised and will cause substantial disruption to the orderly conduct of litigation or unfairly limit the rights of litigants " He concludes that the proposal increases "the likelihood that cases will be decided on the basis of who has the most resources, not who has the most justice, on their side."

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 702, on the ground that its effect "is to substitute trial of the facts by judges rather than by juries."

P. James Rainey, Esq. (98-EV-156) opposes the proposed amendment to Evidence Rule 702. He states that a "Wood Carver should not have to met [sic] the same standards that the Chemical Engineer would have to met [sic] in order to testify about his specialties."

Darrell W. Aherin, Esq. (98-EV-157) states that "some federal judges at the trial level are usurping the role of the jury The current climate appears to be so probusiness I would hope that any proposed rules won't lead to further unfairness and deny access to the courts for individual litigants."

The Atlantic Legal Foundation (98-EV-158) generally supports the proposed amendment to Evidence Rule 702. It states that the proposal will "prevent miscarriages of justice resulting from misunderstanding by lay triers of fact concerning the validity of 'expert' opinions." It also notes that "[a]s *Daubert* recognized, the determination of whether expert opinion satisfies

the standards for admissibility is to be decided by the judge under Rule 104(a), part of the court's longstanding 'gatekeeping' function with respect to expert opinion." The Foundation observes that while the reliability standards set forth in the proposal are "somewhat general, it probably cannot be made more detailed or explicit and still retain general applicability." However, the Foundation believes that part (1) of the proposed proviso to Evidence Rule 702 "goes too far in requiring courts to determine whether expert opinion is 'sufficiently based upon reliable facts or data.'" It states that courts addressing reliability issues "should only examine the methodology and the application of the methodology to the facts, not the facts themselves."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed amendment to Evidence Rule 702, asserting that it engrafts on non-scientific experts "the strict science-based *Daubert* rules."

Hon. Russell A. Eliason (98-EV-161), Magistrate Judge for the United States District Court of the District of North Carolina, proposes that Evidence Rule 702 be amended to subject expert testimony to the following restrictions: "The courts shall consider (1) the nature of the discipline and the degree to which it is capable of rendering valid, credible, or simply accepted conclusions, (2) whether the testimony is sufficiently based upon reliable facts or data, (3) whether the testimony must be given subject to restrictions, limitations or cautions because it cannot be demonstrated to be the product of reliable principles and methods, and (4) whether the principles and methods may be reliably applied to the facts of the case."

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 702.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 702 on the ground that it imposes unnecessarily rigid requirements on experts, and will increase the cost of litigation.

The Law Firm of Saltz, Mongeluzzi, Barrett and Bendesky (98-EV-164) opposes the proposed amendment to Evidence Rule 702, on the ground that it "will have a negative impact on a plaintiff's practice." The Firm asserts that there are "many reasons why the defense would be compelled to challenge each and every expert" under the proposed amendment.

Warren F. Fitzgerald, Esq. (98-EV-165) states that the proposed amendment to Evidence Rule 702 is "unnecessary and will have a detrimental effect upon the fair evaluation of relevant opinion evidence from experts."

Anthony Tarricone, Esq. (98-EV-166) states that the proposed amendment to Evidence Rule 702 would "substitute the judge as finder of fact instead of the jury by removing from the jury consideration of the weight and credibility of evidence." He does not believe that the is "sufficient justification" for the proposed change.

Annette Gonthier Kiely, Esq. (98-EV-167) states that the proposed amendment to Evidence Rule 702 "threatens the traditional role of the jury as the finder of fact by empowering the judge to exclude evidence, whose weight and credibility has traditionally been and should continue to be assessed by the jury in determining the facts in issue."

David Dwork, Esq. (98-EV-168) opposes the proposed amendment to Evidence Rule 702, asserting that "an extension of the *Daubert* decision could have a restrictive impact on the presentation of relevant, credible, and material evidence merely because the expert does not meet rigid criteria which do not in all cases reflect on his or her expertise."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 702.

Douglas K. Sheff, Esq. (98-EV-170) asserts that the proposed amendment to Evidence Rule 702 "would be an affront to the jury system and much of what the founding fathers intended when they created the finest means ever devised to determine disputes."

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 702 stating that it will "properly clarify the gatekeeper function of *Daubert* and enhance the value of expert testimony by requiring that there is real substance behind the opinions proffered."

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 702.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed changes to Evidence Rule "because they address and adequately resolve two problems frequently arising before trial judges as a result of the Supreme Court's decision in *Daubert*. First of all, it was not at all clear whether the Supreme Court intended *Daubert* to apply to only scientific testimony or should be applied to all expert testimony. . . . Second, the criteria set forth by the Supreme Court for evaluating scientific expert testimony frequently would be, either in whole or in part, inapplicable to the scientific testimony proffered in any given case The standards set forth

in the amendments are broad enough to require consideration of any or all of the specific *Daubert* factors and other relevant considerations as appropriate." The Association concludes that the standards set forth in the proposed amendment provide "the trial court, as a gatekeeper, with greater discretion and latitude to either admit or deny proffered expert testimony while at the same time providing the trial judge with greater guidance that was provided by the Supreme Court's limited decision in *Daubert*."

Rule 703

Professor Richard Friedman (98-EV 007) believes that the proposed amendment to Evidence Rule 703 "is generally a good one, at least in criminal cases." He argues that the proposal should be amended, however, to make more explicit the point that otherwise inadmissible information relied upon by an expert, if admitted at all, is admitted for the sole purpose of explaining the expert's testimony."

Lawyers for Civil Justice (98-EV-009) support the proposed amendment to Evidence Rule 703, "which would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion." They argue, however that the Rule or Committee Note should provide more "guidance in applying the suggested limiting instructions."

The Evidence Project (98-EV-010) asserts that the proposed amendment does not go far enough. The Project argues that the trial judge, in balancing under the amended Rule 703, would have to find the information highly reliable in order to allow its disclosure to the jury; if that is the case, the judicial determination of reliability "should make the evidence admissible for substantive use by the jury as well." The Project concludes that the problems in the current rule "can be resolved only by precluding the expert from relying on inadmissible evidence or admitting the otherwise inadmissible evidence because the expert has assessed its reliability and concluded it is trustworthy."

Professor Laird Kirkpatrick (98-EV 011) strongly supports the proposed amendment. He argues, however, that the reference in the text of the proposal to probative value and prejudicial effect should be made more specific. He states that the Committee Note "uses more apt language than the proposed amendment itself" and suggests that the language in the Note should be transferred to the Rule.

Thomas E. McCutchen, Esq. (98-EV-015) states that the proposed amendment "may result in greater expense because of the necessity of calling additional witnesses, such as medical malpractice cases, since the proposed amendment will exclude evidence which is now disclosed to the jury."

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the

proposed amendment.

The Committee on Federal Procedure of the New York State Bar Association (98-EV-017) endorses the proposed amendment to Evidence Rule 703. The Committee states that "the balance in the proposed amendment appears to be right, since it is the proponent of the expert witness who has control over the information on which the expert will rely and who is most likely to be the party to try to sneak otherwise inadmissible information into evidence through an expert."

The Defense Research Institute (98-EV-020) urges the Committee to revise the proposed amendment to Evidence Rule 703 to completely prohibit disclosure to the jury of inadmissible information relied upon by an expert.

E. Wayne Taff, Esq. (98-EV-021) strongly supports "those portions of the proposed amendment to Rule 703 which would limit disclosure to the jury of inadmissible information used as the basis for an expert's opinion." He states that "the simple rules of logic support the amendment." He argues, however, that inadmissible information used as the basis of an expert's opinion should never be disclosed to the jury

Hon. D. Brock Hornby (98-EV-023), Chief Judge of the United States District Court for the District of Maine, states that the proposed amendment to Evidence Rule 703 is "bad policy and unworkable." He argues that the proposal "will lead to expert *ipse dixits*, or opinions with disclosure of only some of the bases for the opinion, as well as battles over what is a disclosure and whether certain data are truly inadmissible bases or not." He also suggests that if a balancing test is to be established, "why not stick with Rule 403?"

Kevin J. Dunne, Esq. (98-EV-025) states that the use of inadmissible information by an expert, and the subsequent disclosure of that information to the jury in the guise of supporting the expert's opinion, is "a game that should not be condoned, and the proposed amendments to Rule 703 should help to put a stop to it."

Diane R. Crowley, Esq. (98-EV-029) states that the proposed change to Evidence Rule 703 is a "step in the right direction" but that it needs "further refinement." She suggests that the proposed balancing test be deleted, or that "a requirement of judicial scrutiny along the lines set forth in the proposed Rule 702 be added before the otherwise inadmissible facts may be disclosed

to the jury."

Professor Lynn McLain (98-EV-030) states that the proposed amendment to Evidence Rule 703 should be revised to clarify the probative value that the trial court should consider when an expert relies on inadmissible information.

Professor Ronald L. Carlson (98-EV-031) strongly supports the proposed amendment, stating that the current Rule 703 "might be abused by opportunistic counsel." Professor Carlson "vigorously" agrees with the proposal's "presumption against disclosure to the jury of otherwise inadmissible information uses as the basis of an expert's opinion or inference."

Harold Lee Schwab, Esq. (98-EV-033) states that the proposed amendment provides "a valid test which should preclude end run attempts by ingenious counsel to avoid the exclusionary rules."

Thomas J. Conlin, Esq. (98-EV-037) believes that on balance "Rule 703 works just fine as it exists today."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 703.

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) state that the proposed amendment to Evidence Rule 703 "creates a necessary and welcome presumption" against disclosure of otherwise inadmissible information that is used as the basis of an expert's opinion and that the proposal "should greatly assist in discouraging the admission of backdoor hearsay and other inadmissible information in the guise of reasonable, trustworthy and reliable data considered by the expert in forming an opinion." These organizations suggest, however, that the Committee Note might be revised "to provide further guidance as to whether or not otherwise inadmissible information should be disclosed to the jury " Such guidance might include criteria such as: "(1) Is the underlying data reasonable and trustworthy? (2) Is the information seriously disputed? (3) Is the data case specific? and (4) Will the opponent have a meaningful opportunity to rebut the information or is it of a type that cannot meaningfully be rebutted?"

The National Board of the American Board of Trial Advocates (98-EV-049) opposes the last sentence of the proposed amendment to Evidence Rule 703 "because it creates confusion in light of existing law and has significant potential for creating mischief by apparently inviting parties to proffer otherwise inadmissible evidence."

The Lawyers' Club of San Francisco (98-EV-050) opposes the proposed amendment to Evidence Rule 703, arguing that it "will have the effect of precluding the jury from knowing the reasons for an expert's opinion where the judge determines that the probative value of the opinion or inference does not substantially outweigh its prejudicial effect."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 703 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence."

Jay H. Tressler, Esq. (98-EV-055) supports the proposed amendment, because "[a]ll too often, an expert will be fed self-serving information by counsel which would not be admissible at trial" and "the expert then gains permission to discuss the content of the otherwise inadmissible testimony."

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056) opposes the proposed amendment. The Committee believes "that Rule 703 is working" and is not persuaded by assertions that the Rule has been "misused to permit introduction of inadmissible evidence before the jury through the backdoor."

Michael S. Allred, Esq. (98-EV-059) opposes the proposed amendment on the ground that it will "place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony."

Charles F. Preuss, Esq. (98-EV-062) supports the proposed amendment to Evidence Rule 703, but argues that "a potential troubling aspect of this amendment is the lack of criteria upon which the trial court is to weigh the probative value of the underlying inadmissible information against its prejudice." Mr. Preuss suggests that the Committee Note should "provide more guidance for the trial courts who must decide this difficult balancing process."

Professor Michael H. Graham (98-EV-063) believes that the proposed amendment to Evidence Rule 703 is "ill-advised." He argues that there is "no problem in practice worth

addressing" and questions how judges are to conduct the balancing required by the proposed amendment.

Frank Stainback, Esq. (98-EV-064) believes that "the proposed amendment to Rule 703 limiting disclosure to the jury of inadmissible information will be a positive change. The proposed amendment will eliminate the proponent's ability to present otherwise inadmissible evidence to the jury under the guise of that evidence being the basis for an expert's opinion."

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 703, noting that it is "extremely well justified by the Committee's accompanying commentary "

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment to Evidence Rule 703.

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) contends that the proposal "creates an apparent imbalance between the parties as they examine a witness." The Committee suggests that the rule or the Committee Note "should reflect a door-opening presumption that once inadmissible evidence has been introduced on cross-examination, on redirect a witness would ordinarily be granted latitude to respond by completing the picture with other facts that would otherwise be inadmissible (that is, but for the cross-examination)."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 703.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 703.

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed amendment to Evidence Rule 703 is "an important and desirable change which clarifies another issue in dispute. The Chapter enthusiastically endorses the proposal."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 703, noting that under the proposal the trial court "would have some discretion" to allow disclosure to the jury of inadmissible information

reasonably relied upon by the expert.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 703.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 703, noting that it restates the existing rule of law in "many jurisdictions." The proposal also "serves the purpose of preventing inadmissible hearsay which, in many instances, would go beyond the relevant scientific or technical information upon which the expert witness relies. It precludes the possibility of admitting irrelevant or prejudicial factual information, as well."

Professor James P. Carey (98-EV-082) states that the proposed amendment to Rule 703 is a "laudable attempt" to clarify the circumstances under which inadmissible information reasonably relied upon by the expert can be disclosed to the jury. He is concerned, however, about the general references in the proposal to probative value and prejudicial effect. Professor Carey concludes that allowing judges "to roam the fields of probativeness" creates a danger of more frequent disclosure of inadmissible underlying information. He suggests a complete prohibition on disclosure of inadmissible information relied upon by an expert, which would place "an incentive on the proponent of expert testimony to present witnesses to establish a basis (or resort to hearsay exceptions), which in itself would go some way toward meeting the various concerns which have resulted in our making judges gatekeepers."

The United States District Court of Oregon and its Local Rules Advisory Committee (98-EV-083) support the proposed amendment to Evidence Rule 703, asserting that it "will assist trial courts and parties by considering the probative value of the information and the risk of prejudice."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) favors the proposed amendment to Evidence Rule 703, because "there has been far too much use of the current Rule as a 'back door' to bring otherwise inadmissible and highly prejudicial evidence to the attention of juries, sometimes resulting in unfair verdicts. The proposed amendment should substantially rein in this practice." The Committee concludes that the balancing test in the proposal is "an appropriate and fair process for decision-making by trial judges" and the Committee is "strongly of the view that the presumption against admissibility created by the amendment is essential to the achievement of the purpose of the revised Rule."

John R. Lanza, Esq. (98-EV-087) states that because the proposed amendment does not prohibit the opponent from eliciting inadmissible information used as the basis of the expert's testimony, the proposal is "unfair to the proponent of the expert, and the expert testimony." He contends that the Rule will make it appear as if "the proponent purposely hid facts and data from the jury." He also asserts that the proposal "would interfere with the flow of the expert's testimony and the corroboration of the expert, potentially resulting in conclusory testimony by the expert.

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 703 is an "important and necessary and appropriate" revision.

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 703, arguing that "the trial court should not be given discretion in this area because they are not experts in the particular fields."

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 703, on the ground that it "would deprive the jury of an opportunity to understand the basis of the expert's opinions."

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 703 on the ground that it "will make it virtually impossible to properly elicit direct testimony from experts on all points of anticipated cross-examination."

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) supports the concept of the proposed amendment to Evidence Rule 703, but suggests that it be amended in two respects. First, the reference to "probative value" should be changed to specify that the trial judge is to assess the value of the inadmissible information in helping the jury to assessing the expert's opinion. Second, the "reasonable reliance" requirement that is currently in the Rule should be deleted, since the amendment to Rule 702 would now require that the expert have a reliable basis of knowledge.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that the proposed amendment "drew opposition from approximately two thirds of those present. Members who opposed the new form of the rule

expressed the concern that the proposed changes will usurp the traditional role of the jury."

The Association of American Trial Lawyers (98-EV-108) opposes the proposed amendment to Evidence Rule 703 for four reasons: the proposal "would add language that is surplusage"; the proposal "appears likely to lead to more satellite litigation over what parts of the expert's basis for the opinion and the opinion itself will be admissible and which will not"; the proposal "does not take into account the common practice during trial of using expert testimony before the jury to describe and characterize documents (not yet in evidence) produced by an opponent, for the purpose of orienting the jury to the evidence that will be adduced;" and "the expert will often need to discuss the data (perhaps including inadmissible material) on which the opinion is based, lest the jury conclude that the opinion is in fact nothing more than the expert's *ipse dixit*."

The New Hampshire Trial Lawyers Association (98-EV-111) does not believe that the proposed amendment to Evidence Rule 703 "provides any significant additional guidance to trial judges in determining how the jury should be instructed with respect to the information which the expert considered or relied upon."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 703.

The Ohio Academy of Trial Lawyers (98-EV-114) supports the proposed amendment to Evidence Rule 703.

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 703 does "not seem objectionable."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Rule 703, contending that the proposal "would often deprive the jury of an opportunity to understand the basis of the experts opinion."

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 703, "insofar as it gives judges the power to exclude disclosure of underlying facts that would otherwise be inadmissible." The Association is "aware of instances in which an expert witness is retained primarily for the purpose of introducing the otherwise inadmissible underlying facts, with the opinion being merely the means to that end." The Association recommends "further

study", however, of whether the presumption should be for or against disclosure of the underlying facts." The Association also recommends deletion of the phrase "to the jury" and "would avoid referring to the 'probative value' of the underlying facts and would instead refer to 'their value in assisting the trier of fact to understand the opinion or inference.'"

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 703, on the grounds that it is too "restrictive" and that "the jury will not have the underlying facts or data that the expert relies upon, and therefore has no basis to consider the merits of the expert's opinion."

The Arizona Trial Lawyers Association (98-EV-124) is opposed to the proposed amendment to Evidence Rule 703.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 703.

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 703.

The International Academy of Trial Lawyers (98-EV-134) is unable to reach a consensus with regard to "the wisdom of adopting the proposed amendments to Rule 703." Those in favor of the proposal point out that "Rule 703 as it presently exists represents a loop hole exception to other exclusionary rules such as hearsay" and that one "can readily envision situations where a court permits hearsay evidence to be admissible under 703, concluding that the evidence passes Rule 403 muster, although clearly the evidence should not be received " Further, "the proposed amendment serves to better guarantee a correct judicial determination in each case and consistency throughout the circuits." Those opposed to the proposal argue that the presumption against disclosure of inadmissible information relied upon by an expert is too "stringent" and that "[s]ufficient safeguards are now present in Rule 403."

B.C. Cornish, Esq. (98-EV-137) finds the proposed amendment to Evidence Rule 703 "troublesome" and states that "[t]he attempt to correct the occasional misuse of the rule as currently written will keep juries from understanding the basis of the expert's opinion."

Martin M. Meyers, Esq. (98-EV-139) opposes the proposed amendment to Evidence Rule 703. He states that under the proposal, property appraisers would not be permitted to disclose the comparable properties that they used in assessing value.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 703.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 703, stating that there has been "routine abuse" under the current Rule, and that "this rule change will produce fairness to all parties."

Karl Protil, Esq. (98-EV-145) strongly opposes the proposed amendment to Evidence Rule 703. He states that an expert "should be allowed to state the facts upon which he relied. If not, then you undermine that expert's credibility and allow the opponent to argue that the expert's opinion is not based on a proper foundation."

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 703.

Pamela O'Dwyer, Esq. (98-EV-147) opposes the proposed amendment to Evidence Rule 703.

The Prison Law Office (98-EV-149) opposes the proposed amendment to Evidence Rule 703.

Jeffrey P. Foote, Esq. (98-EV-151) opposes the proposed amendment to Evidence Rule 703.

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 703, on the ground that it "will be obfuscating numerous issues which this rule is specifically designed to illuminate "

J. Michael Black, Esq. (98-EV-153) does not agree "with any proposal which would prevent experts from relying on hearsay, scientific data."

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 703.

Daniel W. Aherin, Esq. (98-EV-157) opposes the proposed amendment to Evidence Rule 703, on the ground that it is "geared towards preventing individual litigants from presenting reasonable expert testimony."

The Atlantic Legal Foundation (98-EV-158) supports the proposal's placement of the burden on the proponent to show that the otherwise inadmissible facts or data relied upon by an expert should be disclosed to the jury The Foundation suggests, however, that criteria should be added to the Committee Note for "the court to use in deciding whether to admit the otherwise inadmissible evidence."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed amendment to Evidence Rule 703, in the belief that the proposal would prohibit experts from relying on inadmissible facts or data.

Hon. William J. Giovan (98-EV-160) Judge for the Circuit Court for the Third Judicial Circuit of Michigan, states that the proposed amendment to Evidence Rule 703 "does not go far enough" and suggests that the Rule be amended "to restore the former requirement that expert opinion be based upon facts that are in evidence." He asserts that a return to the common-law rule is the only way to avoid "the practical obliteration of the hearsay rule."

Hon. Russell A. Eliason (98-EV-161), Magistrate Judge for the United States District Court of the District of North Carolina, proposes that Evidence Rule 703 be amended to delete the second sentence of the current Rule, and to replace it with the following language: "If the expert relies on facts or data which the court has ruled to be inadmissible evidence, but such evidence is of the type reasonably relied upon by experts in the particular field in formulating conclusions about the subject and the court finds the conclusions to be sufficiently helpful and reliable pursuant to Rule 702, then the court may permit the expert to testify and the evidence shall be disclosed to the jury under appropriate limiting instructions unless the prejudicial effect outweighs their probative value."

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 703.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 703, on the ground that it will force counsel to qualify for admissibility all evidence relied upon by an expert, thus unnecessarily increasing the cost of litigation.

Warren F. Fitzgerald, Esq. (98-EV-165) states that the proposed amendment to Evidence Rule 703 is "an undue restriction upon the ability of qualified experts to provide the sometimes necessary explanations of the foundations of their opinions."

Anthony Tarricone, Esq. (98-EV-166) opposes the proposed amendment to Evidence Rule 703 on the ground that it "would undoubtedly extend the length and complexity of discovery and trial by mandating the introduction in evidence of information and data that, while relied upon by the expert, are not necessary for the court's and jury's consideration."

Annette Gonthier Kiely, Esq. (98-EV-167) states that the proposed amendment to Evidence Rule 703 should not be adopted "since it is redundant and will open the door to needless and costly collateral evidentiary disputes."

David Dwork, Esq. (98-EV-168) states that the proposed amendment to Evidence Rule 703 "will merely invite lengthy disputes and voir dire examinations on issues that are more appropriately and effectively dealt with currently by cross-examination and the presentation of opposing evidence."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 703.

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 703, but suggests "that further guidelines need to be incorporated into the proposed change to Rule 703 if the change is to be meaningful."

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 703. It suggests, however, that the Committee Note should "clarify that a party need not seek a ruling of the Court if the other party agrees that the probative value of the otherwise inadmissible evidence substantially outweighs its prejudicial effect."

The Federal Magistrate Judges Association (98-EV-173) opposes the proposed

amendment to Evidence Rule 703 on the ground that it is "unnecessary."

Rule 803(6)

Professor Richard Friedman (98-EV 007) states that the proposed amendment to Evidence Rule 803(6) is "generally salutary" and "may save some expense."

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 803(6).

Professor Lynn McLain (98-EV-030) supports the proposed amendment to Evidence Rule 803(6), noting that Maryland adopted a similar rule in 1994

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 803(6), noting that it is "extremely well justified by the Committee's accompanying commentary."

The Civil Justice Reform Act Advisory Group for the United States District Court of the Western District of Washington (98-EV-073) endorses the proposed amendment to Evidence Rule 803(6).

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 803(6).

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 803(6)

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed amendment to Evidence Rule 803(6) "makes sense and should be approved."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 803(6).

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 803(6).

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 803(6).

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) believes that the proposed amendment to Evidence Rule 803(6) brings the Rule "into conformity with the increasingly common practice of the federal courts" and "appropriately" imposes "some of the burden with respect to the foundation requirements to the party challenging the evidence."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) opposes the proposed amendment to Evidence Rule 803(6) as applied to criminal cases.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "substantial majority" of those present "were concerned, as a matter of underlying policy to promote cross-examination and potentially, as a matter of confrontation rights, that this change might unduly impair a criminal defendant's ability to cross-examine witnesses who would no longer take the stand to establish the foundation for business records."

Professor Myrna Raeder (98-EV-106) is "troubled by the elimination of a custodian from Rule 803(6)." She recognizes that under the proposed amendment 'the opponent can always raise the question of untrustworthiness, but the rule places the burden on the opponent to demonstrate untrustworthiness, which in criminal cases with limited discovery is harder to do than in civil cases."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 803(6).

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 803(6).

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 803(6).

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 803(6).

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 803(6).

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 803(6).

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 803(6).

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 803(6).

Rule 902

Professor Richard Friedman (98-EV 007) states that the proposed amendment to Evidence Rule 902 is "generally salutary" and "may save some expense." He suggests one change— that the proponent should not only make available the records sought to be admissible, but should also assure that the certifying witness be made available for a deposition on the subject matter of the certification.

Professor Dale A. Nance (98-EV-014) endorses the goal of the proposed amendment, however he suggests certain improvements in the wording of the proposal. He suggests that the reference to admissibility under Rule 803(6) should be deleted He also suggests that the notice provisions should be modified to make clear that the opponent would have an opportunity to challenge the declaration signed by the custodian or other qualified witness

The Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 902.

Professor Lynn McLain (98-EV-030) supports the proposed amendment to Evidence Rule 902, noting that Maryland adopted a similar rule in 1994.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 902, noting that it is "extremely well justified by the Committee's accompanying commentary."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 902.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 902.

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 902.

The Federal Practice Section of the Connecticut Bar Association (98-EV-079)

endorses the proposed amendment to Evidence Rule 902.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 902.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 902. The Association believes "that the procedures for admitting domestic records and foreign records should be similar."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 902, declaring that it "appropriately" reallocates "some of the burden with respect to the foundation requirements to the party challenging the evidence." The Committee states that the proposal's notice requirement "ensures that the Rule will achieve the benefit of efficiency without undue risk of unfairness."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) opposes the proposed amendment to Evidence Rule 902 as applied to criminal cases, "both because of Confrontation Clause concerns, and also because the Committee is concerned that, given the restricted scope of pretrial discovery available in criminal cases, the opponent of the evidence (which may be either the prosecution or the defense) may have insufficient information to weigh the need to the testimony of the custodian until the evidence is offered at trial." The Committee concludes that the proposed amendment "would prevent the opponent of the document from having any chance to challenge its authenticity or admissibility unless the opponent had the foresight and the knowledge to articulate a challenge to it in advance. While it may be reasonable to require such foresight in civil cases, the Committee is concerned that it may be unreasonable" in criminal cases.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal procedure of the Criminal Justice Section of the American Bar Association The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "substantial majority" of those present "were concerned, as a matter of underlying policy to promote cross-examination and potentially, as a matter of confrontation rights, that this change might unduly impair a criminal defendant's ability to cross-examine witnesses who would no longer take the stand to establish the foundation for business records "

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 902.

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 902, but suggests that the language of the proposal be amended to more closely track the language of Evidence Rule 803(6). The Association also recommends that the Committee Note refer to statutory authority governing certifications and declarations under oath. Finally, the Association recommends that the notice provisions in the proposal should specify that the notice must be given in time to permit a pretrial deposition of the witness making the certification.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 902.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 902.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 902.

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 902.

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 902.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 902, because it "retains concepts of fairness for the parties, reduce[s] trial time, and minimize[s] the parties' expenses" and therefore it is "in the best interests of all concerned and of the system at large." The Association suggests, however, that paragraphs (11) and (12) be reworded for consistency "so that both read as a certification under oath or on a written declaration to avoid confusion".

III-A

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Memorandum To: Advisory Committee on Evidence Rules
From: Subcommittee on Privileges
Re: Codification of Privilege Rules
Date: March 1, 1999

At the last Advisory Committee meeting, a subcommittee was constituted to conduct a preliminary investigation of whether it would be useful and appropriate for the Advisory Committee to draft rules governing privileges. The Subcommittee believes that such a project would be worthwhile and would provide benefits for courts and litigants.

The Subcommittee is aware that rules of privilege must be adopted by affirmative act of Congress, and that proposing a set of privilege rules might get Congress inordinately involved in the rulemaking process. However, on balance, the Subcommittee believes that this risk is worth the many benefits that a codification project would provide. The Subcommittee, in reaching this conclusion, relies on the following factors among others:

1. Congress is already involved in the rulemaking process with respect to privileges. Congress has recently passed a tax preparer privilege, and is currently considering directly amending the Federal Rules of Evidence to add a parent-child privilege and a protective function privilege. The Advisory Committee's input into this congressional process has been limited to sending objecting letters--letters that tend to lose their credibility over time because it appears that the Advisory Committee is making no effort to take these privilege questions on for itself. Thus, a codification effort would lend credibility to the primacy of the Advisory Committee's interest and expertise in the rules of evidence respecting privilege, and might serve to defer congressional initiatives--as was the case when the Advisory Committee considered and proposed amendments to the rules on experts.

2. There are many open and disputed questions in the federal common law of privileges that could be usefully addressed by a codification effort. For example, courts differ in their approach to inadvertent waiver of the attorney-client privilege; to the scope of the *Garner* doctrine; and to the nature of procedures respecting the crime-fraud exception to the attorney-client privilege. Courts also differ over the requirements and scope of the deliberative process privilege; over whether there is a joint participant exception to the interspousal privilege; and over

whether the journalist privilege protects non-confidential materials. Finally, there is a good deal of difficulty over such "new" privileges as the privilege for self-critical analysis. All of these open questions, and many others, could be usefully approached and hopefully solved by codification.

3. The original Advisory Committee proposals in Article V have proved extremely helpful to courts, even though the privilege rules were never adopted. The Supreme Court in *Jaffee* cited them as helpful and indeed controlling in part with respect to the establishment of new privileges. This Committee can perform a similar service by beginning with the original proposals as a model, and updating them accordingly. Even if the rules are never adopted or even proposed to Congress for adoption, the codification process can provide helpful guidance to courts and litigants. Indeed, if at the end of the project, referral of the rules to Congress is seen as too risky, the proposed codification could still provide a public benefit by publication in other venues. The Advisory Committee's recent project to inform the public of outdated Committee Notes can serve as a useful precedent.

For all these reasons, the Subcommittee recommends that the Committee begin to research the current federal common law of privileges, with a view to ultimately drafting a proposed federal code of privilege rules.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public comments on, and possible revisions to, Proposed Amendment to Evidence Rule 103
Date: March 1, 1999

This memorandum discusses some of the public comments received concerning the proposed amendment to Evidence Rule 103, and provides some suggested language for the Committee to consider, should the Committee decide to adopt the suggestion of any particular comment.

This memorandum does not set out every comment for discussion A full summary of all of the public comments received can be found in this Agenda Book. Likewise, a copy of the proposed amendment that was released for public comment can be found in this Agenda Book.

Attached to this memorandum is a letter from Judge Bill Wilson, a member of the Standing Committee, to Judge Smith, noting his concerns about the second sentence of the proposed amendment to Evidence Rule 103--the sentence codifying *Luce*.

Working Draft

The memorandum begins by setting forth the working draft of the Rule, which includes the revisions tentatively agreed to at the October, 1998 Advisory Committee meeting. This working draft contains four changes from the proposal issued for public comment:

1. The Committee Note was amended to replace the *Favala* cite with the *Mejia-Alarcon* cite and parenthetical, in accordance with the comment from Professor James Duane.

2. The Committee Note was amended to emphasize that an objection or offer of proof must be made at trial if the facts and assumptions supporting the trial court's advance ruling are materially changed by developments at trial--in accordance with a comment from Professor Richard Friedman.

3. The Committee Note was amended to include a recent 7th Circuit case *(Wilson v. Williams)* which held that an objection to an in limine ruling must always be renewed. This addition has not been agreed to by the Committee, but I believe it is necessary to include it as a counterpoint to the citation to *Cook v. Hoppin.*

4. The Committee Note was amended to include a recent Third Circuit case (*Walden v. Georgia-Pacific Corp.)* which elaborates, to some extent, on counsel's obligation to clarify whether an advance ruling is definitive. Again this change has not been approved by the Committee, but I believe it is helpful to clarify that the burden of determining "definitiveness" is placed on the objecting party.

These changes have been placed in bold in the working draft set forth immediately below.

Working Draft of Proposed Amendment to Evidence Rule 103

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

Rule 103. Rulings on Evidence*

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.— In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. But if under the court's ruling there is a condition precedent to admission or exclusion, such as the

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

introduction of certain testimony or the pursuit of a certain claim or defense, no claim of error may be predicated upon the 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 asserted that an objection or offer of proof once made should be 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, 691, n.2 (7th Cir. 1986). ***But see Wilson v. Williams,* 161 F.3d 1078, 1084 (7th Cir. 1998) (declaring that "the *in limine* motion must be renewed at trial or it is waived").** 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); ***United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary.").** 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). 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. ***See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").**

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. Roemgk*, 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). **Moreover, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, such changes cannot be asserted on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight.").**

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, e.g., 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) (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).

Public Comments and Possible Revisions

The public comments raise four questions that merit consideration by the Committee:

1. A number of public comments advocate deleting the second sentence of the proposal (the *Luce* sentence) and simply stating in the Committee Note that there is no intent to disturb *Luce.*

2 .If the *Luce* sentence is to be retained, a public comment notes that there is some conflict between that sentence and the Supreme Court's decision in *New Jersey v. Portash.*

3. The proposal can be seen as creating a conflict with a Civil Rule and a statute which require objections to Magistrate Judge rulings to be taken to the District Court, in order to preserve the right to appeal.

4. A few public comments argue that the proposal does not adequately address the problem arising when evidence is admitted subject to a connection that the proponent never establishes at trial.

These comments will be analyzed in turn.

1. Taking *Luce* out of the Rule and referring to it in the Committee Note.

By far the predominant criticism of the proposed amendment is its codification and extension of *Luce*. Much of the criticism has come from law professors on policy grounds--fighting the battle over the Supreme Court opinion itself. But there are at least two critiques that might be considered more pertinent to whether the proposed amendment should continue to retain the *Luce* language.

First, Judge Wilson, a member of the Standing Committee, has indicated that he will vote against the proposed amendment if it comes before the Standing Committee containing the *Luce* sentence. At the last Standing Committee meeting, Judge Wilson posited what he believed to be an example of unnecessary expense caused by the extension of *Luce* to civil cases: the trial judge rules that if an expert testifies, he can be impeached with prior shoplifting misdemeanors; even though this ruling is wrong on the law, the proponent of the expert, to preserve the claim of error for appeal, must undertake the expense and inconvenience of producing the expert--even if the expert lives across the country, and even if the expert had been deposed. Further, in a letter to Judge Smith, Judge Wilson argued that *Luce* is "contrary to the definitive ruling proviso" in the proposed amendment and that "the *Luce* language could be construed as eviscerating the first part of the proposed amendments to FRE 103 " That is, advance rulings might be so often based on conditions precedent that the non-renewal proviso would rarely be triggered.

Second, several comments indicate that extension of the *Luce* rule to civil cases could result in "unintended consequences " As Judge Wilson put it in his letter to Judge Smith:

> I have the free floating anxiety that the *Luce* language may contain untoward ramifications that I don't readily fathom. What about the case where a judge renders a definitive pretrial ruling which renders a claim or defense practically worthless, although the party could still get to the jury? Why should that party be forced to present a gutted claim or defense in order to preserve error? This seems most unwise.

Judge Wilson's comment echoes the concerns expressed by Steve Saltzburg at the October, 1998 meeting of the Advisory Committee. It is also similar to the comment by the Chicago Council of Lawyers (98-EV-074) The Council states that the "condition precedent" language "may force litigants into untenable choices at trial." The Council elaborates with an example:

> For example, in a Title VII sex discrimination case, a defendant may obtain a pre-trial ruling that it may introduce records of the plaintiff's psychological counseling — with embarrassing and patently irrelevant personal revelations — if the plaintiff presents evidence of mental distress in her case in chief. The plaintiff would face the dilemma of either not presenting mental distress evidence, thus foregoing that part of her claim, or presenting the evidence and triggering the onslaught just to preserve the evidentiary issue for appeal. We believe that a plaintiff should be allowed to attack the *in limine* ruling in such a case without having to sabotage her trial.

Another critique of the proposed *Luce* language, along similar grounds, was submitted by the Pennsylvania Trial Lawyers Association (98-EV-081). The Association focuses on the problem of connecting up certain challenged evidence with subsequently introduced evidence--that is never introduced. The Association asserts that "the second sentence as written appears to permit testimony over an objection if the proponent promises to introduce subsequent testimony establishing the propriety of the testimony to which his opponent objects." In such a case, "if the proponent does not produce such testimony, the condition precedent is not satisfied, but the objector cannot rely on his objection unless he renews it. This is contrary to the salutary purpose of the first sentence" of the proposal, and "places an unfair burden on counsel who has made a timely objection when the burden should actually be placed on the proponent of the testimony to show that he did not make a misrepresentation to the court."

Reporter's Comment

It can be argued that many of the above criticisms can be answered. For example, the Pennsylvania Trial Lawyers hypothetical arguably does not trigger a *Luce* problem at all When evidence is admitted subject to connecting up, the ruling is made subject to a condition *subsequent* rather than a condition *precedent*. So if some renewal is required, it would not be required by the *Luce* language of the proposal. It may be that the opponent must make a motion to strike in order to preserve a claim of error on appeal, but that requirement would not come from the *Luce* language. (See the discussion on this point below in the context of the Comment from the International Academy of Trial Lawyers).

Similarly, Judge Wilson's hypothetical about the expert having to be called could be answered the same way that any *Luce* issue is answered, i.e., if fulfillment of the condition precedent is not required, there is a risk that a party will make an *in limine* objection in order to create an appealable issue as to evidence that the party never intended to present

Still, given the variety of comments; the possibility that the application of the *Luce* language in civil cases will lead to unintended consequences; and the probability that objections will be voiced at the Standing Committee; the Committee may well wish to consider deleting the *Luce* language from the proposed amendment to Evidence Rule 103, and simply referring to *Luce* in the Committee Note. It would be unfortunate if the entire proposal was defeated because of objections to the *Luce* language. If the *Luce* language were deleted from the text, the proposed amendment, and Committee Note, would look something like this:

Proposed Amendment to Evidence Rule 103 with Luce Language Dropped

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

Rule 103. Rulings on Evidence[**]

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.— In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

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

* * * * *

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 asserted that an objection or offer of proof once made should be 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, 691, n.2 (7th Cir. 1986). ***But see Wilson v. Williams,* 161 F.3d 1078, 1084 (7th Cir. 1998) (declaring that "the *in limine* motion must be renewed at trial or it is waived").** 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); ***United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary.").** 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). 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. ***See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").**

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). **Moreover, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If**

the relevant facts and circumstances change materially after the advance ruling has been made, such changes cannot be asserted on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight.").

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. 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. *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) (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).

2. The *New Jersey v. Portash* Question.

If the second sentence of the proposal *is* to be retained, then the Committee might want to consider whether the Committee Note should be amended to provide a reference to *New Jersey v. Portash*, 440 U.S. 450 (1979). The Philadelphia Bar Association (98-EV-118) recommends that the second sentence of the proposed amendment "should not be adopted without further study of the rule's effect on *Portash* and the desirability of that effect."

Background

In a state trial, Portash moved in limine to prevent the use of his immunized statements for impeachment purposes. The state trial judge ruled that the immunized statements would be admissible if the defendant testified. The defendant did not take the stand and was convicted; that conviction was reversed by a New Jersey appellate court. In the United States Supreme Court, the state argued that the Fifth Amendment issue had not been preserved because Portash never testified. But the Supreme Court stated that "the New Jersey appellate court necessarily concluded that the federal constitutional question had been properly presented, because it ruled in Portash's favor on the merits." The Court found this to be a case "where provisions of state law allowed federal review that may not otherwise have been available." The Court noted that "there is nothing in federal law to prohibit New Jersey from following such a procedure", i.e., permitting a party to preserve a claim of error concerning impeachment evidence, without taking the stand.

In *Luce*, the Court distinguished *Portash*, but not on the ground that review was permitted by a state rule of procedure Rather, the Court stated that *Portash* involved a trial court ruling "reaching constitutional dimensions." Then it relied on Justice Powell's concurring opinion in *Portash*, which stated that the "preferred method" for preserving a claim of error as to impeachment is for the witness to testify at trial. The Court also relied on Justice Blackmun's *dissenting* opinion in *Portash* for the proposition that the accused's decision whether to testify "seldom turns on the resolution of one factor."

Lower courts after *Luce* have given mixed messages about the scope of *Portash*. The only cases I could find to rely on *Portash*--thus permitting a witness to rely on an *in limine* ruling without having to testify--are habeas corpus cases where the defendant argued in limine that impeachment would violate his constitutional rights, and a *state rule of procedure* allowed this issue to be preserved for review without the defendant actually testifying. See *United States ex rel Atkins v. Greer*, 791 F.2d 590 (7th Cir. 1996); *Biller v. Lopes*, 834 F.2d 41 (2d Cir. 1987). Yet these cases, in rejecting the applicability of *Luce*, do not rely exclusively on the fact that a state rule of evidence permitted the defendant to preserve his objection without testifying For example, the *Atkins* court distinguished *Luce* as follows:

> *Luce* presents a different case from that before us now. First, the Supreme Court in *Luce* was concerned with the practical problems involved in reviewing the district court's ruling . . In William Adkins' case, however, the determinative questions are legal, not factual. A

> reviewing court's concerns about ruling in a factual vacuum are not present. Whether or not Adkins took the stand, the question before the appellate court remains whether a confession elicited in violation of a defendant's Fifth Amendment rights may ever be used for impeachment purposes. Second, the in limine ruling in *Luce* was on "a question not reaching constitutional dimensions" . . . Third, the case before us involves collateral review of state procedures while Luce involved a federal court's in limine ruling. Thus we may properly reach the merits of Adkins' appeal.

Similarly, the *Biller* court distinguished *Luce* as not involving a ruling of "constitutional dimensions" and also pointed out that the in limine ruling in the instant case was on a purely legal matter.

In contrast, *United States v. Bond*, 87 F 3d 695 (5th Cir. 1996) involved a *federal* trial where the defendant moved in limine to prevent impeachment with his allegedly Fifth Amendment protected statements. The trial court denied the motion, on the ground that if the defendant testified, he would waive his Fifth Amendment protection The defendant never testified, and on appeal argued that his claim of error was preserved under *Portash*. The government relied on *Luce*. The Court held that *Luce* applied, and therefore that the claim of error was not preserved. The Court reasoned that *Luce* had distinguished *Portash* "as a state case involving the question of whether a state appellate court's ruling on the merits had properly preserved the federal issue for Supreme Court review under state procedural law." In addition, "at least four justices of the *Portash* court stated or hinted that the issue either had not been properly preserved, even in the state court context, or might not have been properly preserved had the case arisen in federal court."

Reporter's Analysis:

It is clear that *Portash* has not been completely overruled by *Luce*. But what remains of the *Portash* rule is subject to dispute. A narrow view of *Portash* is that it is limited to habeas cases where a state rule of procedure permitted the defendant to preserve a claim for review without having to take the stand. A middling view is that *Portash* is that where the alleged error is of constitutional dimensions, i.e., where admission of evidence would violate the party's constitutional right, even if subject to a condition precedent, an *in limine* objection is sufficient to preserve the claim of error. (This interpretation was rejected by the *Bond* court). The most expansive interpretation of *Portash* is that it applies whenever the pretrial ruling is on a purely legal issue. (Though this interpretation ignores the fact that the *Luce* rule is based on a number of premises, the most important one being that we will never know whether the defendant ever intended to testify in the first place--that rationale is equally applicable to pretrial rulings on purely legal questions).

The question for the Committee is whether the language of the Rule--which appears absolute--could be read to overrule whatever is left of *Portash* after *Luce*. Certainly it could be read that way, and that would certainly seem to be an unanticipated consequence of the proposed amendment--at least a consequence that has never been discussed within the Committee

There are three possible solutions that the Committee could pursue.

First Solution

First, the Committee could make a substantive determination concerning the appropriate scope of the *Portash* "exception" to the *Luce* "rule." A proviso could be added after the second sentence, e.g.: "The condition precedent need not be satisfied, however, in a habeas corpus proceeding if a state rule of procedure provided to the contrary." Or, "The condition precedent need not be satisfied, however, if the objection to the advance ruling is on constitutional grounds." Or, "The condition precedent need not be satisfied, however, if the advance ruling is on a question of law."

The arguable problem with all of these substantive solutions, however, is that they add a problematic layer of complexity to the text of the rule; moreover, the addition of text may lead to unintended consequences and will inevitably result in a change of law in at least one Circuit, no matter which substantive rule is chosen. Finally, each solution poses a substantive question of what the proper rule should be, and surely there is room for argument as to each of the posed substantive answers. Thus, adding to the text simply makes the rule more awkward, results in substantive change in at least one circuit, and requires an investigation of substantive policy concerns that the Committee has not yet begun Adding to the text is therefore the least viable solution at this point in the rulemaking process.

Second Solution

The second solution is to add language to the Committee Note stating that there is no intent to disturb the holding in *Portash*. This does not appear to be an ideal solution, since the language of the text of the Rule appears absolute, and is therefore inconsistent with whatever exception *Portash* provides to the Rule. On the other hand, the *Portash-Luce* question comes up so infrequently (just three reported cases in the 15 years since *Luce* was decided), that it seems appropriate to deal with the matter in the Note if it is to be dealt with at all. If amending the Note is the option chosen by the Committee, the following language might be added to the end of the Committee Note:

Possible Language to Add to the End of the Committee Note to Account for *Portash*

Nothing in the amendment is intended to disturb the holding in *New Jersey v. Portash*, 440 U.S. 450 (1979) (Fifth Amendment objection concerning impeachment evidence could be heard on appeal, even though the defendant did not testify at his state trial, where state rule of procedure did not require that defendant testify to preserve error). *See also United States v. Bond*, 87 F.3d 695, 701 (5th Cir. 1996) (noting that the Court in *Luce* distinguished *Portash* "as a state case involving the question of whether a state appellate court's ruling on the merits had properly preserved the federal issue for Supreme Court review under state procedural law."); *United States ex rel Atkins v. Greer*, 791 F.2d 590 (7th Cir. 1996) (stating that *Luce* rule was not applicable where the original proceeding was in state court, and the *in limine* determination involved a constitutional question).

Third Solution

The third solution is simply to eliminate the second sentence of the proposed amendment, i.e., the sentence codifying the *Luce* rule. This option has already been discussed earlier in this memorandum. The *Portash* difficulty simply provides another strong reason--assuming one is needed--for deleting the *Luce* language from the text of the Rule.

3. Magistrate Judge Rulings

Magistrate Judge Tommy Miller (98-EV-140) is concerned that the proposed amendment to Evidence Rule 103 will create a "trap for the unwary" because it does not refer to either 28 U.S.C 636(b)(1) or to FRCP 72(a). Both these provisions cover nondispositive pretrial rulings by Magistrate Judges in cases where the dispute is not being tried before the Magistrate Judge with the consent of the parties. Rule 72(a) provides that a party must serve and file an objection to a Magistrate Judge's pretrial ruling within 10 days of receiving a copy of the order. A party "may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." 28 U.S.C. 636(b)(1) states that a party "may" file objections to the magistrate judge's nondispositive determinations in cases not based on mutual consent to a magistrate judge's determination. Most courts have found the statute's 10 day objection rule to be a mandatory requirement--i.e failure to meet it results in review only for plain error.

Analysis:

The first sentence of the proposed amendment states that once the court "makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." This language could reasonably be read as inconsistent with Civil Rule 72(a) because that rule appears to require a renewed objection, of sorts, though not with the judge that made the advance ruling.

It could be argued, though, that the language "need not renew" is not in conflict with Civil Rule 72(a), since the Civil Rule does not deal with a situation of "renewal"--that is, the party is not asking the judge who made the ruling to revisit it. Rather, the further action contemplated by Rule 72 is real in the nature of an *appeal* rather than a renewed objection. On the other hand, reasonable minds could differ and interpret the proposed amendment to mean that a party's obligations to preserve a claim of error are *complete* (i.e , nothing more need be done) when the pretrial ruling is definitive. Under that interpretation, there would be conflict with Civil Rules 72, because that Rule does require more than an in limine objection to preserve a claim of error.

The situation with 28 U.S.C. 636(b)(1) is more complicated--and it must be addressed because Civil Rule 72(a) governs only civil proceedings before a magistrate, not criminal proceedings. Since there is no provision in the Criminal Rules comparable to Civil Rule 72, any requirement of objection to a magistrate's pretrial ruling in order to preserve a claim of error in criminal cases will be governed by 28 U.S C. 636(b)(1). When a party receives an order on a nondispositive matter by the magistrate, section 636(b)(1) provides as follows:

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations *as provided by rules of court*. A judge of the court shall make a de novo determination of those portions of the report or specified

> proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. (Emphasis added).

The case law on section 636(b)(1) is complicated, because the statutory language seems permissive, not mandatory, and the applicability of the objection requirement seems to be dependent on the rules of the specific court. For example, in *Thomas v. Arn,* 474 U.S. 140 (1985), the Court upheld a 6th circuit rule requiring objection within 10 days to a magistrate's report. The Court seemed to imply that the ten day rule in section 636(b)(1) is not self-executing.

The confusing language of section 636(b)(1) has helped to lead to disparate results on the preclusiveness of the 10 day requirement. Thus, in *Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997) the court stated that "[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration." The court cited *Park Motor Mart v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980), *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), and *United States v. Walters*, 638 F 2d 947, 950 (6th Cir 1981). The *Wells* court stated bluntly that "[i]f written objections to a magistrate judge's recommendations are not filed with the district court within ten days, a party waives its right to an appeal."

In contrast, in *Lorin Corporation v. Goto and Company, Ltd.*, 700 F.2d 1202 (8th Cir. 1983), the Court held that the failure to comply with the ten day notice requirement did not constitute a waiver of the right to appeal a magistrate's determination under 28 U.S.C. 636(b)(1). The Court reasoned as follows:

> The statute itself does not provide for a waiver. It fixes a time limit of ten days for the filing of objections in the District Court, but it does not say that failure to file will destroy the right to appeal to this Court . . Nor have we been told that anything in the legislative history of Section 636 indicates that Congress intended such a waiver. One would think that if Congress had wished such a drastic consequence to follow from the missing of the ten-day time limit, it would have said so explicitly.

The *Lorin* court distinguished contrary rulings in other circuits as generally dependent on local rules of court:

> [I]n *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 29-30 (2d Cir 1978) the Second Circuit noted that the district court from which the appeal was taken had a local rule providing that "any party wishing to object must" do so in writing and with specificity. In *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980), the First Circuit left open the possibility that a party who failed to object could obtain a remedy by moving the district court to reconsider its approval of the magistrate's report. And in *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981), the Sixth Circuit, in

adopting a prospective rule of waiver, required, as a condition of the rule's application, that "a party shall be informed by the magistrate that objections must be filed within ten days or further appeal is waived."

Note that the *Lorin* case is a civil case and so it would seem that its permissive ruling would be in conflict with Civil Rule 72(a). *Lorin* preceded the adoption of Civil Rule 72(a) however, and so, strangely enough, its reasoning about the permissive nature of 28 USC 636(b)(1) would still be applicable to (and indeed limited to) criminal cases.

Solutions:

The tension between Civil Rule 72 (and 28 USC 636(b)(1)) and the proposed amendment to Evidence Rule 103 is grave enough that it at least should be addressed, either in the Rule or in the Committee Note or both. Given the apparent need to address the problem there are three possible solutions.

First Solution:

One possible solution is to specifically mention Civil Rule 72(a) and 28 U.S.C. 636(b)(1) in the text of the Rule, as an exception to the general principle of non-renewal set forth in the amendment. This kind of solution has been resisted by the Standing Committee, however, and with good reason--reference to a specific statute or rule becomes problematic if that statute or rule is repealed, changed, renumbered, etc. Moreover, mentioning specific statutes in the text creates the possibility that some relevant statutes will be left out--creating unintended consequences.

Second Solution:

A second possible solution is to create a general "except as otherwise provided" exception to the general principle of non-renewal, and then to mention Civil Rule 72 and section 636(b)(1) in the Committee Note. This has the virtue of covering all the bases, and follows the pattern of the recent amendment to Evidence Rule 615. If the proposed amendment were revised in accordance with this solution, the first sentence of the proposal could read as follows:

Possible Revision to Account for Statute and Rule Requirements for Objection to Preliminary Determinations by Magistrate Judges:

> Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal, **except as otherwise provided by rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress**.

The added language is lifted from Evidence Rule 802.

One possible problem with the above solution is that the applicability of 28 USC 636(b)(1) is dependent to some extent on the existence of a local court rule. Reference to local court rules in the exception would be extremely problematic, however, given the Standing Committee's legitimate concern over the proliferation of local rules The Evidence Rules Committee undoubtedly should not be seen as urging or supporting the adoption of local rules. At any rate, the reference in the proposed new language to an act of congress should suffice--since it is an act of congress (section 636(b)(1)) that conditions its own enforcement on the existence of a local rule.

Putting the Magistrate Judge Language Together with the Luce Language

Another problem with the proposed language arises if the *Luce* language is retained in the text. The problem becomes awkward drafting, because there would be a rule with two separate exceptions. Thus, if the *Luce* language were retained, and the reference to other statutory and rule requirements were retained as well, then the amendatory language would look like this:

> Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal **except as otherwise provided by rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress**.. But if under the court's ruling there is a condition precedent to admission or exclusion, such as the introduction of certain testimony or the pursuit of a certain claim or defense, no claim of error may be

predicated upon the ruling unless the condition precedent is satisfied.

Thus, the Rule would read---Rule, except, but if. Unless there is some other viable way to put all these concepts together, it would seem that the addition of the reference to other rules and statutes is one more reason to delete the second sentence of the proposed amendment.

Committee Note:

If the proposed amendment is to be revised to refer to other rules and statutes, the Committee Note will have to be amended to provide more specific references to the specific statute and rule governing appeals from preliminary determinations of magistrate judges. The proposed addition should be placed at the end of the comments concerning the renewal provision, and it might read as follows (with first paragraph set forth unchanged, in order to provide the Committee with context for placement of the additional language):

Proposed Amendment to Committee Note to Account for Objection Requirement With Respect to Magistrate Judge Rulings.

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). Moreover, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, such changes cannot be asserted on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States,* 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight ").

The amendment provides for an exception "as otherwise provided by rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." This exception is intended to accommodate provisions such as Fed.R.Civ.P. 72(a) and 28 U.S.C. §636(b)(1), pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before the magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error for appeal. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."); *Park Motor Mart v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).

* * *

Third Solution

The third possible solution is to mention the problem of magistrate judge rulings in the Committee Note only. The possible problem with this solution is that it can create a trap for the unwary. It is a question for the Committee as to whether a practitioner could read the amendment as dispensing with any requirement to object to a magistrate's definitive ruling. The chances of the unwary actually being trapped, however, is arguably remote, since I have been told by Magistrate Judges that their nondispositive rulings ordinarily include a reference to the 10 day requirement; indeed some courts have held that such a disclosure must be made to hold the 10 day requirement binding.

If the decision is made to revise the Committee Note only, it might read as follows--placed in the same place as the proposal set forth immediately above.

Possible Revision to Committee Note to Address Magistrate Pretrial Rulings, Where the Proposed Amendment's Text is not Revised.

* * *

Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1), pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before the magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."); *Park Motor Mart v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980). Where Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) are operative, their requirements must be satisfied in order for a party to preserve a claim of error on appeal, even where this rule would not require a subsequent objection or offer of proof.

* * *

It is for the Committee to decide whether the question of magistrate judge rulings needs to be addressed in the text and the Note, or only in the Note. The argument cutting against the need to include the language in the text is that Rule 72 and the statute do not deal with *renewal* of objections. One thing is clear: if the matter is referred to in the text, then the next sentence of the rule--the *Luce* sentence--must either be dropped or substantially revised.

4. The "Subsequent Foundation" Problem

Two commentators have suggested that the proposed amendment, or at least the Committee Note, should be revised to address the problem arising when evidence is admitted subject to connection or foundation, and the proponent never ends up satisfying that requirement. For example, the International Academy of Trial Lawyers (98-EV-134) states that the amendment should "make it clear that if the court rules that evidence is admissible subject to the eventual introduction by the proponent of the evidence of a foundation for the evidence, the opponent of the evidence cannot claim error based on the failure of the proponent to establish the foundation unless the opponent calls that failure to the court's attention in a timely fashion in a motion to strike or other suitable motion."

Reporter's Comment:

New language already added to the working draft, spurred by the comment of Professor Friedman, arguably covers the problem of a proponent's failure to provide a subsequent foundation. That language (also set forth above within the entire Rule) reads as follows

> **Moreover, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, such changes cannot be asserted on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States,* 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight.").**

The failure to connect up or to establish a subsequent foundation can reasonably be construed to fall within "the relevant facts and circumstances" that have "materially changed" since the time of the advance ruling. There has been a material change in such circumstances because the court's expectation (that the proponent would establish the necessary foundation) has been dashed.

If the Committee believes, however, that the subsequent foundation problem must be more specifically addressed, then another sentence could easily be added to the above passage. If the provision is revised to specifically address the subsequent foundation problem, it might read like this:

Possible Revision of Committee Note to Specifically Address the Subsequent Foundation Problem

Moreover, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling If the relevant facts and circumstances change materially after the advance ruling has been made, such changes cannot be asserted on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States,* 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). **Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. See *Huddleston v. United States,* 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").**

Summary

Working Draft of Proposed Amendment to Evidence Rule 103, Including Luce Language, and Addressing the Problems of: 1. *Portash*; 2. Magistrate Judge Rulings; and 3. Proponent's Failure to Establish a Subsequent Foundation.

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

Rule 103. Rulings on Evidence*

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.— In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

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

Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal, **except as otherwise provided by rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress**. But if under the court's ruling there is a condition precedent to admission or exclusion, such as the introduction of certain testimony or the pursuit of a certain claim or defense, no claim of error may be predicated upon the 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 asserted that an objection or offer of proof once made should be 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, 691, n.2 (7th Cir. 1986). ***But see Wilson v. Williams,* 161 F.3d 1078, 1084 (7th Cir. 1998) (declaring that "the *in limine* motion must be renewed at trial or it is waived").** 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); ***United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary.").** 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). 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. ***See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d**

Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

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). **Moreover, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, such changes cannot be asserted on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. See *Huddleston v. United States*, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").**

The amendment provides for an exception "as otherwise provided by rules prescribed by the Supreme Court pursuant to

statutory authority or by Act of Congress." This exception is intended to accommodate the provisions of Fed.R.Civ.P. 72(a) and 28 U.S.C. §636(b)(1), pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before the magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Some courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."); *Park Motor Mart v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).

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) (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).

Nothing in the amendment is intended to disturb the holding in *New Jersey v. Portash*, 440 U.S. 450 (1979) (Fifth Amendment objection concerning impeachment evidence could be heard on appeal, even though the defendant did not testify at his state trial, where state rule of procedure did not require that defendant testify to preserve error). *See also United States v. Bond*, 87 F.3d 695, 701 (5th Cir. 1996) (noting that the Court in *Luce* distinguished *Portash* "as a state case involving the question of whether a state appellate court's ruling on the merits had properly preserved the federal issue for Supreme Court review under state procedural law."); *United States ex rel Atkins v. Greer*, 791 F.2d 590 (7th Cir. 1996) (stating that *Luce* rule was not applicable where the original proceeding was in state court, and the *in limine* determination involved a constitutional question).

Working Draft of Proposed Amendment to Evidence Rule 103 with *Luce* Language Dropped and Provisions Added Respecting Magistrate Judge Rulings and Proponent's Failure to Establish a Subsequent Foundation

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

Rule 103. Rulings on Evidence[1]

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof — In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

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[1] New matter is underlined and matter to be omitted is lined through.

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

Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal, **except as otherwise provided by rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress**.

* * * * *

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 asserted that an objection or offer of proof once made should be 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, 691, n 2 (7th Cir. 1986). ***But see Wilson v. Williams,* 161 F.3d 1078, 1084 (7th Cir. 1998) (declaring that "the *in limine* motion must be renewed at trial or it is waived").** 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)*;* ***United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary.").** 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). 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. ***See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").**

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). **Moreover, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, such changes cannot be asserted on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. See *Huddleston v. United States*, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").**

The amendment provides for an exception "as otherwise provided by rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." This exception is intended to accommodate the provisions of Fed.R.Civ.P. 72(a) and 28 U.S.C. §636(b)(1), pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before the magistrate judge by consent of the parties.

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

Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Some courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."); *Park Motor Mart v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. 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. *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).

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Proposed Amendment: Rule 103(a)

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) (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).

Appendix to Rule 103 Report: Letter from Judge Wilson to Judge Smith

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 149
LITTLE ROCK, ARKANSAS 72201
(501) 324-6863
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BILL WILSON
JUDGE

January 21, 1999

The Honorable Fern Smith, Chair
Advisory Committee on Evidence Rules
Post Office Box 36060
San Francisco, CA 94102

Professor Daniel J. Capra, Reporter
Advisory Committee on Evidence Rules
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

Dear Judge and Professor:

In my opinion, the Evidence Committee has done a superb job with some very complex issues.

Unless something new is brought to my I plan to support your proposals, with one serious exception.

The more I cerebrate about incorporating Luce in FRE 103, the more I oppose the notion.

In the first place, I don't like Luce. Let me give you an example of how it can work a severe injustice.

A white collar defendant is on trial for fraud. In a separate, unrelated case, with similar facts, a civil judgment was rendered against the defendant, finding that he committed fraud.

The defendant wanted to take the stand, and would have taken stand, but for the fact that the district judge held that he would allow the prosecution to cross examine the defendant regarding the civil judgment (under FRE 609). The ruling was manifestly wrong, but the district judge held to his ruling despite briefs and oral argument.

The defendant filed a detailed, written offer of proof setting forth what he would testify to, in his defense, if the prosecution could not cross examine him about the civil judgment. The defendant was an articulate business person.

The defendant's testimony would apparently be very beneficial to him, but he and his counsel decided, after much deliberation, that the admission of the civil judgment for fraud outweighs the benefit of his testimony. Accordingly, he elects not to testify, and is convicted (after long deliberation by the jury).

I actually tried the above case, Luce was handed down while our appeal was pending, removing our core issue on appeal.

In my opinion Luce ignores the realities involved in defending a citizen accused of a crime. I believe Luce was decided by judges who had not had sufficient experience in the arena of justice. I would modify Luce by requiring that the defendant agree that his proffer would be admissible, if offered by the prosecution if he declined to testify after a favorable ruling. This should preclude "buffing" by a defendant.

Be that as it may, Luce is the law in criminal cases. Further, Professor Capra advised us that some circuits have applied Luce in civil cases involving prospective expert testimony. In other words, as I understand it, if you had a good expert witness, and the district judge erroneously ruled that the expert could be cross examined, under FRE 609, about a civil judgment, you would actually have to put that expert on the stand to preserve you error for a record. This would be true, a I understand Mr. Capra, even if the expert's deposition had been taken.

I think it would be most unwise to write Luce into FRE 103. It might be wise to mention it in the committee notes since, it seems to me, Luce is contrary to the "definitive ruling" proviso in FRE 103(1)-- in the proposed amendment.

Furthermore, it seems to me that the Luce language could be construed as essentially eviscerating the first part of the proposed amendments to FRE 103.

On top of all the above I have the free floating anxiety that the Luce language may contain untoward ramifications that I don't readily fathom. What about the case where a judge renders a definitive pretrial ruling which renders a claim or defense practically worthless, although the party could still get to the jury? Why should that party be forced to present a gutted claim or defense in order to preserve error? This seems most unwise.

Incidentally, why was the Luce language included?

Thank you for your consideration.

Cordially,

Bill W. by jch

Wm. R. Wilson, Jr.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public comments on, and possible revisions to, Proposed Amendment to Evidence Rule 404(a)
Date: March 1, 1999

This memorandum sets forth the draft of the proposed amendment to Evidence Rule 404(a) including the changes tentatively agreed to at the October, 1998 meeting. It also discusses public comments received since that meeting.

This memorandum does not set out every comment for discussion. A full summary of all of the public comments received can be found in this Agenda Book. Likewise, a copy of the proposed amendment that was released for public comment can be found in this Agenda Book.

Working Draft of Proposed Amendment to Rule 404(a)

The working draft contains four changes from the proposal issued for public comment:

1. The text of the rule is changed to limit government rebuttal to "the same" character trait as that of the victim's that was attacked, rather than with any "pertinent" character trait. A corresponding change was made to the Committee Note.

2. Changes to the text and Committee Note were made to add "alleged" before each reference to "victim." This change was not discussed by this Committee. However, the change provides consistency with Rule 412, which refers to an "alleged" victim. And it also makes logical sense, since the victim's status is merely alleged at the time the evidence covered by the rule is proffered. A short explanatory note on this matter is added to the Committee Note.

3. The Committee Note was amended to specify that the Rule is not applicable if the accused offers proof of a victim's character trait for a purpose other than to prove the victim's propensity to act in a certain way. This change was in accordance with Professor Kirkpatrick's public comment.

4 References in the Committee Note to "the defendant" were changed to "the accused", to make them consistent with the text Again, this is not a change discussed by the Committee, but it is a necessary change since the reference throughout the rule is to "the accused."

Working Draft of Proposed Amendment to Evidence Rule 404(a)

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

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

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

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

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

Working Draft of Proposed Amendment to Evidence Rule 404(a)

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

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

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

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

* * * * *

Working Draft of Proposed Amendment to Evidence Rule 404(a)

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of **an alleged** victim under subdivision (a)(2) of this Rule, the door is opened to an attack on **the same** character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir 1985) (when the **accused** offers proof of self-defense, this permits proof of the **alleged** victim's character trait for peacefulness, but it does not permit proof of the **accused's** character trait for violence).

The amendment makes clear that **an accused** cannot attack **an alleged** victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning **the same character trait of the accused**. For example, in a murder case **with a claim of self-defense, the accused**, to bolster this defense, might offer evidence of the **alleged** victim's allegedly violent disposition. If the government has evidence that the **accused** has a violent character, but is not allowed to offer this evidence as part of its rebuttal, then the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the **accused's** prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in

Working Draft of Proposed Amendment to Evidence Rule 404(a)

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

conformity with the **accused's** character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when the accused chooses to attack the character of the **alleged** victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks,* 470 F.2d 432, 434-5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, where known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm").

Finally, the amendment does not permit proof of the **accused's** character when the accused attacks the alleged victim's character as a witness under Rules 608 or 609.

The term "alleged" is inserted before each reference to

Advisory Committee Note
Amendment to Evidence Rule 404(a)

"victim" in the Rule, in order to provide consistency with Evidence Rule 412.

Public Comments

Most of the negative reaction to the proposal released for public comment concerned the potential overbreadth of permitting government rebuttal with any "pertinent" character trait. That concern has been answered by the Working Draft's limitation of rebuttal to the "same" character trait brought out by the accused's attack on the victim.

Beyond this now-answered criticism, there are only three public comments of note. These comments make the following arguments

1. The proposal is unconstitutional.

2. The proposal should provide balance not by allowing more character evidence to be introduced, but by allowing less.

3. The proposal should be rejected because it destroys the delicate balance currently worked out in the character rules.

None of the comments appear to warrant any changes in the Working Draft of the proposed amendment to Evidence Rule 404(a)

1. Constitutional Infirmities?

The Association of the Bar of the City of New York (98-EV-088) contends that the proposed amendment to Evidence Rule 404(a) violates the accused's "right to confrontation", apparently because it imposes a penalty on the accused who wishes to attack the victim's character. Even assuming there is a constitutional question here, it cannot be the right to confrontation that is at issue. The right to confrontation guarantees, to a greater or lesser degree depending on the circumstances: 1) The right to challenge hearsay; 2) The right to have the accuser testify in the physical presence of the accused; and 3) The right to challenge and develop the testimony of adverse witnesses. See Capra, Saltzburg, et. al., *Evidence: The Objection Method*, Chapter 14. None of these interests are even remotely implicated by a rule permitting the government to introduce negative character evidence. The old-saw case cited by the City Bar, *Davis v. Alaska,* has nothing to do with character evidence or with imposing an evidentiary penalty for opening a door. Rather, *Davis* simply held that a state rule of evidence deprived the accused of his right to effectively cross-examine the star prosecution witness when it precluded the defendant from bringing up the witness's juvenile record.

Certainly there could be a constitutional concern where a rule of evidence imposes an evidentiary penalty for a decision made by the accused or counsel, though it would not be grounded in the right to confrontation. To take an extreme case, a rule permitting the government to introduce the accused's involuntary confession, should he decide to attack the victim's character, would probably create a constitutional problem The constitutional right at issue in such a case is not the right to confrontation but rather the due process right to an effective defense.

But with respect to Rule 404(a) — and leaving aside the question whether the proposed amendment is good policy or not — the evidentiary consequence imposed on an accused who attacks the victim's character is undoubtedly constitutional A number of cases permit government rebuttal with evidence that could not *constitutionally* be admitted in the direct case, so long as the rebuttal is responsive to the door that the accused opened. See, e.g , *United States v. Robinson,* 485 U.S. 25 (1988) (prosecutor was permitted to point out that the accused failed to testify, after the accused argued that he had never been permitted to tell his side of the story). See also *Harris v. New York,* 401 U.S. 222 (1971) (defendant could be impeached with *Miranda*-defective confession that would not have been admissible in the direct case). It follows, therefore, that the rebuttal permitted by the proposed amendment to Rule 404(a) is constitutional, since the evidence to be admitted in rebuttal is certainly responsive to the evidence admitted by the defendant. Moreover, there would be no constitutional limitation on admitting negative character evidence as to the accused even without the accused opening the door--so the constitutional basis for the proposed amendment is even stronger than the fact situation in *Robinson* and *Harris, supra*, which permitted constitutionally excluded evidence to be admissible after the accused opened the door..

2. Return to the Common Law?

Judge William Giovan (98-EV-160) argues that the goal of the Committee to provide a balanced presentation of evidence would be better met by prohibiting the accused from attacking the character of the victim in the first place. His proposal — to prohibit attacks on the character of an alleged victim — would be a return to the common law, under which evidence of the victim's character would be admissible only if the accused heard about it, because it would then be probative of the *defendant's* reasonable beliefs Under Judge Giovan's proposal, evidence of the victim's character would not be admissible to prove conduct in conformity with the character trait.

One problem with this proposal is that it is inconsistent with the law in the vast majority of the states. See 1 *Evidence in America* sec. 14.4. New York retains the common-law rule and it has been roundly criticized. See *In re Robert S.*, 52 N Y.2d 1046, 438 N.Y.S.2d 509 (1981) (Fuchsberg, J., dissenting) (arguing that the common-law rule is antiquated and unfairly deprives the accused of the right to present relevant evidence).

Another problem with this proposal is that it is much harsher than the Advisory Committee's proposal, since it deprives the accused of an entire line of relevant evidence. Consider a defendant who claims self-defense, who has no violent character, and who killed an alleged victim who did have a violent temper. The common-law rule prevents that accused from bringing in compelling evidence of his innocence. In contrast, the Advisory Committee proposal does not prohibit the defendant from bringing in relevant character evidence; it simply requires a balanced presentation if such evidence is introduced. A proposal to return to the common law--because it is so harsh to the accused--would surely stir up far more controversy than the proposal currently set forth by the Advisory Committee.

Finally, the common-law rule, protecting the alleged victim from any character attack, would provide the same basic protections as guaranteed to alleged rape victims. This presents a delicate policy question. Presumably the idea behind Rule 412 is to provide for special protections to alleged rape victims, in order to encourage reporting and to protect the privacy of complainants. Query the propriety of providing victims in other cases the same level of protection.

For all these reasons, the proposed change to return to the common-law rule has been drafted as an alternative for the Committee to consider. If the Committee decides that it wishes to restore the common-law rule, that rule and accompanying Committee Note could be drafted expeditiously.

3. An Unbalanced Approach?

Professor David Leonard (98-EV-092) argues that the "balance" sought by the Committee is "illusory" and that the Committee's proposal in fact creates an imbalance. In his view, "balance" can only be assessed by a consideration of the risks of erroneous determinations on one side or the other. Under the current rule, there is a risk that the accused will be unfairly acquitted, but Professor Leonard considers that less costly than the Committee's proposal, under which an accused could be unfairly convicted by negative character evidence Therefore he suggests that we not upset the "balance" so carefully struck by the current rule.

Professor Leonard's assertion that the current Rule 404(a) strikes some careful "balance" is belittled by Judge Jackson's famous critique of the federal rule on character evidence in *Michelson v. United States*, 335 U.S. 469 (1948): "Thus the law extends helpful but illogical options to a defendant. Experience taught a necessity that they be counterweighted with equally illogical conditions to keep the advantage from becoming an unfair and unreasonable one."

At any rate, Professor Leonard's argument proves way too much. Under his view of "balance" an accused should be able to offer all evidence of his own good character, and not have to suffer rebuttal with evidence of *his own* bad character. The same risks apply as cited by Professor Leonard--the risk of wrongful conviction versus the risk of wrongful acquittal. Yet nobody seriously argues that an accused can offer all evidence of his own good character without any possibility of rebuttal, simply to protect against the undifferentiated risk of wrongful conviction.

Whether the Committee's proposed amendment is good or bad policy is for the Committee to decide. But that decision cannot be determined by a blunderbuss balance of risks approach that always favors the accused, no matter what.

III-C

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public comments on, and possible revisions to, Proposed Amendment to Evidence Rule 701
Date: March 1, 1999

This memorandum discusses the public comment received concerning the proposed amendment to Evidence Rule 701, and considers the changes that might be made in response to those comments.

At the October, 1998 meeting, no changes were made to the proposed amendment to Evidence Rule 701 that was released for public comment. Thus, the "working draft" is the same as the public comment version set forth earlier in this Agenda Book.

The public comment on the proposed amendment was almost exclusively favorable. Many of those listed as simply opposing the proposed amendment were actually voicing a general objection to what they viewed as an "expert package"-- their ire was directed specifically at Rule 702, not Rule 701.

The only negative comments received were along the lines of the letter sent by Eric Holder to the Standing Committee, setting forth the now-familiar objections of the Justice Department to the proposed amendment.

This memorandum addresses the possible problem of an overbroad application of the "specialized knowledge" limitation, and the possible solutions should the Committee believe that the potential problem should be addressed. Finally, this memorandum suggests a slight change to the Committee Note to reduce any possible misunderstanding in the Note's interchangeable use of the terms "specialized knowledge" and "specialized information."

1. The Potential Overbreadth of the "Specialized Knowledge" Limitation

Eric Holder's letter expressed concern that the Advisory Committee's proposed amendment would require many people who have traditionally testified as lay witnesses to be qualified as experts. That case is largely built on hypotheticals: 1. Would the resident of a neighborhood with heavy drug trafficking have to be qualified as an expert before testifying to patterns indicative of drug activity? 2. Would a person have to be qualified as an expert to testify that a certain substance was narcotics? 3. Would a person have to be qualified as an expert to testify that he smelled a dead body in the shed?

Similar concerns have been expressed by Professor Friedman, Professor Kirkpatrick, and the Association of American Trial Lawyers (98-EV-108), which states that the "potential breadth of this proposal leads us to wonder if even high-school-level coursework used in developing an opinion could excluded [sic] on the ground that it is 'specialized'!"

Currently, there are three states — Florida, South Carolina, and Delaware — that include a specialized knowledge limitation in their version of Rule 701. It is thus at least relevant to consider the practice in those states, to determine whether the state rules are creating the kind of problems that are envisioned by Mr. Holder and some others.

The Experience in the States

Alabanza v. Bus Service, Inc., 669 So.2d 338 (Fla.App. 1996): The issue was the condition of a vehicle after it had been repaired. The owner of the motor vehicle was permitted to testify that it did not drive properly and was defective in certain respects. The Court stated that "this type of information can be imparted by anyone who has tried to drive the vehicle, and does not require an expert witness to convey this information." Thus, the driver's own very particularized knowledge was not considered "specialized" knowledge within the meaning of Florida Rule 701.

Lewek v. State, 702 So.2d 527 (Fla.App. 1997): In a trial on charges of vehicular homicide, an eyewitness was allowed to give an opinion as to the speed of the defendant's car. The Court held that the witness did not need to be qualified as an expert, because "an estimate of the speed at which a conveyance or other object was moving at a given time is generally viewed as a matter of common observation rather than expert opinion."

Florida Bar v. Clement, 662 So.2d 690 (Fla.1995): A lawyer challenged his disbarment on the ground that he had bipolar disorder and that disbarment was therefore precluded under the ADA.(!) The Court held that the lawyer's wife should have been permitted to give her opinion about the lawyer's mental competence, without having to be qualified as an expert. The Court

stated that "a nonexpert witness may testify to an opinion about mental condition if the witness had an adequate opportunity to observe the matter or conduct about which the witness is testifying." On the other hand, if the witness had been asked to opine whether the lawyer was a schizophrenic, or whether he had Munchausen's Syndrome, she would have to be qualified as an expert. This analysis is consistent with Judge Becker's public comment in favor of the proposed amendment to Evidence Rule 701:

> The district courts will work it out, and probably not require the family friend who is a psychiatrist to be qualified as an expert in giving lay opinion testimony as to the competence of a friend, *except if the proponent emphasizes the witness' specialized training or expertise*. (Emphasis added).

D.R.C. v. State, 670 So.2d 1183 (Fla.App. 1996): In a juvenile delinquency proceeding, a police officer was permitted to give lay testimony that the juvenile was a seller and not a user of rock cocaine. The witness based his lay opinion upon his experience, the amount of cocaine found on the juvenile, and the fact that the juvenile was not carrying drug paraphernalia The Court held that admitting the testimony was error, because this was a subject matter for expert testimony--the conclusion had to be based on extensive experience beyond that of the ordinary lay person. This result is consistent with that of the Ninth Circuit in *United States v. Figueroa-Lopez*, which is relied upon in the Committee Note to the proposed amendment to Evidence Rule 701, and which is the model for the proper result envisioned by the proposed amendment.

State v. Williams, 469 S.E.2d 49 (S.C. 1996): The defendant was charged with murder after he chased and shot a person at the conclusion of a narcotics transaction. A witness who knew both the victim and the defendant, and who was at the scene but not a participant in the drug transaction, was permitted to testify that the victim probably ripped the defendant off, and the defendant was probably angry. The court found this to be a proper subject for lay witness testimony--not based on specialized knowledge

Gulledge v. McLaughlin, 492 S.E.2d 816 (S.C.App. 1997): In an automobile accident case, it was error to permit a police officer to testify that the physical evidence indicated that the defendant was driving improperly. The policeman had not been qualified as an expert in accident reconstruction. This holding is consistent with the holdings in virtually all of the states--indicating that the "specialized knowledge" limitation does not skew the result.

Small v. Pioneer Machinery, 1997 WL 722995 (S.C.App.): In a product liability case dependent on whether and why the throttle of a log skidder got stuck, both expert and lay witnesses were properly permitted to testify that the throttle got stuck because debris became lodged in the throttle linkage area. The lay witness was the person who operated the vehicle on a

daily basis. This was certainly particularized knowledge, but it was not considered "specialized" knowledge within the meaning of the Rule 701 exclusion.

Seward v. State, 1999 WL 3883 (Sup. Ct. Del.): Where a medical examiner's report, concluding that the substance seized from the defendant was crack cocaine, was excluded due to a discovery violation, the government purported to call the arresting officers as lay witnesses. The officers testified about their police background, and concluded that the substance seized was crack cocaine. The government stated in closing argument that the officers had seen crack cocaine many times before and so they knew that the substance in question was crack cocaine. The court declared that the officer's testimony was inadmissible "because what the officers perceived could have been communicated accurately and fully by describing the substance, it was improper to allow the officers to express their opinion that the substance was crack cocaine." This rationale would seem to be not dependent on any distinction between lay and expert testimony. Rather, the court is implying that the testimony was not helpful under Rule 701 because it was conclusory and could have been broken down into factual components However, the court also noted that at oral argument, the state conceded "that the officer's testimony identifying the substance as crack cocaine was not within the common knowledge of a lay person and therefore the officer improperly testified as an expert."

Conclusion on State Case Law:

All of these cases, other than perhaps *Seward*, immediately above, seem to have no trouble finding a rational and easily maintained delineation between expert testimony based on *specialized* knowledge and lay testimony based on common albeit perhaps *particularized* knowledge. As to *Seward*, it could be looked at in three ways. First, it could confirm the worst fears of those who argue that the proposed amendment will require virtually every witness with particularized knowledge to be qualified as an expert. Second, it could be looked at as a case that properly required witnesses to testify as experts, where the government emphasized their expertise in identifying a particular drug that was beyond the common experience of most people. And third, it could be considered a case in which the testimony was improperly admitted not because of expert rules, but rather because "what the officers perceived could have been communicated accurately and fully by describing the substance", as the court indicated. The case, in sum, seems too ambiguous to provide any indication of how the proposed amendment to Evidence Rule 701 would play out if it were adopted.

The Tennessee Experience:

In Eric Holder's letter to the Standing Committee, he stated that Tennessee amended its Rule 701 to change from a specialized-knowledge-limitation model to the current federal model. The implication is that the previous rule, with its specialized knowledge limitation, was unworkable. In light of this implication, it is appropriate to consider the Tennessee experience to see whether it provides any indication of how the proposed amendment to Evidence Rule 701 might work.

The old Tennessee Rule, amended to copy the federal model in 1996, provided as follows:

Rule 701. Opinion testimony by lay witnesses. —

(a) Generally. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences where:

(1) The opinions and inferences do not require a special knowledge, skill, experience, or training;
(2) The witness cannot readily and with equal accuracy and adequacy communicate what the witness has perceived to the trier of fact without testifying in terms of opinions or inferences; and
(3) The opinions or inferences will not mislead the trier of fact to the prejudice of the objecting party.

(b) Value.
A witness may testify to the value of the witness's own property or services.

The Advisory Commission Comment to the 1996 Rule change (i.e , the change to the Federal model) states in its entirety:

"This rule was amended because the former rule precluded any lay opinion if the lay witness could substitute facts for opinion."

The clear implication from this comment is that the rule was changed not because of dissatisfaction with the specialized knowledge limitation. Rather, it was changed because subdivision (2) of the old rule prohibited lay opinion testimony whenever the witness could substitute facts for opinion. Thus, it appears that Mr. Holder's implication, that Tennessee found a specialized knowledge limitation to be unworkable, is unfounded.

Tennessee Case Law Before and After the Change:

I investigated the Tennessee case law on Rule 701 both before and after the rule change, in the hope that it might provide some indication of whether there would be problematic results under this Committee's proposed amendment to Federal Rule 701. A short discussion of that case law follows.

Before the Change (special knowledge limitation):

State v. Boggs, 932 S.W.2d 467 (Tenn. App. 1996): Lay witness testimony that another person had impaired vision and hearing was properly admitted, "because the ordinary lay person would know that another person was physically impaired."

Whaley v. Rheem Mfg. Co., 900 S.W.2d 296 (Tenn. App. 1995): Lay witness could not testify that a heat pump was defective, because "[t]he workings of a heat pump are beyond the common knowledge of laymen" and therefore the testimony was based on special knowledge.

State v. Wingard, 891 S.W.2d 628 (Tenn. App. 1994): An officer was permitted to testify under the old Rule 701 that he yelled loud enough for the defendant to hear him 300 yards away. "His conclusions required no expertise and were within the range of common experience "

Bell v. State, 1994 WL 406168 (Tenn. App.): The court noted several cases on one side of the line or other Admissible lay witness testimony, under the special-knowledge-limitation rule, includes: a substance appeared to be blood; a person was or was not drunk; bags containing marijuana appeared to have been in a person's mouth because they were wet; the defendant was faking crying and emotion during her interview with police; a person was driving about 60 miles per hour; and a person drank a lot of alcohol and was able to function when he did so Inadmissible testimony when offered by a lay witness included: a paramedic's opinion as to the source of a bruise; and a police officer's opinion as to the cause of certain marks on defendant's arms.

State v. Honey, 1993 WL 38151 (Tenn. App.): Police officers were properly permitted to testify as lay witnesses that the defendant was faking when she cried during an interview

Prater v. Culp, 1993 WL 542887 (Tenn. App.): A police officer could not testify as a lay witness that he had given a ticket to one person involved in an accident but not to the other. This testimony was tantamount to a legal conclusion as to who was at fault.

State v. Brown, 836 S.W.2d 530 (Tenn. 1992): The defendant was charged with child abuse and murder. A paramedic testified concerning the condition of the victim and expressed the opinion that eye bruises are caused by skull trauma and that they take 2 to 7 hours to develop. This testimony was inadmissible as lay opinion, since it "called for specialized skill or expertise." On the other hand, testimony from a nurse that an injury on the victim's foot looked like a cigarette burn was based on matters within common knowledge and was admissible under Rule 701. The court, in its analysis, also cited two other instances of opinion testimony properly within the old Rule 701: testimony that a footprint in the snow looked like someone had slipped, and testimony that a substance appeared to be blood. The court provided the following distinction between expert and lay testimony:

> The distinction between an expert and a non-expert witness is that a non-expert witness's testimony results from a process of reasoning familiar in everyday life and an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field.

That is precisely the distinction that the proposed amendment to Evidence Rule 701 intends to draw.

State v. Pendergrast, 1992 WL 275397 (Tenn. App.): Statement by investigator that marks on the defendant's arms were caused by prior acts of abuse was based on special knowledge and was thus inadmissible where the investigator was never qualified as an expert.

State v. Joyner, 1992 WL 105973 (Tenn. App.): Testimony concerning the speed of a vehicle does not involve special knowledge, and was properly admitted under old Rule 701.

Harwell v. Walton, 820 S.W.2d 116 (Tenn. App. 1991): The plaintiff conducted a post-accident experiment and determined that she could not drive her car at more than 26 m.p.h. along the road on which the accident occurred. This testimony was properly admitted under old Rule 701. Knowledge of the plaintiff's ability to drive a certain speed, while highly particularized, is not something that requires special knowledge within the meaning of the rule. "The plaintiff is not contending that her vehicle does not have the mechanical capabilities of going any faster. She is merely alleging that she, while driving at her normal capacity, could not go faster than 26 miles an hour."

After the change (Federal model):

State v. Betts, 1999 Tenn. Crim. App. Lexis 73: Testimony by a police officer that a shotgun will not fire unless the hammer is cocked could not be admitted as lay opinion. The witness "offered testimony requiring specialized knowledge that would have been appropriate only from an expert on firearms." Thus the court employed a specialized knowledge limitation even though it had been taken out of the text of the rule.

Brayfield v. Kentucky National Ins. Co., 1998 WL 670389 (Tenn. App.): A police detective testified that the plaintiffs were "uncooperative" during his investigation of a fire on their premises, and he also testified to his belief that they had deliberately hidden facts. This testimony should have been excluded as lay opinion because the witness never enumerated any facts, and he could have accurately testified without giving an opinion. Thus, this case does not rest on a lay/expert distinction, but rather on the fact that opinions are not permitted where they are essentially conclusions unadorned by any supporting facts. That is true under any version of Rule 701.

State v. Travis, 1998 WL 391756 (Tenn. App): Police officer's testimony that the defendant was drunk was properly admitted as lay opinion. This is the same result as the case law under the old Tennessee Rule 701.

State v. Trotter, 1998 WL 75423 (Tenn. App.): Police officers were permitted to testify as to why, in their opinion, the defendant was guilty of possession for resale versus simple possession. This was proper under the new Rule 701. The defendant's attack on this testimony as not within Rule 701 was misplaced because he was relying on the old Rule. The concurring judge took the view that the officers' testimony was actually admitted as expert testimony under Rule 702, and that this was the proper way to proceed. It would seem that the result in *Trotter* — an end-run of expert witness foundation requirements, with the proponent nonetheless emphasizing the witness's expert credentials to the jury — is exactly the result that the Committee wanted to prevent by its proposed amendment to Evidence Rule 701. It is the result that appears possible under the Federal model but precluded under a rule that contains a specialized knowledge limitation.

State v. Lee, 969 S.W.2d 414 (Tenn App. 1997): The case involved vehicular assault charges arising out of a serious car crash. The defendant offered evidence that he had not been driving, and in rebuttal the government offered the testimony of a rescue worker at the scene. The witness, though never qualified as an expert, testified that he had years of experience in removing

individuals from wrecked vehicles, and also described the positions of the bodies in the car and the process of removal. He then gave his opinion that the defendant had been driving the car. The court stated that "had the proper procedures been followed, the rescue worker would have been qualified as an expert" due to his extensive experience, skill and training. However, the testimony was properly admitted anyway under amended Tennessee Rule 701 Thus, the result here is the very result that the Committee is trying to prevent by its proposed amendment--a witness whose expertise is emphasized by the proponent testifies in the guise of a lay witness. The Tennessee court found that the federal-based language permitted this result.

Robins v. Memphis Little Theatre Players Assoc., 1997 WL 585743 (Tenn. App.) Testimony from a lay witness that a crumpled piece of paper looked like it had been stepped on was properly excluded as lay opinion, because the crumpled condition of the paper could have been described "without opining that it looked like it had been stepped on." Thus, the opinion was excluded not because it should have been qualified as expert testimony, but rather because the opinion did not assist the jury. The court noted that its decision would have been the same under the old rule.

Summary on the Tennessee Experience

A fair reading of the above cases is that the prior rule, with its "special knowledge" limitation, did not result in a wholesale exclusion of traditional lay witness testimony. Rather, the testimony that the courts required to be scrutinized under Rule 702 was precisely the type of testimony that one would ordinarily expect to come from experts: testimony on engineering principles applied to the workings of a heat pump; testimony as to medical causation; testimony that is essentially accident reconstruction. Testimony traditionally considered as lay opinion was treated as permissible lay opinion under the old rule: the mental or physical condition of a person; drunkenness; the speed of a vehicle; whether a substance was blood. These are all matters of knowledge that anyone can master within common experience, and consequently were not considered specialized knowledge within the meaning of old Tennessee Rule 701.

The advent of the new rule has made no difference in many of the cases. Thus, testimony that a rifle cannot fire unless it was cocked was inadmissible under Rule 701 even without a specialized knowledge limitation in the text of the rule. However, there has clearly been some expansion in admissibility of lay witness testimony, and it seems to be the very kind of expansion criticized by Judge Becker in *Asplundh*--testimony from "lay" witnesses who are really testifying as experts, and who are treated as such by the proponent and by the jury. This includes testimony from police officers that the defendant was a drug seller, and testimony from a rescue worker that in his opinion, the defendant was driving the car. If this is not specialized knowledge within the meaning of Rule 702, it is hard to see what is.

In sum, the Tennessee experience seems to support the Committee's position in the proposed amendment to Evidence Rule 701, not to detract from it. Judge Becker's comment that the Department of Justice has latched onto a "non-problem" appears to have merit.

2. Solutions to the Potential Overbreadth of the Specialized Knowledge Limitation

Assume for the sake of argument that the Committee's proposed amendment to Rule 701 will result in an unacceptable number of traditional lay witnesses having to be qualified as experts. Are there any reasonable solutions to this arguable problem? Three potential solutions have been suggested--two by way of public comment, and one at the previous meeting of the Advisory Committee. This memo proceeds to discuss these potential solutions.

A. Deleting the Reference to Specialized Knowledge

The Pennsylvania Trial Lawyers Association (98-EV-081) suggests that the words "specialized knowledge" should be eliminated from the proposed amendment to Evidence Rule 701. The Association believes "that the words 'scientific' and 'technical' sufficiently demonstrate the type of testimony which should not be permitted by a lay witness." Under this proposal, Rule 701 would read as follows:

> **Rule 701. Opinion Testimony by Lay Witnesses**
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue~~;~~ and (c) not based on scientific or technical knowledge.

If this solution were adopted, the Committee Note would have to be amended to cut out all references to the specialized knowledge limitation.

Reporter's Comment

The obvious criticism of this solution is that it does not completely solve the problem addressed by the Committee in its proposed amendment to Evidence Rule 701. Many witnesses who testify as de facto experts rely on expertise that is based on "specialized" knowledge--not of a technical or scientific nature. If those witnesses are proffered as lay witnesses, they end up evading the reliability requirements of 702 and the disclosure requirements of the Civil and Criminal Rules. A classic example is *United States v. Figueroa-Lopez*, cited in the Committee Note to the proposed amendment, where law enforcement officials testified that in their opinion the defendant was engaged in countersurveillance driving. That testimony was based on specialized, not technical or scientific knowledge. If the Committee's desire is to codify the result in a case like *Figueroa-Lopez* — which held that such specialized knowledge testimony was inadmissible under Rule 701— then the solution

proposed by the Pennsylvania Trial Lawyers Association will simply not do the job.

Another problem with deleting the specialized knowledge language is that it simply replaces one problem of arguably difficult classification with another. The arguable difficulty with the current proposal is that courts and parties must separate out testimony based on truly specialized knowledge (covered by Rule 702) from testimony based on particularized knowledge that any member of the public could master (such as the smell of dead bodies or that a substance was narcotics--covered by Rule 701). Under the Pennsylvania Trial Lawyers proposal, the difficult classification would be that between testimony based on specialized knowledge (all of which would be covered by Rule 701) and testimony based on technical knowledge (covered by Rule 702). The line between "technical" and "specialized" knowledge is not exactly a bright one. Indeed, the testimony of the witness in *Asplundh* — that a crane accident was caused by metal fatigue — could be fairly characterized, under the circumstances of that case, as either technical or specialized.

Indeed, part of this Committee's written criticism of the congressional proposals to amend Rule 702 was that the proposals tried to make some categorical distinctions among scientific, technical, and other specialized knowledge--when in fact the line between these kinds of knowledge is indefinite. Deleting the reference to "specialized knowledge" in the proposed amendment to Evidence Rule 701 would appear to fall into the same trap.

B. Referring to Rule 702

At the October meeting of the Evidence Rules Committee, a proposal was floated that the Committee agreed to consider at the forthcoming April meeting That proposal would simply state that testimony is not admissible under Rule 701 if it is expert testimony The proposal, as changed from the current proposal, reads as follows.

Rule 701. Opinion Testimony by Lay Witnesses

~~If the witness is not testifying as an expert, the~~ A witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue~~.~~ and (c) ~~not based on scientific, technical or other specialized knowledge~~ **not expert testimony within the meaning of Rule 702**.

If this proposal were adopted, the Committee Note would have to be changed because it refers throughout to the amendment's use of the terms "scientific, technical or other specialized knowledge." A Committee Note tailored to the proposal, as modified from the current proposed note, might read as follows:

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 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 **within the meaning of Rule 702** ~~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 **that is in fact expert testimony through Rule 702** ~~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 **within the meaning of Rule 702** 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) .

Reporter's Comment on the Proposed Solution

The proposal has the advantage of not posing, in the text of the rule, the possibly problematic distinction between specialized knowledge covered by Rule 702 and particularized knowledge governed by Rule 701 It essentially leaves it more up to the courts to determine what "looks like" expert testimony and what "looks like" lay witness testimony. The current proposal leaves a good deal of discretion to the courts as well, but seems to provide somewhat more guidance by articulating an exclusion for scientific, technical, or other specialized knowledge. The question is whether that greater guidance is worth the risk of possible misinterpretation, i.e., the risk that courts or litigants might think that the current proposal really does intend to channel traditional lay witnesses into the rule governing experts. Whether the more general language of this alternative proposal is sufficient to address the problem perceived by the Committee, and whether the current proposal's possibly greater guidance comes at the expense of changing traditional case law, are questions on which reasonable minds can differ.

A possible problem with the proposal is that it refers to expert testimony "within the meaning of Rule 702"--but Rule 702 does not really provide a *definition* of expert testimony. Rather, it sets requirements for the admissibility of expert testimony, which apply whenever the witness is testifying as an expert. Thus, there is an argument that the exclusionary language of this proposal is devoid of content; a de facto expert witness who purports to testify as a lay witness could simply argue that he was not proffering expert testimony "within the meaning of Rule 702", since Rule 702 *has* no particular meaning with respect to defining expert testimony.

C. Adding Temperate Language to the Committee Note

The Philadelphia Bar Association (98-EV-118) supports the text of the proposed change, but expresses concern over the uncertain impact that the proposed amendment might have "on the admissibility of opinion that would traditionally be considered admissible lay opinions but that are arguably based on specialized knowledge." The Association suggests that these concerns can be alleviated by directly addressing it in the Committee Note.

The current Committee Note does presently state, in its last paragraph, that there is no intent to affect testimony that traditionally has been given by lay witnesses. But if more elaboration would alleviate concerns about the scope of the Rule, then more elaboration could be provided.

The following is a proposed addition to the last paragraph of the Committee Note to address the concerns raised by the Philadelphia Bar Association.

Modified Committee Note (Last Paragraph, additions in bold):

* * *

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 **within the meaning of Rule 702**). 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) . **For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook,* 896**

F.3d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the meaning of Rule 702, but rather is based upon particularized experience that a layperson could obtain. If, however, the witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown,* the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

Reporter's Comment:

Adding the above language to the end of the Committee Note would probably be harmless at worst and helpful at best. The more examples given, the easier it will be to avoid any disruption in what otherwise should be a common-sense enterprise. If this language can allay the fears of those with concerns about the rule, it would certainly be useful to include it.

One question the Committee might wish to consider is whether the above language should be added to the Committee Note if the proposed amendment is altered to refer to "expert testimony within the meaning of Rule 702." It would seem that the above language would be a useful addition to the Committee Note whatever version of the amendment is ultimately adopted, though it would have to be slightly modified to reflect the fact that the text of the rule would no longer mention specialized knowledge See Appendix B for the composite version of a revised Committee Note and a textual revision of the proposed amendment that would include a reference to Rule 702.

3. Use of the Term "Specialized Information" in the Committee Note:

Judge Amestoy called to my attention the fact that the Committee Note to the proposed amendment to Rule 701 on one occasion uses the term "specialized information" rather than "specialized knowledge". Having written the Note, I can say there was no conscious attempt to distinguish between "information" and "knowledge". But since the term "specialized knowledge" is used in the proposed amendment, in Rule 702, and throughout the Note, it seems obvious that the term should be used consistently throughout. There is no need to create confusion by referring to "specialized information." Therefore, the Committee might wish to consider a slight change to the second paragraph of the Rule 701 Committee Note. That change would read as follows:

Substituting "specialized knowledge" for "specialized information"(second paragraph of Committee Note, change in bold):

* * *

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 **testimony based on** scientific, technical, or other specialized ~~information~~ **knowledge** 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 **based** 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)").

* * *

Appendix A--Proposed amendment to Evidence Rule 701, no change in text, changes to Commitee Note as discussed in this memorandum.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 701

Rule 701. Opinion Testimony by Lay Witnesses*

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

* * * * *

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

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

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 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 **testimony based on** scientific, technical, or other specialized **knowledge** 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 **based** 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). **For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in**

the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook,* 896 F.3d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the meaning of Rule 702, but rather is based upon particularized experience that a layperson could obtain. If, however, the witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown,* the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

Appendix B--Proposed amendment to Evidence Rule 701, text changed to refer to Rule 702, Committee Note changed to accord with textual change, and amplified as discussed in this memorandum.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 701

Rule 701. Opinion Testimony by Lay Witnesses[**]

~~If the witness is not testifying as an expert, the~~ A witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue~~.~~ and (c) **not expert testimony within the meaning of Rule 702**.

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COMMITTEE NOTE

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

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 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 **testimony based on** scientific, technical, or other specialized **knowledge within the meaning of Rule 702**. See generally *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony **that is in fact expert testimony to Rule 702**, 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 **within the meaning of Rule 702** is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

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) .**For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this**

analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook,* 896 F.3d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the meaning of Rule 702, but rather is based upon particularized experience that a layperson could obtain. If, however, the witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown,* the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

III-D

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public comments on, and possible revisions to, Proposed Amendment to Evidence Rule 702
Date: March 1, 1999

This memorandum discusses some of the public comments received on the proposed amendment to Evidence Rule 702, and provides some suggested language for the Committee to consider, should the Committee decide to adopt the suggestion of any particular comment.

This memorandum does not set out every comment for discussion. A full summary of all of the public comments received can be found in this Agenda Book. Likewise, a copy of the proposed amendment that was released for public comment can be found in this Agenda Book.

Attached to the memorandum as an appendix is an outline of most of the major cases applying *Daubert*.

Working Draft of Proposed Amendment to Evidence Rule 702

The memorandum begins by setting forth the working draft of the Rule, which includes the revisions tentatively agreed to at the October, 1998 Advisory Committee meeting. This working draft contains three changes from the proposal issued for public comment:

1. The Committee Note was amended to add a paragraph concerning experts who testify to general principles only (as distinct from experts who actually apply their methods to the facts of the case).

2. The Capra Georgia Law Review citation replaces a citation to a different article in the Committee Note, and a parenthetical is added.

3. *Moore v. Ashland* and a parenthetical about the case is added to the Committee Note paragraph concerning "red flag" factors, i.e., additional factors that courts have considered after *Daubert* as bearing on reliability.

Working Draft of Proposed Amendment to Evidence Rule 702

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 702

Rule 702. Testimony by Experts*

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~~.~~, 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 reliably to the facts of the 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

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

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 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) whether 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 for the type of opinion the expert would give. **See *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological**

> **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).

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.*"

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general

principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert is qualified; (2) the testimony addresses a subject matter on which the factfinder can be assisted by an expert; (3) the testimony is reliable; and (4) the testimony "fits" the facts of the case.

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. *See* **Daniel J. Capra, *The* Daubert *Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review.").** Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert.*, and it

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

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).

Public Comment Critiques of Proposed Amendment to Evidence Rule 702

The criticisms of the proposed text of the rule can be grouped into eleven categories:

1. The rule will give rise to untold numbers of *Daubert* motions.

2. The rule will permit the trial judge to choose the defendant's expert in a fight between competing experts, thus violating the plaintiff's right to a jury trial.

3. It is both unnecessary and ill-advised to extend the *Daubert* gatekeeping function to non-scientific experts.

4 The Rule ignores the fact that two or more methodologies might be employed in the same discipline. It does not sufficiently consider the possibility of competing methodologies.

5. The rule needs to address more specifically the admissibility of testimony from experience-based experts.

6. Subpart (1) of the proposal invades the province of the jury.

7. Subpart (1) of the proposal creates a problematic relationship with Rule 703, because the reliability of the basis of an expert's testimony is already regulated at least in part by Rule 703.

8. Subpart (1) of the Rule would prohibit an expert from offering opinions based on hypothetical scenarios.

9. The rule should be amended to refer to the "reasoning" of an expert, and should clarify that the methods employed must be valid for the facts at hand.

10. Rule 702 works fine as it is; if it is not broke, don't fix it.

11. Finally, a comment already considered argued that the Rule would exclude testimony from experts on generalized, background-type subjects. At the October meeting, the Committee tentatively agreed to address this problem by a paragraph in the Committee Note. Just for the sake of completeness, this memo briefly discusses the question raised by generalized expert testimony, and whether it should be addressed in the text of the Rule rather than in the Committee Note.

The criticisms and suggestions with respect to the proposed Committee Note can be grouped into two categories:

1. The Note should specify that admissibility of expert testimony is governed by Rule 104(b), not Rule 104(a).

2. The discussion of the "red flag" factors in the Note makes it sound as if the failure to meet any one factor renders the testimony inadmissible.

This memorandum will discuss each of the above critiques and suggestions. Where appropriate, the memorandum will suggest possible language changes to the rule, or to the note, that the Committee might consider if it feels that the critique warrants a solution.

1. A Proliferation of Daubert Motions?

Most of the public comments that were negative argued that the rule would give rise to expensive and time-consuming *Daubert* motions If the proposal would dramatically increase the number of *Daubert*-type hearings, without any corresponding benefit to the judicial system, then this would definitely be a cause for concern. But there are several responses to this charge.

Most importantly, the proposal appears to require no more from an expert than *Daubert* and *Joiner* presently require. There is some indication that the number of challenges to experts have marginally increased after *Daubert*. But if that increase is caused by *Daubert*, and the amendment simply codifies the *Daubert* principles, then any increase in challenges to experts would not be caused by an amendment to the rule.

Given that *Daubert* and *Joiner* are the law, there can really only be two possible complaints about the proposal independent of those cases, insofar as the critique is based on a feared proliferation of challenges to experts. First, it could be argued that the proposal is more stringent than those cases. Second, it could be argued that the proposal's extension of the gatekeeping function to non-scientific experts goes farther than those two cases, and will lead to a plethora of pretrial challenges to these experts.

As to the first argument, it seems clear that the proposal codifies *Daubert* and *Joiner*, and is no more stringent than those cases. Subpart (1) of the proposal tracks *Joiner* at least insofar as it requires an assessment of the *quantitative sufficiency* of the expert's basis. The expert's testimony in *Joiner* was held properly excluded because it was not sufficiently based on the data assertedly relied upon--there was an analytical gap between the data and the conclusion. (As to whether the requirement that the basis must be *reliable* is problematic, see the specific discussion of Subpart (1) later in this memo). Subpart (2) of the proposal requires the testimony to be the product of reliable principles and methods. This is precisely what *Daubert* requires The Court in *Daubert* states that Rule 702 imposes "a standard of evidentiary reliability" and "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." Subpart (3) requires a reliable application of the methodology to the facts, and this is what *Daubert* requires as well. In *Daubert*, the Court states that trial courts must determine whether the expert's "reasoning or methodology properly can be applied to the facts in issue."

As to the second argument--extending *Daubert* to non-scientific experts--it is true that the proposal goes further than *Daubert*. But this is the very question that the Court has undertaken to decide in *Kumho*. Obviously, this Committee must incorporate the result in *Kumho* into its proposed amendment. If the Court in *Kumho* states that a flexible gatekeeper function applies to the testimony of non-scientific experts, then once again the proposed amendment will not be leading to more challenges of experts---*Kumho* will be doing that. On the other hand, if the Court in *Kumho* rejects a *Daubert*-type gatekeeping function as applied to non-scientific expert testimony, then the proposed amendment and Committee Note will have to be modified.

In sum, there appears to be no merit to the charge that the proposed amendment as a whole will lead to more evidentiary challenges and more pretrial hearings.

Solution:

If the Committee believes that the concern over a proliferation of expert challenges and pretrial hearings should be addressed, whether the concern is meritorious or not, then the Committee might wish to add some qualifying language to the Committee Note. One possible place to add this language is right after the discussion in the Note about the "red flag" factors that courts after *Daubert* have considered. Set forth below is proposed language for the Committee to consider, should it decide that it is appropriate to add something to the Note to address the concern about a proliferation of challenges to expert testimony. This additional language is set forth in bold, after the red flag factor discussion, which is included simply for purposes of orientation.

Possible language to add to the Committee Note to address the concern over a proliferation of challenges to experts.

* * *

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 for the type of opinion the expert would give. See *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological 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).

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

A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law"; and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert proffered by an adversary.

* * *

Reporter's Comment:

The proposed paragraph does add a modulating influence to the rest of the Note, which could be read, especially by those with an economic interest, as having anti-plaintiff tendencies. Whether the language goes too far the other way is a question for discussion, should the Committee decide that some modulating language is appropriate.

2. Concern over the right to jury trial

The oft-expressed concern of opponents to the proposed amendment is that it will give the trial judge authority to simply exclude expert testimony that she disagrees with or does not believe--thus infringing on the jury's role.

One response to this charge is the same as discussed with respect to the previous criticism, i e., any concern about infringement on the plaintiff's right to jury trial is the result of *Daubert* and *Joiner*, not the result of the proposed amendment. Again, the amendment does not do anything that is not already done by those cases (with the exception of requiring a reliable basis in Subpart (1), a matter that will be discussed later in this memorandum).

At any rate, an undifferentiated "right to jury trial" argument proves too much. Taken to its logical conclusion, it would mean that the judge violates a party's right to jury trial by excluding hearsay--why shouldn't the jury have the authority to determine the credibility of hearsay? Indeed, any evidentiary rule of exclusion could be attacked as impinging on the proponent's right to a jury trial.

But of course, the right to a jury trial is not an absolute in the sense that a trial judge must allow the jury to hear all the proffered evidence, no matter how dubious, unreliable, or prejudicial. Rather, the right to jury trial means that it is the jury's role to consider all the *reliable* evidence that is not unduly prejudicial. There is a legitimate concern that the jury, unschooled in the ways of experts, will if unregulated give undue weight to expert testimony that is in fact unreliable. Therefore, a rule of evidence excluding unreliable expert testimony--such as either the current or the amended Rule 702-- is in no sense violative of the right to jury trial.

The response to this argument is that under the amendment, the trial judge would be able to exclude expert testimony because the expert is not *credible;* and credibility is a jury question. But the answer is not that simple. Certainly in a Rule 104(a) hearing the trial judge must make credibility determinations. If one expert says that he employed the methods used in his profession, and other experts testify that the asserted methods are in fact rejected throughout the profession, then some credibility assessment must be made in determining whether the expert's reliance on those methods will lead to reliable testimony. For example, in *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), the plaintiff's expert ophthamologist concluded that the plaintiff's cataracts were cause by exposure to nuclear radiation. He testified at the *Daubert* hearing that radiation-induced cataracts can be detected by simple visual observation, and that other members of his profession agreed with that assessment. But other members of the profession did not agree. The defendant's experts testified that a proper methodology for detecting radiation-induced cataracts included a medical work-up, a work-up of the patient's history, and an examination of occupation dosimetry charts. The trial judge, relying in part on a credibility determination, excluded the plaintiff's expert testimony, and the court of appeals affirmed under *Daubert*. The trial judge believed defendant's experts, and not the plaintiff's expert, on the question of what was standard methodology in the field.

Thus, credibility and reliability are not as easily separable as opponents of the proposed amendment would have it. Put another way, the proposed amendment (as well as *Daubert* and *Joiner*) permits the judge to make some credibility determinations--but this is necessary to determine whether proffered expert testimony is reliable, and reliability is emphatically a question in the first instance for the judge.

This is not to say that the proposal is completely unproblematic with respect to its judge-jury allocations. By requiring that an expert's testimony must be based upon "reliable" facts or data, Subpart (1) of the proposal could possibly be construed as permitting a trial judge to exclude an expert simply because he disbelieved the expert's factual basis where those facts are contested. This concern is discussed below in the section of the memo dealing specifically with Subpart (1)

Solution:

Assuming, arguendo, that the Committee finds it advisable to address the expressed generic concerns about the right to jury trial, the best solution would be to add language to the Committee Note. In this regard, the language already proposed to address the "proliferation" problem would also seem to suffice to address the "jury trial" problem. I reproduce that language here, with the reminder that the language is most properly placed after the "red flag" discussion that is currently in the Note.

Language to address the jury trial concern:

* * *

A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law"; and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert proffered by an adversary.

* * *

Reporter's Comment and possible elaboration:

The quote indicating that there is no intent to replace the adversary system would seem to allay the concerns of those who believe that the proposed amendment will impinge on the jury's role. If the Committee does not feel that the reference is strong or direct enough, or that more elaboration would be helpful, a quote from *Daubert* itself could be added immediately after the quote from the Fifth Circuit case. The possible addition to the Note would then read like this:

Language amplified to include a quote from *Daubert:*

> **A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law"; and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert proffered by an adversary.**

It is for the Committee to decide whether the Note needs to be amplified at all to address the concerns over the right to jury trial, and, if so, whether the simple statement set forth above will suffice, or whether the quote from *Daubert* should be added to it.

3. Application of the gatekeeper function to non-scientific experts:

Another common complaint from the public commentators concerned the proposal's extension of the gatekeeping function to the testimony of non-scientific experts. This criticism does not require extended discussion. The Court's opinion in *Kumho* will be factored into the proposal when that opinion is handed down. If, as expected, the *Kumho* Court imposes a flexible gatekeeping function on non-scientific expert testimony--as the proposed amendment does currently--then any complaint will have to be directed at the opinion, not at the proposal. If the *Kumho* Court rejects a gatekeeping function with respect to non-scientific expert testimony, then the proposal will have to be amended accordingly. Thus, there is no decision to be made at the time of this writing in response to the concerns about applying the gatekeeping rule to non-scientific expert testimony. If *Kumho* is decided before the April meeting, a memo will be sent to the Committee addressing its implications.

4. The problem of competing methodologies in the same field:

Some public comments have expressed the concern that the proposal fails to recognize that there might be two or more competing methodologies in the same field. The implication of these comments is that the proposal would require a trial judge to choose the more established or more accepted methodology--which could lead to a kind of rigid orthodoxy

One response to this charge is that it is not supported by the *text* of the proposal. The proposal simply says that the expert must be using reliable principles and methods. It does not say that the methods must be those used by a majority of professionals in the particular field. Nor does it say that competing methodologies in a single field cannot all be reliable Nor does it say that a method is unreliable until it is embraced by a majority of professionals in the field.

To take an example, nothing in the text of the proposal would prevent two psychiatrists from different "schools" from testifying as to the mental condition of a patient--a Freudian and a Skinnerian could both testify, and come to different conclusions, so long as they were acting as they would in their respective professional lives. Nor would the court be forced to exclude one of two economists, where the witnesses are from different schools of economic thought. Nor would an expert necessarily be excluded if he relied on one method of DNA identification (e.g., PCS) rather than the other more commonly used method (e g., RFLP).

The concern, therefore, must be that the *Committee Note* expresses or implies 1) that only orthodox methodology is permissible, and 2) that in a field with conflicting methodologies the trial judge must choose the testimony that is based on the most widely accepted methodology and reject all other experts.

The only possible language in the Committee Note that could be construed as mandating orthodoxy might be the reference in the preliminary discussion of *Daubert* to the factor of general acceptance. That provision currently reads as follows:

> *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) *whether the technique or theory has been generally accepted in the scientific community.* (Emphasis added)

Of course, this paragraph does nothing more than restate the factors specifically set forth in *Daubert*,

so it can hardly be creating a problem on its own; once again, the problem if any, seems to be created by *Daubert* itself. Indeed, the Court in *Daubert* recognized that the test it imposed might in some cases lead to a scientific orthodoxy or rigidity in expert testimony. Consider the following passage from *Daubert:*

> Petitioners and, to a greater extent, their amici exhibit a different concern. They suggest that recognition of a screening role for the judge that allows for the exclusion of "invalid" evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth 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. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Yet even this restrictive language would not necessarily prohibit a court from permitting testimony from both sides of a methodological dispute, where one set of methods was used by the "majority" and the other by a significant "minority." The Court does not say that a minority view is always so outside the mainstream as to be subject to automatic exclusion.

In sum, the criticism of the proposed amendment on the ground that it would not permit competing methodologies within the same discipline to testify seems unwarranted.

Solution:

If the Committee decides that the concerns over the admissibility of competing methodologies in a single field should be addressed, a paragraph could be added to the Committee Note to address this question. The most appropriate place to add the paragraph would be after the discussion of the "red flag" factors. What follows is proposed language for the Committee to consider. I also include the red flag factor discussion to provide context for the Committee, as well as the possible language that could be added to deal with the concerns about proliferation of challenges to experts and the right to jury trial (see the discussion under points 1 and 2).

Possible language to address the concerns over admissibility of competing methodologies (including previously proposed language concerning proliferation of challenges and the right to jury trial).

* * *

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 for the type of opinion the expert would give. See *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological 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).

All of these factors remain relevant to the determination of the reliability of expert testimony

under the Rule as amended.

A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law"; and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir 1996). Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert proffered by an adversary. [As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert proffered by an adversary.]

When a trial court, applying the amendment, rules that an expert's testimony is reliable, this would not necessarily mean that contradictory expert testimony is automatically unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. ***See, e.g., Heller v. Shaw Industries, Inc.*** **__ F.3d __, __ (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in** ***In re Paoli R.R. Yard PCB Litigation*****, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness."** ***See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*****, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola of Puerto Rico,* 161 F.3d 77, 85 (1st Cir. 1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").**

* * *

Reporter's Comment:

As with the other suggested additions, the above language tends to temper the perceived harshness of the current Committee Note. It is for the Committee to decide whether any language at all is needed to address the question of competing methodologies, and, if so, whether the language set forth above is actually too permissive.

5. The problem of experience-based experts

Some public commentators took the rather extreme position that the proposed amendment would exclude the testimony of any expert relying on experience, rather than scientific or technical knowledge. These comments were generally conclusory, but they appeared to be based on an assumption that the proposal's emphasis on "reliable principles and methods" is somehow inconsistent with an expert's reliance on experience.

There are three responses to this critique. First, the term "reliable principles and methods" does not in any way prevent reliance on experience. Use of experience can certainly be a reliable "method" for coming to certain conclusions. Second, the text of Rule 702 currently refers to experts qualified by experience, and that is not changed by the amendment. Third, the Committee Note emphasizes that the testimony of experience-based experts can be admissible if it is reliable. The pertinent part of the Committee Note reads as follows:

* * *

> 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).
>
> * * *

Solutions:

If the broad language of the text of the Rule and the specific reference to experience-based experts is not considered sufficient to address the concerns over the admissibility of such experts, then there are two possible solutions. One is to amend the text of the Rule to somehow refer to the relevance of experience. This proposed solution might read as follows:

Amending the text of the rule to refer to experienced-based experts (changes in bold):

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

Reporter's comment:

The problem with this additional language is that it seems to set up a dichotomy between experience and other reliable methods. This may be confusing to courts and litigants. The language is also awkward because it refers, in essence, to "reliable experience." While some experience could be considered "reliable" and some "unreliable", it is not the first kind of adjective one would think about when referring to "experience." It is difficult to think of any way to include a reference to experience in the text of the rule without completely reworking the rule itself.

The reference to experience does have certain advantages, however, since it clarifies in the text of the rule that experience-based experts can qualify for admissibility--and more importantly that experience-based experts must meet the same basic threshold of reliability as other experts.

Note that if the text is changed to add a reference to experience, the paragraph in the Committee Note referring to experience-based experts would have to be changed as well. Specifically, the paragraph defining experience in terms of principles and methods would have to be deleted and the following paragraph would need some elaboration to pick up the points that were made in the now-deleted paragraph. Here is how that could look:

Change to Committee Note if text of the rule is changed to add a reference to experience (change in bold):

* * *

~~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, **why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts of the case.** 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 ***second solution*** to the perceived problem of exclusion of experience-based experts is to add language to the Committee Note to more fully embrace the possibility that such experts might qualify under the Rule. Additional language on that point could be added after the first paragraph of the Note that deals with experience-based experts. The additional language might look like this:

Possible additional language to the Committee Note concerning experience-based experts

* * *

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.

Nothing in this amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education -- may not provide a reliable foundation for expert testimony. On the contrary, the text of the rule expressly contemplates that an expert may be qualified on the basis of experience alone. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. ***See, e.g., United States v. Jones,*** **107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail);** ***Tassin v. Sears Roebuck,*** **946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony could be admissible where the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches").**

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).

* * *

Reporter's Comment:

This language seems to provide solace to those concerned that the proposed amendment will result in wholesale exclusion of experience-based experts; and yet it seems to set forth sufficient standards so that unreliable experience-based testimony can still be excluded. The questions for the Committee are whether a concern about experience-based experts needs to be addressed at all, beyond what is currently in the Committee Note; and, if so, whether it is more appropriately addressed by a somewhat problematic change to the text or by a less problematic addition to the Note.

6., 7., and 8. Subpart (1) of the proposed amendment

Subpart (1) of the proposed amendment requires that expert testimony must be "sufficiently based on reliable facts or data." We have received three sets of comments that have been specifically aimed at this subpart. These comments are discussed in turn, and the solutions to address these critiques will then be set forth and discussed.

a. Invades the province of the jury

The comments from the New York State Bar Association (98-EV-017), and the Atlantic Legal Foundation (98-EV-158), both assert that Subpart (1) goes too far because it may improperly impinge on the role of the trier of fact. These assertions are somewhat different from the broader claims addressed earlier in this memo concerning the impact of the entire proposal on the right to jury trial. Those previous comments were essentially undifferentiated and overstated claims about the rule as a whole. The comments from NYSBA and ALF are more particularized and measured. Both organizations support Subparts (2) and (3) of the proposed amendment. Therefore, these more measured comments are worthy of specific consideration.

These two organizations argue that courts addressing reliability issues should only examine the methodology and the application of the methodology to the facts, not the facts themselves. The organizations point out that Rule 703 already requires the trial judge to screen the reliability of inadmissible evidence used by an expert. Therefore, if Subpart (1) is not to be redundant, it must require the trial judge to screen the reliability of *admissible* evidence relied upon by an expert. In the view of these organizations, a judge who excludes expert testimony on the ground that the expert has relied on admissible evidence that the judge finds unreliable has invaded the province of the trier of fact.

The example of the concern, given to me in a telephone conversation, is a car accident in which two competing accident reconstructionists rely on different factual assumptions (e.g., they use different assumptions about the speed or direction of the vehicles), where these facts are fairly in dispute and reasonable people can differ about what the actual facts really were. The concern is that a trial judge under Subpart (1) may exclude an expert simply because he believes one set of facts rather than the other; if the trial judge's belief did not rise to the "matter of law" level required for a directed verdict, the trial judge in excluding the expert would be impinging on the jury's authority to resolve disputable facts--the judge would essentially be directing a verdict in a case where reasonable minds could differ about the facts.

NYSBA in particular recognizes that Subpart (1) justifiably addresses the concern that, reliability aside, an expert may not be basing an opinion on sufficient facts or data. It states that this concern, while legitimate, is adequately handled by Subpart (3), which requires the trial judge to evaluate whether the principles and methods have been reliably applied to the facts of the case. In NYSBA's view, Subpart (3) would exclude an opinion without a sufficient basis, since if the expert's

basis was wanting, the method used would not be reliably applied to the facts.

Reporter's comment:

The concerns expressed by NYSBA and the Atlantic Legal Foundation seem to have some merit. It is, of course, unlikely that trial judges would choose to usurp the power of juries by acting as adjudicators of the facts in the guise of ruling on expert testimony But if the proposal could be read to invite such analysis by these respectable organizations, it is a cause for concern whether the threat of usurpation is real or not.

b. Creates a problematic relationship with Rule 703

Both Subpart (1) of the proposed amendment and Rule 703 purport to regulate the reliability of the basis of information used by an expert. Public commentators have expressed different views about the effect of Subpart (1) on the reasonable reliance requirement of Rule 703. Some commentators have concluded that Subpart (1) is simply redundant insofar as it requires a reliable basis, and since it adds nothing, it should be dropped. Some have said that Subpart (1) actually conflicts with Rule 703 because it imposes a more stringent reliability standard than the reasonable reliance requirement of Rule 703. The New York State Bar Association says that Subpart (1) has the potential of applying (inappropriately) to facts or data that are admissible--since otherwise it is a redundancy, given Rule 703's regulation of information that is inadmissible.

Reporter's comment:

The fact that there are so many competing interpretations about the relationship between Subpart (1) and Rule 703 is cause for concern. At the very least, the relationship between "reliable facts or data" in Subpart (1) and inadmissible information of "a type reasonably relied upon by experts in the particular field" in Rule 703 is a complex one, possibly leading to costs in terms of confusion and misapplication. And it is not obvious that these costs are going to be outweighed by any advantage created in terms of screening out unreliable expert testimony. After all, Subpart (2) requires the expert to use reliable principles and methods; Subpart (3) requires reliable application; and Rule 703 requires inadmissible information used by the expert to be reliable. So it is hard to see what kind of unreliable basis of information might slip through the cracks of those provisions that would need to be regulated by a *separate reliability requirement* (as opposed to a *sufficiency* requirement) in Subpart (1)

Speaking as a member of the *Daubert* Subcommittee, and having conferred with most of the members on this point, the inclusion of Subpart (1) was intended to require the trial court to engage in a *quantitative* analysis, in order to insure that the expert had relied on *enough* data--e.g., had not excluded something from his consideration that he should have included. For example, an expert who testifies that a substance caused a certain injury should probably be excluded if he relied on a single anecdotal study.

The word "reliable" was included simply to provide some parallelism with the other subparts. But Subpart (1) was not intended to allow the judge to engage in a *qualitative* analysis of the facts relied upon by an expert. Indeed, that is already mandated by Rule 703 where the facts or data are inadmissible; and to permit the judge to do a qualitative analysis of admissible evidence used by the expert would indeed appear to intrude on the jury's prerogatives

c. Prohibits the use of hypothetical facts:

A few public commentators have argued that, if read literally, Subpart (1) would prevent an expert from relying on a hypothetical set of facts. The opponent could argue that such an expert's testimony was not "sufficiently based on reliable facts or data" because the hypothetical facts are not reliable. This would send the trial judge off on a weird adventure to determine whether "facts" that are not really "facts" are reliable. Alternatively, it could be argued that hypothetical facts are *never* reliable, because by definition they are hypothetical, not real.

Reporter's Comment:

Obviously the proposed amendment does not intend to preclude reliance on hypothetical facts, where those hypotheticals fit the facts of the case. But it is undeniable that the reference to "reliable facts or data" in Subpart (1) creates some tension when an expert relies on hypotheticals.

On the other hand, the *sufficiency* requirement in Subpart (1) *does* properly regulate an expert's use of hypotheticals. An expert who draws a conclusion from an insufficient set of hypotheticals should be excluded For example, take an expert who is given the hypotheticals that a driver was driving 15 miles over the speed limit on a wet, curvy road. If that expert says that on the basis of those hypotheticals, the driver was intoxicated, the expert should be excluded, and properly so, because the factual basis (hypothetical or not) for drawing that conclusion is insufficient. Thus, while the use of the term "reliable" is problematic when applied to hypothetical facts, the use of the term "sufficient" is not.

Solutions to the problems arising from Subpart (1):

If the Committee believes that it must address these three concerns about Subpart (1)--that it could permit the trial judge to exclude expert testimony simply by disbelieving the disputed facts; that it creates a problematic relationship with Rule 703; and that it could be read to prohibit an expert from relying on hypothetical facts--there are several possible solutions, though some of these solutions create problems of their own. These solutions are:

1. deleting Subpart (1);

2. deleting the word "reliable" from Subpart (1);

3. deleting the word "reliable" from Subpart (1) and adding some reference to the requirements set forth in Rule 703;

4. rewriting Subpart (1) solely in terms of requiring a sufficient basis for the expert's opinion;

5. deleting the reasonable reliance requirement from Rule 703; and

6. adding some kind of protective language to the Committee Note paragraph that addresses the relationship between Rules 702 and 703.

Each of these solutions will be set forth and discussed in turn.

Solution 1: Deleting Subpart (1)

The NYSBA suggests that the problem it sees with Subpart (1) can be remedied simply by deleting that provision, without any loss of legitimate standards required by the proposed amendment. The proposal to delete Subpart (1) would lead to the following rule:

> 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~~:~~, provided that (1) the testimony is the product of reliable principles and methods, and (2) the witness has applied the principles and methods reliably to the facts of the case.

Reporter's Comment:

The problem with this proposal is that it leaves the rule with no explicit requirement that the expert must have a sufficient basis upon which to draw an opinion. Rule 703 does not fill this void because it does not deal with sufficiency--it deals with the kind of information the expert can use as a basis. NYSBA argues that any question of sufficiency of basis can be handled by reference to the remaining two subparts. If, for example, an expert relies on a single, ambiguous study to draw a conclusion that a substance causes harm, it could be argued that the expert has used an unreliable method (extrapolating from an insufficient basis) or has improperly applied a method to the facts of the case, which differ from the study relied upon. Yet this is at best an indirect analysis. The fact remains that if Subpart (1) is completely deleted, there is nothing in Rule 702 that specifically regulates the sufficiency of an expert's basis.

It is clear that any rule governing expert testimony must in some manner require a scrutiny of the sufficiency of the expert's basis. Dozens of opinions after *Daubert* have excluded expert testimony on the ground that the expert had an insufficient basis for his opinion--including *Joiner*. Perhaps the Committee will be content with having the basis question regulated somewhat indirectly by the subparts dealing with reliable methods and reliable application. If the Committee believes that the question of sufficient basis must be addressed more explicitly, than the proposed solution of deleting Subpart (1) should be rejected.

Solution 2: Deleting the word "reliable" from Subpart (1):

There are three problems with the currently proposed Subpart (1), as seen in the public comment: 1) A judge could usurp the jury by finding an expert's basis unreliable in a case where the underlying facts are reasonably disputed; 2) Subpart (1) creates a problematic interrelationship with the reasonable reliance requirement of Rule 703; and 3) Subpart (1) appears to impose unnecessary limitations on the expert's use of hypothetical facts. All three of these problems arise not from the requirement that the basis must be *sufficient*, but rather from the fact that the basis must be *reliable*. Therefore, one possible solution to these problems is simply to delete the word "reliable" from Subpart (1). If that proposal were adopted, the rule would look like this:

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

Reporter's Comment:

This proposal has the advantage of retaining the structure of the current proposal. It would, on its face, appear to alleviate the tension with Rule 703, and to permit the use of hypotheticals (since there is no requirement that the facts relied upon must be found independently reliable). Also, by taking the word "reliable" out of Subpart (1) and leaving it in the other subparts, there is a kind of positive inference about the reliability requirements that must be met in terms of method (Subpart (2)) and application (Subpart (3)).

There are two possible problems with this proposal. First, some might say that it does not improve the situation to take out the word "reliable" because the reference to "facts or data" still remains. Arguably, a purported fact is not a "fact" unless it is reliable--the same argument applies to "data". Thus, there is a possibility that deleting the word "reliable" leaves the proposal right back where it started.

On the other side of the spectrum, there could be a concern that taking out the term "reliable" would allow the expert to rely on anything, no matter how unreliable it might be--tea leaf readings, animal entrails, etc This concern seems somewhat overstated, however, given the protections that would remain. The expert would still have to use reliable methods reliably applied to the facts of the case. And if the expert relies on inadmissible information, it must satisfy the reasonable reliance

requirement of Rule 703. Finally, the basis must be sufficient. So it is hard to see how an expert could rely on a completely unreliable basis and get away with it, even if the word "reliable" is taken out of Subpart (1).

Solution 3: Deleting the word "reliable" and providing a reference to Rule 703:

One possible means of avoiding the problems inherent in the reliability requirement of Subpart (1) is to delete the word "reliable" and add a reference to Rule 703. Such a proposal would look like this:

> 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~~,~~ provided that (1) the testimony is sufficiently based upon facts or data **that the expert is permitted to consider under Rule 703**, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Reporter's comment:

This proposal would alleviate any conflict with Rule 703; it would deal with the hypothetical fact problem, because it is well-recognized under Rule 703 that an expert can rely on hypotheticals. And it would tend to alleviate any concern, expressed in addressing the previous proposal, that an expert could base an opinion on completely unreliable sources of information. Also, since Rule 703 imposes no limitation on the expert's use of admissible evidence, this proposal would prohibit a trial judge from excluding an expert's testimony on the ground that the expert was relying on a contested set of facts that the judge disagreed with. Finally, the proposal simply reads better than the previous one, which referred to "testimony sufficiently based on facts or data". Leaving the term "facts or data" at the end of the clause seems to cry out for some descriptive phrase--such as "facts or data that the expert is permitted to consider under Rule 703."

All in all, this seems to be the best solution to each of the problems cited by the public commentators.

Solution 4: Referring directly to a requirement of sufficient basis or foundation

Since the intent of Subpart (1) is to focus on the sufficiency, and not the reliability, of the expert's basis, one possible solution to all the cited problems with the current proposal is simply to recast Subpart (1) in terms of a sufficient foundation, rather than by reference to facts or data. As discussed above, the reference to facts or data can thought to lead to a focus on the reliability of those facts or data. A direct focus on foundational sufficiency would lead to a rule like this:

> 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~~:~~, provided that (1) **a sufficient basis [foundation] for the testimony is established**, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Reporter's Comment:

For this solution, either the word "basis" or the word "foundation" could be used. This solution seems to answer the three problems created by the existing proposed Subpart (1): 1) since the emphasis is on the sufficiency and not the reliability of the underlying basis, the risk that a judge will usurp the jury is alleviated; 2) there is no independent reliability requirement that will conflict with the standards of Rule 703; and 3) a sufficient foundation can certainly rest on hypothetical facts.

One possible problem with this solution is that it could be considered a bit vague. By referring to basis or foundation, without any reference to what that basis or foundation can consist of, the proposal could be considered incomplete. Arguably the previous solution, which specifically refers to the reasonable reliance requirement of Rule 703, provides more definitive guidance.

Solution 5: Deleting the reasonable reliance requirement of Rule 703:

The Federal Bar Council (98-EV-097) suggests that the reliable basis requirement of the current proposed Subpart (1) renders the reasonable reliance requirement of Rule 703 redundant. The Council suggests that the proper solution to this redundancy is to delete the reasonable reliance requirement of Rule 703 (i.e., the second sentence of the current Rule 703), and to retain the current proposed Subpart (1) of Rule 702.

Reporter's Comment:

There are several problems with this proposed solution. The first is a practical problem--what if the proposed change to Rule 703 ends up being adopted and the proposed change to Evidence Rule 702 does not? Then you would have a deletion of the reasonable reliance requirement without anything left in its place to regulate the reliability of inadmissible information used by an expert. Given the uncertainties of the rulemaking process, it can be perilous to make one rule change dependent on the change to a different rule.

Moreover, the deletion of the reasonable reliance requirement, without a corresponding change to Subpart (1), solves only one of the three perceived problems created by Subpart (1). The deletion would alleviate any tension that would arise from two separate reliable basis requirements. But it does nothing to alleviate the risk that a trial judge will find an unreliable basis, and exclude an expert, where the experts in the case are relying on contradictory and reasonably contested admissible evidence. And it does not address the problem of the expert who relies on hypothetical facts. So for all these reasons, the solution of deleting the reasonable reliance requirement of Rule 703 does not seem adequate to the task.

Solution 6: Adding language to the Committee Note

The three problems created by Subpart (1)--possibility of the judge usurping the jury's role, conflict with the reasonable reliance requirement of Rule 703, and failure to address the use of hypothetical questions--could be addressed in the Committee Note without changing the text. The most logical place for an addition would be around the paragraph that already deals with the relationship between Rule 702 and Rule 703. A change to the Committee Note to address these three problems might look like this:

* * *

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. **The language "facts or data" is sufficiently broad to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.**

Where facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "reliable facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

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.

Reporter's Comment:

Additional language along the lines above would certainly help to clarify that there is no intent

to create the problems that are created by the current proposed Subpart (1). It is unclear, however, whether a Committee Note will be enough to eliminate the potential for confusion and misapplication For example, retaining the reference to "reliable facts or data" in Subpart (1) creates a confusing relationship between Subpart (1) and Rule 703. While the Committee Note addresses this interrelationship, it is unclear whether it does so in such a way as to eradicate all confusion. This is because the relationship is fuzzy at best. Taking the reliability requirement out of the text of Subpart (1) is the only sure way to avoid confusion. Thus, the best solution is probably to add some clarifying language to the Committee Note, *together with* a change to the text of the Rule, as discussed in the other solutions addressed above.

Final Note: Committee Note MUST be changed if certain changes are made to the text:

Some of the solutions outlined above would require a change to the text of the existing Committee Note. For example, if the Committee chooses Solution (4), which refers only to foundation, the paragraph of the Committee Note which refers to "facts or data" would have to be deleted. Similarly, if the Committee chooses Solution (3), which deletes the term "reliable" and refers to Rule 703, then the Committee Note paragraph dealing with the relationship between Rule 702 and 703 would have to be amended.

Set forth below are each of the *viable* solutions involving a change to the text, and the corresponding change to the Committee Note that would have to be made. Where applicable, I will also include the proposed additions to the Committee Note addressing the problem of hypothetical questions and other matters discussed in this section. These elaborations are set forth in bold.

Solution 1: Deleting Subpart 1 (and Committee Note)

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~~:~~, provided that (1) the testimony is the product of reliable principles and methods, and (2) the witness has applied the principles and methods reliably to the facts of the case.

Changes to Committee Note:

* * *

~~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.~~ **~~The language "facts or data" is sufficiently broad to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.~~**

~~Where facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "reliable facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.~~

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.

Solution 2: Deleting the word "reliable" from Subpart (1) (and Committee Note):

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

Changes to Committee Note:

* * *

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. **The language "facts or data" is sufficiently broad to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.**

Where facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "~~reliable~~ facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

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Solution 3: Deleting the word "reliable" and providing a reference to Rule 703 (and Committee Note):

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~~:~~, provided that (1) the testimony is sufficiently based upon facts or data **that the expert is permitted to consider under Rule 703**, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Changes to Committee Note:

* * *

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 **The language "facts or data" is sufficiently broad to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.**

Where facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "~~reliable~~ facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

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

Solution 4: Referring directly to a requirement of sufficient basis or foundation (and Committee Note):

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~~,~~ provided that (1) a sufficient basis [foundation] for the testimony is established, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Changes to Committee Note:

* * *

~~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.~~ **~~The language "facts or data" is sufficiently broad to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.~~**

Where facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on ~~"reliable facts or data"~~ "a sufficient basis [foundation] for the testimony" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other. The term "sufficient basis [foundation] is also sufficiently broad to allow an expert to rely on hypothetical facts that are supported by the evidence.

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.

9. Expert Reasoning and the Validity of an Expert's Methods

Bert Black and Cliff Hutchinson (98-EV-003) suggest a different focus for an amendment to Evidence Rule 702. They suggest that the rule should refer to an expert's "reasoning" rather than "principles and methods". They opine that the term "reasoning" is both broader and more descriptive of what the trial court must actually look at in conducting a gatekeeping analysis. They also argue that the proposed amendment misses a distinction between validity and reliability; they contend that an expert must use a reliable method, but that the method might not be valid for the purpose for which it is offered.

Black and Hutchinson suggest that if the Rule is to be amended, it should be changed as follows:

> 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~~:~~, provided that (1) the testimony is sufficiently based on reliable facts or data, (2) the testimony is derived through valid reasoning and a reliable methodology, (3) the witness has properly applied the reasoning and methodology to the facts of the case, and (4) it is shown that the kind of reasoning and methodology used by the expert produces conclusions sufficiently reliable for the legal purpose at hand.

Reporter's Comment:

This is a substantial rewriting of the proposed amendment, and would require some changes to the Committee Note as well. It does not appear that the benefits of these changes would outweigh the cost of such a substantial change to the proposal at this point. A careful reading of the opinion in *Daubert* indicated that the Court equated validity with reliability. Any distinction between these terms is one that is simply fodder for debate among philosophers of science. Likewise, there is no meaningful distinction between reasoning and use of principles and methods. Indeed, reasoning is a method by which a reliable conclusion can be reached. When Bert Black testified at the public hearing, he could not come up with an instance in which using the term "reasoning", as opposed to "principles and methods", would make any difference. Finally, the proposed subdivision (4) does not seem to add anything meaningful, beyond the reliable application requirement that is already in Subpart (3) of the proposed amendment.

It is for the Committee to determine whether a change from "principles and methods" to "reasoning", and articulation of a distinction between validity and reliability makes sense at this point in the rulemaking process. If the Committee decides to adopt this approach, Subpart (1) of the Black proposal would have to be amended for the reasons discussed earlier in this memorandum.

10. If it's not broke . . .

A number of public commentators assert that Rule 702 should not be amended, because it is currently working well. They contend that the courts are reaching uniformity over the meaning of *Daubert*, and that it therefore does not make sense to "start all over again" by changing the rule.

Reporter's Comment:

These commentators tend to overstate the existence of post-*Daubert* uniformity these days. Set aside the question of whether *Daubert* applies to non-scientific experts. Even if that issue is settled by *Kumho*, there are a number of other questions on which the courts remain divided. Here are some examples:

1 The Third Circuit says that *Daubert* requires the gatekeeper to determine that the expert's methods are reliably applied to the facts of the case. See *Paoli* (quoted in the Committee Note). In contrast, the Sixth Circuit has said that mistakes in the application of the method are for the jury. *United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993) The Committee's proposal resolves that conflict.

2. Some courts draw a much stronger distinction between methodology and conclusion than other courts In *Paoli* and *Lust*, both cited in the Committee Note, the courts noted that methodology and conclusion cannot be neatly divorced. Whereas other courts rely more heavily on the language in *Daubert* that the focus is on methodology and not conclusion. See, e.g., *Kannankeril v. Terminix Intern., Inc.*, 128 F.3d 802 (3d Cir. 1997) (fact that conclusion is out of the mainstream is a question of weight, not admissibility). The Committee's proposal--and especially the Committee Note--provides guidance on this conflict.

3. Some courts have held that the burden is on the opponent to prove that the expert's testimony is unreliable. Other courts have relied on Rule 104(a) to hold that the burden is on the proponent to prove that the expert's testimony is reliable. Other courts have held that the *Daubert* hearing is governed by Rule 104(b). See, e.g., *Maryland Cas. Co. v. Therm-O-Disc., Inc.*, 137 F.3d 780 (4th Cir. 1998) (placing the burden of proving unreliability on the opponent); *Daubert on remand* and *Paoli* (both applying the Rule 104(a) standard); *Isely v. Capuchin Province*, 877 F.Supp. 1055 (E.D Mich. 1995) (applying Rule 104(b) in a *Daubert* hearing). The Committee Note to the proposed Rule resolves this question by setting forth a Rule 104(a) standard.

These are only a few of the conflicts in the courts over *Daubert* that will remain live after *Kumho*. More generally, a rule change, with a guiding Committee Note, is likely to provide helpful guidance to both courts and litigants as to how to approach a *Daubert* issue. Currently, even without any obvious conflicts on the specifics, the courts have divided over how to even approach a *Daubert* question. Some courts seem to approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize, in detail, the expert's basis, methods, and application. Other courts seem to think that all

Daubert requires is that the trial court assure itself that the expert's opinion is something more than mere unfounded speculation--all other possible defects go to the jury. This difference in approach is evident in the cases set forth in the outline attached as an appendix to this memorandum.

Adoption of the proposed rule change, and the Committee Note, would likely help to provide uniformity in the *approach* to *Daubert* questions. The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.

Finally, if the Rule is not amended, there is a legitimate cause for concern that Congress will act to amend Rule 702. As discussed in previous memos, Senator Hatch and Congressman Coble have each proposed legislation that purports to codify *Daubert.* These codification efforts were shelved, in part, because of assurances that the Rules Committee was already considering a change to Rule 702. If the Committee does not act, there is a possibility (how strong a possibility cannot be assessed) that these congressional efforts will be renewed.

11. Generalized expert testimony

At the October meeting, the Committee discussed a comment from Professor David Faigman, expressing concern over Subpart (3) of the proposed amendment, which 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 Subpart (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.

The Committee tentatively agreed to address this concern in the Committee Note, rather than in the Rule. The additional paragraph that was tentatively agreed to is as follows:

* * *

> **If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert is qualified; (2) the testimony addresses a subject matter on which the factfinder can be assisted by an expert; (3) the testimony is reliable; and (4) the testimony "fits" the facts of the case.**

* * *

Reporter's Comment:

If the Committee believes that the problem of generalized expert testimony can be handled in the Note, then the above language would seem to suffice. However, if the Committee believes that the language of the current proposal is so exclusionary that such a paragraph would be flatly inconsistent with the Rule itself, then it might be appropriate to amend the Rule to accommodate experts who testify to general principles only. Such a textual change--without any change to Subpart (1) for purposes of this discussion--could look like this:

Possible change to cover testimony by experts on general principles:

* * * 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.

It is the focus on application *by the witness* that creates problems when the Rule is applied to generalized expert testimony. 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.

If such a change is made, the added paragraph to the Committee Note, already tentatively agreed to, should be included as well, for helpful guidance. The question for the Committee, then, is whether the Committee Note is enough to eliminate any confusion about the effect of the Rule on generalized expert testimony, or whether a textual change is necessary to eliminate that confusion.

Public Comment suggesting change to the Committee Note, # 1--Suggestion that admissibility is governed by Rule 104(b)

Professor Eileen Scallen, (98-EV-024) takes issue with the following passage in the Committee Note:

> 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 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).

Professor Scallen contends that the Note should be amended to provide that questions concerning the reliability of expert testimony are to be governed by Rule 104(b) rather than Rule 104(a). She recognizes that *Daubert* specifically stated that admissibility questions are governed by Rule 104(a), but dismisses that statement as dictum. She distinguishes *Bourjaily*, which held that the predicate issue of conspiracy under Rule 801(d)(2)(E) was governed by Rule 104(a), as a case involving mixed questions of law and fact--fodder for a judge--as opposed to the question of reliability which is a question of fact--fodder for the jury. She also notes that the Court applied the Rule 104(b) standard to proof of uncharged misconduct in *United States v. Huddleston,* 485 U.S. 681 (1988). On the merits, she argues that adoption of a Rule 104(b) standard "would provide a basis for consensus" because it would retain a gatekeeping role for the judge and yet not permit a judge to usurp the jury function.

Reporter's Comment:

The problem with the Scallen proposal is that it is inconsistent with Supreme Court cases, the structure of the Evidence Rules, and the recent amendment adopting Evidence Rule 804(b)(6). As to Supreme Court cases, *Bourjaily* holds that the Rule 104(a) standard generally controls all questions of admissibility under the Rules. *Daubert* states the same principle with respect to the reliability of expert testimony. The argument that *Daubert* is dictum on the point is weak, because the whole second part of *Daubert*, dealing with the gatekeeping function, is technically dicta--that doesn't mean it shouldn't be followed. The new Rule 804(b)(6) explicitly states in the Committee Note that Rule 104(a) controls admissibility questions--in that situation, the question of whether the party caused a declarant's unavailability. So the use of a Rule 104(b) standard in Rule 702 would be inconsistent with precedent and the other Evidence Rules.

Professor Scallen's proffered distinction at the public hearing--that *Bourjaily* presented a mixed question of fact and law and thus warranted Rule 104(a) treatment whereas consideration of pure questions of fact does not--fails to persuade in light of the use of the Rule 104(a) standard in

other Evidence Rules. The Rule 804(b)(6) question--did the party cause the declarant's unavailability--is clearly a question of fact, and yet it is specifically governed by Rule 104(a).. A number of hearsay questions--e g., was the declarant under the influence of a startling event, was the business activity regularly conducted, did the defendant actually make the statement proffered as an admission--are governed by the Rule 104(a) standard, and there is a good deal of case law on all these matters. All of these are questions of fact.

So how does one reconcile *Huddleston*, where the question of whether the defendant actually committed the bad act is decided under Rule 104(b)? The answer could be that 104(a) is used when the proffered evidence could especially prejudice the adversary, and therefore more protection from the judge is warranted. In *Huddleston*, the question of whether the defendant even committed the prior bad act need not be strictly scrutinized, since if a juror were to find that the defendant did not commit the act, then the bad act would not be used to the defendant's prejudice. It would drop out of the case. In contrast, in *Bourjaily*, Rule 104(a) scrutiny is required because a juror could use the hearsay statement against the defendant even if that juror found that the declarant was not a coconspirator. Likewise, an excited utterance is governed by Rule 104(a) because the hearsay statement could be used by the jury to the prejudice of the adversary, even if the jury found that the declarant was not under the influence of a startling event when he made the statement.

The question is whether this analysis follows through to require the Rule 104(a) standard for questions of admissibility under Rule 702. It seems clear that it does. The adversary can be prejudiced by expert testimony even if the jury finds that the expert did not meet one or more of the requirements set forth in the amendment. The jury could well say, "sure, he didn't look at much data, but he seems sincere, and he is qualified, so let's believe him." This is not a fanciful proposition--it happened all the time before *Daubert*.

For all these reasons it appears that the Rule 104(a) standard must govern admissibility decisions under Rule 702. One proposal that might be considered is simply to delete the reference in the Committee Note to Rule 104(a), i.e., to say nothing about the matter, thus leaving it to the courts to determine the appropriate standard of proof. This solution would entail cutting the last two sentences out of the paragraph in the Committee Note that is reproduced above. Whether to evade the question by simply not mentioning it is a decision for the Committee.

Public Comment suggesting change to the Committee Note, #2--Dispositive nature of the red flag factors

The Committee Note discusses some of the factors that courts have considered as pertinent to reliability after *Daubert*. That section of the Committee Note (which I sometimes refer to as the section on "red flag factors") reads as follows (with the change in the paragraph already tentatively agreed to in bold):

* * *

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 for the type of opinion the expert would give. **See *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological 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).

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

* * *

Several members of the public have objected that this paragraph implies that the failure to meet one or more of these factors automatically renders the expert testimony unreliable and inadmissible. They point out, for example, that the "anticipation of litigation" factor cannot be dispositive because the court in *Daubert on remand* recognized that forensic experts could be permitted to testify even though their research was conducted solely in anticipation of litigation. Moreover, failing to meet any one of the factors should not, in their view, render an expert's testimony automatically inadmissible.

Reporter's Comment and Solution:

It is at least possible to read the red flag factors paragraph as implying that a failure to meet any one of the factors renders the expert testimony automatically inadmissible. This was never the intent of the Note. In order to alleviate any confusion or concern, it would be simple to add some language to the end of the red flag factors paragraph to repudiate the notion that a failure on any single factor would be dispositive. This added language could read like this:

Possible addition to the end of the "red flag factors" paragraph:

* * *

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. **Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. See, e.g., *Heller v. Shaw Industries, Inc.* __ F.3d __, __ (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").**

Reporter's Comment:

The above language, or something like it, would seem usefully included in the Note in order to ameliorate some of the perceived anti-plaintiff tone of the Note. The quotes provide helpful observations from highly respected judges. There seems to be little downside in adding this language.

Appendix to Report on Rule 702--Outline on Cases Applying *Daubert*

CASES APPLYING *DAUBERT*

By Daniel J. Capra, Reed Professor of Law, Fordham University School of Law

This Outline is current as of March 16, 1999

I. THE GATEKEEPING ROLE

Factors for the Gatekeeper to Consider

Research In Anticipation of Litigation: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995): On remand from the Supreme Court, the Court of Appeals held that summary judgment was properly granted against the plaintiffs. The Court noted that "Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before." It stated that the first prong of the two-prong *Daubert* analysis--whether the expert's testimony is derived from the scientific method--"puts federal judges in an uncomfortable position" because they must second-guess qualified experts. Nonetheless, a Court after *Daubert* cannot be content with an expert's self-serving conclusion that his testimony is derived from the scientific method. "Rather, the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology."

The *Daubert* Court stated that a "very significant fact" in determining reliability is whether the experts are testifying on the basis of research "conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying." Since the scientist's "normal workplace is the lab or the field, not the courtroom" it follows that expert testimony based on research prepared in anticipation of litigation is unlikely to be consistent with the scientific method, whereas research prepared independent of the litigation gives some objective proof of good science. However, one exception to the general exclusion of research prepared in anticipation of litigation is that scientific research "closely tied to law enforcement may indeed have the courtroom as a principal theatre of operations."

Applying these principles to the plaintiffs' experts, the *Daubert* Court found that none had conducted research that pre-existed or was independent from the litigation. Nor had the research and analysis been "subjected to normal scientific scrutiny through peer review and publication." The Court concluded that apparently no one in the scientific community "has deemed these studies worthy of verification, refutation or even comment."

In the absence of both independent research and peer review, the *Daubert* Court held that the experts "must explain precisely how they went about reaching their conclusions and point to some objective source--a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like--to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field." In this case, the experts had failed to explain with particularity the methodology they followed, and they could not point to any objective external source to validate their methodology. The Court concluded that it had been presented "with only the expert's qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."

The second prong of *Daubert* requires a showing of the "fit" between the expert's testimony and an issue in the case. The Court found that most of the plaintiffs' expert testimony failed the "fit" requirement. This was because state tort law required the plaintiffs to prove that Bendectin was more likely than not the cause of their injuries, and these experts did not did not make that conclusion. Rather, they simply testified that Bendectin increased the risk of limb reduction; this testimony in fact tended to disprove the plaintiffs' argument as to legal causation, because "it shows that Bendectin does not double the likelihood of birth defects."

Thorough Overview of the *Daubert* Mandate: *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994): Affirming in part and reversing in part a grant of summary judgment in a case alleging damages from exposure to PCB's, the Court engaged in an extensive and incisive analysis of *Daubert's* effect on scientific expert testimony. The Court made the following important points about Rules 702 and 403 after *Daubert*:

1. Because a judge at an *in limine* hearing must make findings of fact on complex scientific issues, and because the *in limine* ruling will often decide the case, "it is important that each side have an opportunity to depose the other side's experts in order to develop strong critiques and defenses of their expert's methodologies."

2. The factors to be deemed important for scientific validity are: a. whether the expert's hypothesis can be tested; b. peer review; c. known or potential rate of error; d. existence of protocols; e. general acceptance; f. the relationship of the method to other techniques which have been found reliable; g. the qualifications of the expert; and h. the non-judicial uses to which the method has been put.

3. Because the question of reliability is an admissibility requirement governed by Rule 104(a), a proponent must do more than simply make a *prima facie* case on reliability. While the proponent does not have to prove to the judge that the proffered expert testimony is *correct*, she must prove to the judge by a preponderance of the evidence that the testimony is *reliable*. The *Paoli* Court stated that the "evidentiary requirement of reliability is lower than the merits standard of correctness."

4. After *Daubert* any distinction between methodology and its application is no longer viable. *Daubert* provides that "*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.*"

5. *Daubert's* focus on methodology rather than conclusion has only a limited practical effect, because when a judge disagrees with the expert's conclusion, "it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert." The only situation in which the methodology/conclusion distinction might make a difference is the rare case in which expert testimony is challenged on the sole ground that the conclusion is different from that of other experts. In that case, the Trial Judge must inquire beyond the conclusion before excluding the testimony.

6. Because the *Daubert* Court held that Rule 702 was the "primary locus of a court's gatekeeping role," the use of Rule 403 to exclude expert testimony should be left for the rare case, especially at the pretrial stage. Thus, "there must be something *particularly* confusing about the scientific evidence at issue--something other than the general complexity of scientific evidence."

Applying the foregoing principles to the expert testimony proffered by plaintiffs, the *Paoli* Court held the following:

1. The testimony of one doctor was properly excluded because he relied on answers to a questionnaire to assume that the plaintiffs had certain symptoms. As a result, the doctor had no reliable foundation to assume that the plaintiffs even had any illness, much less that the illness was caused by exposure to PCB's. The testimony was also unreliable because the doctor failed to exclude other possible causes through a proper differential diagnosis.

2. The district court erred in excluding the testimony of one doctor insofar as that testimony was based on the doctor's personal examination and review of the medical history of certain plaintiffs, knowledge of PCB exposure in the area at issue, and some consideration of possible alternative causes.

3. The testimony of an expert who concluded that plaintiffs had been exposed to PCB's was properly excluded insofar as it relied on the expert's recalculation of data prepared by American Medical Laboratories, Inc. The Court found that recalculation based on the differences between three samples "is not a technique identified in the scientific literature; nor is it generally accepted." A recalculation based on such a small sample is "too rough to be reliable."

4. The district court abused its discretion when it excluded expert testimony that PCB's are harmful to humans. The testimony was based on animal studies, and such studies are sufficiently reliable when they are not contradicted by epidemiological studies.

5. Contrary to the district court's ruling, it was not necessary for a doctor to examine patients before he could reliably testify that they faced a future risk of illness from prior exposure to PCB's. The doctor's opinion was reliable because he based it on a residential history of each plaintiff, and on fat and blood tests performed on the plaintiffs.

Expert Must Employ the Same Methodology for an In-Court Conclusion as She Would Employ In Her Out-of-Court Work: ***Braun v. Lorillard Inc.,*** 84 F.3d 230 (7th Cir. 1996): The plaintiff sought to prove that the decedent's mesothelioma was caused by smoking cigarettes with a filter made with crocidolite asbestos. The decedent's lung tissue was tested for asbestos fibers, using the standard methodologies of "bleach digestion" and "low temperature plasma ashing." No crocidolite fibers were found. The plaintiffs then retained an expert who tested for asbestos in building materials to conduct tests on the decedent's lung tissue. This expert was unaware of the methodologies ordinarily employed in testing tissue. He used the same test that he used on building materials, known as high temperature ashing, and found crocidolite fibers in the tissue. The expert stated that high temperature ashing was as usable on tissue as on bricks, though he had never conducted such a test on tissue before this litigation. He also admitted that the high temperature could alter the chemistry of the sample, in which case it would be impossible to tell whether asbestos fibers were crocidolite or some other kind. But he asserted that his method was far more likely to produce a false negative than a false positive.

The Court held that the expert's testimony was properly excluded as unscientific under *Daubert.* It made the following points:

> Nowhere in *Daubert* did the Court suggest that failure to adhere to the customary methods for conducting a particular kind of scientific inquiry is irrelevant to the admissibility of a scientist's testimony. On the contrary, the Court made clear that it is relevant. A judge or jury is not equipped to evaluate scientific innovations. If, therefore, an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may appropriately insist that he ground his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry. To forsake the accepted methods without even inquiring why they are the accepted methods--in this case, why specialists in testing human tissues for asbestos fibers have never used the familiar high temperature ashing method--and without even knowing what the accepted methods are, strikes us * * * as irresponsible.

Modern science is highly specialized. An expert in the detection of asbestos in building materials cannot be assumed to be an expert in the detection of asbestos in human tissues even though, as the plaintiff reminds us, many building materials, most obviously wood, are, like human and animal tissues, organic rather than inorganic substances. The fact that the plaintiffs' lawyer turned to this nonexpert, having already consulted experts without obtaining any useful evidence, is suggestive of the abuse, or one of the abuses, at which *Daubert* and its sequelae are aimed. That abuse is the hiring of reputable scientists, impressively credentialed, to testify for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit.

Level of Scrutiny

Limited View of Gatekeeper Role: ***McCullock v. H.B. Fuller Co.,*** 61 F.3d 1038 (2d Cir. 1995): The plaintiff alleged that she contracted a respiratory ailment, including throat polyps, from exposure to an unventilated glue pot at the place of her employment. The defendant challenged two experts under *Daubert*--a consulting engineer, who testified that the plaintiff was in the "breathing zone" of the glue fumes, and an ear, nose and throat doctor, who testified that the glue fumes caused the plaintiff's ailments. The Court held that the testimony of both experts was sufficiently reliable under *Daubert.* The engineer based his opinion on his extensive practical experience, examination of safety literature and the warnings provided by the defendant, interviews with the plaintiff concerning her exposure, and background industrial experience with ventilation. The doctor based his testimony on his treatment of the plaintiff, her medical history, pathological studies, use of a scientific analysis known as differential etiology (which requires listing all possible causes, then eliminating all causes but one), and scientific and medical treatises. Under these circumstances, any dispute as to the experts' lack of specialization, flaws in methodology, or lack of textual authority, went to weight and not admissibility. The Court concluded that the defendant's point-by- point, strict scrutiny attack on the experts' qualifications and methodology constituted an unwarranted extension of *Daubert:*

Trial judges must exercise sound discretion as gatekeepers of expert testimony under *Daubert.* Fuller, however, would elevate them to the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul -- separating the saved from the damned. Such an inquiry would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.

Trial Court's Gatekeeping Standards Too Strict: ***United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,*** 80 F.3d 1074 (5th Cir. 1996): In an eminent domain action, the landowner proffered an engineering expert and a real estate appraisal expert. The engineering expert stated that a new levee left the subject property unprotected from flooding, and in a worse position than before the levee was built. The real estate appraisal expert stated that any prospective buyer would determine that the property was subject to flooding, and that the fair market value of the property had been reduced. The trial court excluded the experts' testimony as speculative and without foundation, relying specifically on the experts' uncertainty about the extent of flooding on the property in the event of heavy rainfall. But the Court of Appeals found an abuse of discretion, because the trial court "applied too stringent a reliability test." The Court stated that *Daubert* had not worked a "seachange over federal evidence law" and that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." The engineer's opinion was properly based on his review of maps, photographs and other relevant data, as well as his experience as an engineer. The appraisal expert's opinion was based on his experience, his personal inspection of the property, comparable sales, and discussions with local brokers. Under these circumstances, any vagueness or tentativeness in the testimony were "matters properly to be tested in the crucible of adversary proceedings; they are not the basis for truncating that process."

Sufficiency of Expert Testimony

Gatekeeper Role Does Not Extend to Sufficiency Review: ***In re Joint E. and S. Dists. Asbestos Litigation (Maiorana),*** 52 F.3d 1124 (2d Cir. 1995): The trial court held that the plaintiff had presented insufficient evidence to establish that asbestos caused colon cancer, and granted the defendant's motion for judgment as a matter of law after a jury verdict in favor of the plaintiff. While the plaintiff's expert testimony was found on a previous appeal to be admissible, the trial court on remand relied on *Daubert* for the proposition that the trial judge has an obligation to strictly scrutinize expert testimony for its sufficiency as well as its admissibility. But the Court of Appeals reversed the trial court and reinstated the verdict. The Court held that *Daubert* did not change the standard for assessing the sufficiency of evidence or for granting judgment as a matter of law. While the trial judge has an expanded role in assessing the admissibility of scientific expert testimony, this does not allow the judge to usurp the jury's function by acting as a gatekeeper as to sufficiency. The Court explained as follows:

> The "admissibility" and "sufficiency" of scientific evidence necessitate different inquiries and involve different stakes. Admissibility entails a threshold inquiry over

whether a certain piece of evidence ought to be admitted at trial. The *Daubert* opinion was primarily about admissibility. It focused on district courts' role in evaluating the methodology and the applicability of contested scientific evidence in admissibility decisions.

This case is about sufficiency, not admissibility. A sufficiency inquiry, which asks whether the collective weight of a litigant's evidence is adequate to present a jury question, lies further down the litigational road.

Applying its analysis of sufficiency review after *Daubert* to the District Court's ruling, the *Asbestos* Court held that the District Court erred in at least the following respects:

1. The district court unfairly discredited an expert's testimony that a number of studies listing standard mortality ratios for asbestos/colon cancer ranging from 1.14 to 1.47 are statistically significant when taken together. The district court had simply asserted, without support, that an SMR of less than 1.50 is "statistically insignificant" and that "no matter how many studies yield a positive but statistically insignificant SMR for colorectal cancer, the results remain statistically insignificant." The Court of Appeals responded: "Although perhaps a floor can be set as a matter of law, we are reluctant to adopt such an approach. We believe that it would be far preferable for the district court to instruct the jury on statistical significance and then let the jury decide whether many studies over the 1.0 mark have any significance in combination."

2. The district court erred in disregarding the studies proffered by the plaintiff's experts revealing SMRs of 1.62 and 1.85 for asbestos exposure and colon cancer, and in disregarding another study which yielded an SMR of 2.27 for colon cancer in plant workers exposed to asbestos. These SMRs exceeded the district court's own threshold for statistical significance, yet that court unaccountably rejected them in its sufficiency inquiry.

3. The district court gave too much weight to contrary epidemiological studies offered by the defendant, and improperly ignored public reports which had found a link between asbestos exposure and colon cancer. The Court of Appeals stated: "For the district judge to supersede the opinions of the expert witnesses with his own lay judgment raises some concerns; for the court to omit any consideration of agency reports backing up the claims of plaintiff's experts and supporting the jury verdict is, in our view, especially troubling."

Daubert* Cannot Be Argued in Terms of Insufficiency on Appeal, Where the Party Failed to Object to Admissibility at Trial: *C.B. Fleet v. Smithkline Beecham Consumer Healthcare, 131 F.3d 430 (4th Cir. 1997): In a Lanham Act case, the major issue of dispute was the scientific reliability of tests conducted by the defendant that were the basis of the defendant's advertised claims of product superiority. The plaintiff made no *Daubert* objection to the

defendant's scientific testimony at trial, choosing instead to call its own scientific experts to attack the defendant's testing procedures. The Trial Judge found in favor of the defendant, and the plaintiff challenged the evidentiary sufficiency for this finding, contending that the judge's determination was based on evidence that failed to meet *Daubert* standards. In pursuit of this claim, the plaintiff argued that it need not have made a *Daubert* objection at trial, because its challenge on appeal was not to the admissibility of the defendant's expert evidence, but rather to "its insufficiency when tested by *Daubert* principles." But the Court of Appeals rejected this argument as confusing admissibility with sufficiency. The Court explained as follows:

> *Daubert* deals with the admissibility of this kind of scientific evidence. As with all rules governing admissibility, its application to particular evidence is to be raised and resolved in the trial court. There the proponent can attempt upon objection to lay the proper foundation for admitting the evidence and the objector can challenge is sufficiency. In this way the question of admissibility can be resolved as a threshold matter. Fleet essentially would have this court engage in a first instance application of *Daubert* principles on a record completely inadequate for the purpose. This cannot be done under the guise of a challenge to the substantive sufficiency of this evidence.

Reliability and Sufficiency Are Intertwined: ***Conde v. Velsicol Chemical Corp.***, 24 F.3d 809 (6th Cir. 1994): The trial court granted summary judgment for the defendant on the plaintiffs' claim for damages allegedly caused by their exposure to chlordane. The plaintiffs complained that the trial court misconstrued *Daubert* by requiring their experts' testimony to be generally accepted. But the Court held that the issue was whether the experts' testimony, even if admissible, was sufficient to prove that chlordane caused the plaintiffs' injuries. The experts could only state that chlordane exposure was "consistent with" the symptoms suffered by the plaintiffs; the experts could not exclude alternative causes, and their conclusions were inconsistent with the fact that tests of the body tissues of the plaintiffs revealed no chlordane, and were also inconsistent with the relevant, peer-reviewed scientific literature. Thus, "the Condes' expert testimony is insufficient to permit a jury to conclude, by a preponderance of the evidence, that chlordane exposure caused the Condes' health problems." See also ***Elkins v. Richardson-Merrell, Inc.***, 8 F.3d 1068 (6th Cir. 1993) ("the Court in *Daubert* indicated that even if expert opinion or evidence on one side were relevant and admissible, if insufficient to allow a reasonable juror to conclude that the position more likely than not is true, it may be the basis for a directed verdict or a grant of summary judgment.").

Failure to Object Precludes Sufficiency Attack: ***Marbled Murrelet v. Babbitt***, 83 F.2d 1060 (9th Cir. 1996): the Court affirmed the grant of injunctive relief against a logging company in an action by an environmental group to protect a nesting habitat. It held that, because the company failed to request a ruling at trial on its *Daubert* objections to expert testimony, it could not make a sufficiency of the evidence argument on appeal that seemed to be based on a *Daubert* analysis.

Summary Judgment

Caution Required in Applying *Daubert* on Summary Judgment: *Cortes-Irizarry v. Corporacion Insular,* 111 F.3d 184 (1st Cir. 1997). The Court addressed the plaintiff's argument that a *Daubert* analysis is improper in the context of summary judgment:

> The plaintiff posits that *Daubert* is strictly a time-of-trial phenomenon. She is wrong. The *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross *Daubert's* threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment. See *Cavallo v. Star Enter.*, 100 F.3d 1150, 1159 (4th Cir. 1996); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297-99 (8th Cir. 1996); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994); *Porter v. Whitehall Lab.*, Inc., 9 F.3d 607, 612, 616-17 (7th Cir. 1993).

However, the Court cautioned against employing the gatekeeper function too rigorously when deciding a summary judgment motion. The Court explained as follows:

> The fact that *Daubert* can be used in connection with summary judgment motions does not mean that it should be used profligately. A trial setting normally will provide the best operating environment for the triage which *Daubert* demands. Voir dire is an extremely helpful device in evaluating proffered expert testimony, and this device is not readily available in the course of summary judgment proceedings. Moreover, given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.
>
> We conclude, therefore, that at the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious -- except when defects are obvious on the face of a proffer -- not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.

As the *Cortes-Irizarry* Court notes, the record on summary judgment is ordinarily insufficient for a conscientious *Daubert* determination. It is only where the expert's affidavit is purely conclusory and speculative that the Trial Court would have enough confidence to reject the expert testimony as insufficiently reliable at such an early stage of the proceedings.

Of course it is possible for the Trial Court to speed up the *Daubert* determination by essentially requiring a full presentation of the expert testimony, and rebuttal, at the summary judgment stage. Courts have displayed considerable ingenuity in devising ways in which an

adequate record can be developed so as to permit *Daubert* rulings to be made in conjunction with motions for summary judgment. See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of in limine hearings), *cert. denied,* 115 S. Ct. 1253 (1995); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) 29 F.3d at 502 (discussing the District Court's technique of ordering experts to submit serial affidavits explaining the reasoning and methodology underlying their conclusions). The problem with these methods is that it may result in a trial before the trial. As the *Cortes-Irizarry* Court put it: "We do not in any way disparage such practices; we merely warn that the game sometimes will not be worth the candle."

Holding Expert Testimony Admissible Under *Daubert* Does Not Preclude Summary Judgment: *Rebel Oil Co., Inc. v. Atlantic Richfield Co.,* 146 F.3d 1088 (9th Cir. 1998): Appealing from a grant of summary judgment for the defendant in an antitrust case, the plaintiff argued that the grant of summary judgment was inconsistent with the Trial Court's previous holding that the testimony of the plaintiff's cost analysis expert was admissible under *Daubert.* Affirming the order of summary judgment, the Court found no inconsistency. The test for the admission of expert testimony under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology. The Court declared that whether the expert's cost analysis "is an economically valid method is a different question from whether it is legally sufficient to support a price discrimination claim."

Use of Rule 403

Requirement of a Record On Which To Base Exclusion: *Petruzzi's IGA v. Darling-Delaware*, 998 F.2d 1224 (3d Cir. 1993): To prove an antitrust conspiracy, the plaintiffs proffered the testimony of two economists, who applied multiple regression analysis to sales information provided by the defendants in discovery. On the basis of this methodology, the experts concluded that the defendants must have set prices in concert. The Trial Court rejected this testimony by invoking Rule 403, and granted summary judgment for the defendants, but the Court held that this was an abuse of discretion. The Court made the following points:

1. The testimony comported with the scientific method under *Daubert*; multiple regression analysis is reliable and well-accepted, and there was no indication that it was improperly applied by the plaintiffs' experts.

2. The Trial Court's use of Rule 403 to exclude the evidence, in the context of a pre-trial ruling, was inappropriate, because Rule 403 is only to be used as a last resort with respect to expert testimony. This is especially true at the pretrial level,

where there is a danger that the perceived risk of confusion and prejudice cannot be accurately assessed. Thus, in order to exclude expert testimony under Rule 403, a court must have a record complete enough to be considered a "virtual surrogate for a trial record." That standard of completeness was not met in this case.

3. The Trial Court employed the wrong test under Rule 403 when it excluded the evidence on the ground that it was not more probative than prejudicial. Rule 403 provides that evidence is admissible unless the probative value is substantially outweighed by the risk of prejudice, confusion and delay.

Special Scrutiny for DNA Probability Evidence: ***United States v. Chischilly,*** 30 F.3d 1144 (9th Cir. 1994): The Court held that evidence of DNA identification was admissible under *Daubert.* It noted, however, that Rule 403 would have special bearing on the statistical probability aspect of DNA evidence. The Court recognized that the jury might assign undue weight to DNA profiling statistics. It specified two "general tendencies that should be guarded against by the use of Rule 403." First, the jury might accept the DNA evidence as a definitive statement of source probability. Second, the jury might equate source with guilt, "ignoring the possibility of non-criminal reasons for the evidentiary link between the defendant and the victim."

As to the second concern, that of equating source with guilt, there was no danger of prejudice in *Chischilly*, since the source of evidence was semen extracted from the murder victim. Under the circumstances presented in the case, this was not susceptible of an innocent explanation.

As to the first concern, the danger is that the jury may equate random match probability with source probability, when in fact "the real source probability will reflect the relative strength of circumstantial evidence connecting the defendant and other persons with matching DNA to the scene of the crime." The *Chischilly* Court noted that the pitfalls of source probability become "more perilous where the defendant is a member of a substructured population" because the danger is created that the odds will be inflated due to underrepresentation of the substructure in the database. In these situations, "the jury may be ill-suited to discount properly the probative value of DNA profiling statistics." The problem of overstated odds is exacerbated further by geographic differences between the database and the possible set of suspects; it is quite possible that the product rule "will understate the random probability that some other nearby resident with a similar genetic profile could have been the source of the sample found on the victim."

Despite all these risks, the *Chischilly* Court held that evidence of statistical probability that is attendant to DNA profiling can survive a Rule 403 objection, so long as "the district court provides careful oversight." The Court found that such oversight was provided by the district court in this case. It noted that the prosecution "was careful to frame the evidence properly" by

characterizing the DNA profiling statistics as the probability of a random match, "not the probability of the defendant's innocence that is the crux of the prosecutor's fallacy." Also, the prosecution expert "arguably calculated on the basis of somewhat conservative statistical assumptions"; and the defendant, a Native American, was compared with a Native American database--though admittedly there was a possibility of substructuring because the defendant is a Navajo and the database was of Native Americans throughout the country.

Use of Rule 703

Reliance on Hearsay: ***United States v. Locascio***, 6 F.3d 924 (2d Cir. 1993): The government called a law enforcement official to testify as an expert concerning the structure and practices of organized crime families. The expert admittedly relied on inadmissible hearsay for some of his conclusions. The defendant argued that after *Daubert*, the trial court must find that the sources of information relied upon by an expert are trustworthy. The Court agreed that under *Daubert*, the trial court had a gatekeeper function as to the sources of information relied upon by an expert. While *Daubert* dealt with Rule 702 and the "source" question is covered by Rule 703, the Court found that "the flexibility of the federal rules also applied to Rule 703 and the determination of the trustworthiness of the sources of expert testimony." However, the court declined "to shackle the district court with a mandatory and explicit trustworthiness analysis." That is, no explicit determination of trustworthiness must be made on the record. The Court found no abuse of discretion in admitting the expert's testimony in this case.

Daubert **Applies to the Rule 703 Enquiry:** ***In re Paoli R.R. Yard PCB Litigation***, 35 F.3d 717 (3rd Cir. 1994): The Court held that after *Daubert*, the Circuit's previous view of Rule 703--that the trial judge had no independent role in assessing the reliability of the basis of an expert's opinion--was no longer viable. The Court explained as follows:

> *Daubert* makes clear for the first time at the Supreme Court level that courts have to play a gatekeeping role with regard to experts. In stating that Rule 702 is the primary locus of the gatekeeping role, the Court implies that there are at least some secondary loci in other Rules. By requiring the judge to look to the views of other experts rather than allowing the judge to exercise independent judgment, current Third Circuit case law eviscerates the judge's gatekeeping role with respect to an expert's data and instead gives that role to other experts. * * *

> We now make clear that it is the judge who makes the determination of reasonable reliance, and that for the judge to make the factual determination under Rule 104(a) that an expert is basing his or her opinion on a type of data *reasonably* relied upon by experts, the judge must conduct an independent evaluation into reasonableness.

The *Paoli* Court noted that in a trial court's evaluation of reasonable reliance under Rule 703, the views of experts would be relevant, but not dispositive.

II. HARD SCIENCES--EVIDENCE INADMISSIBLE

Causation in Tort Cases

Trial Court Did Not Abuse Its Discretion In Excluding Unfounded Testimony: ***General Electric Company v. Joiner,*** 118 S.Ct. 512 (1997): In a suit alleging that the plaintiff's cancer was caused by exposure to PCB's, the Supreme Court found that the Trial Court did not abuse its discretion in excluding the plaintiff's expert testimony on causation. The experts' reliance on studies involving infant mice was unscientific, because the mice contracted a different kind of cancer than that suffered by the plaintiff; moreover, the studies could not be replicated in adult mice nor in any other species. The experts' reliance on four epidemiological studies was likewise flawed. Two of the studies found no statistically significant connection between PCB's an cancer; one study did not mention PCB's; and the fourth study, which found a statistically significant connection, involved subjects who were exposed to a variety of other carcinogens.

Unreliable Methodology In Light of Contrary Epidemiological Evidence: ***Raynor v. Merrell Dow Pharmaceuticals, Inc.,*** 103 F.3d 1371 (D.C.Cir. 1997): In a Bendectin case, the trial judge, before *Daubert,* granted a JNOV in favor of the defendant. This decision was remanded for consideration in light of *Daubert.* The trial court held that *Daubert* did not change the result, and the Court of Appeals affirmed this decision. The plaintiffs' experts testified to causation on the basis of chemical studies, in vitro studies, and animal studies. The Court concluded that this methodology was unscientific because it came to a conclusion contrary to every existing epidemiological study. The Court distinguished its opinion in *Ambrosini v. Labarraque* (see infra), where the same type of testimony was held admissible, on the ground that the drug at issue in *Ambrosini* had not been the subject of significant epidemiological study. As to the specific factors noted in *Daubert,* the Court stated: 1) The experts' methodology and conclusion had not been peer reviewed; 2) The testimony suffered from "testing" problems since there was no way to verify that animal and chemical studies are accurate as applied to humans--indeed, the only reliable testing in such an area is through epidemiological study, and the experts' conclusions were contrary to these studies; when *Daubert* referred to the importance of testing, it clearly did not mean that expert testimony was admissible when contradicted by the testing; 3) "[W]here sound epidemiological studies produce opposite results from nonepidemiological ones, the rate of error of the latter is likely to be quite high." The Court noted that "epidemiological evidence does not always trump the nonepidemiological." However, in this case the plaintiffs made "no serious argument that the epidemiological sample sizes have been too small to detect the relationship between Bendectin and birth defects, a relationship that has been studied for hundreds of thousands of subjects."; and 4) Reliance on chemical and animal studies in the face of contradicting epidemiological evidence is not a generally accepted methodology.

Unreasonable Extrapolation: ***Cavallo v. Star Enterprise***, 892 F.Supp. 756 (E.D.Va. 1995), *aff'd*, 100 F.3d 1150 (4th Cir. 1996): The plaintiff alleged that she suffered respiratory illness as a result of exposure to aviation jet fuel vapors that were released from an overflow at the defendant's storage terminal. The plaintiff's experts, one a toxicologist and the other an immunologist, were prohibited from testifying at trial after a *Daubert* hearing, and the Court consequently granted summary judgment for the defendant. The toxicologist did not purport to follow the methodology ordinarily followed by toxicologists. Rather, he formed his opinion "and then tried to conform it to the methodology." His reliance on anecdotal case studies was improper, because these studies were not pre-designed in a controlled setting, and moreover they dealt with different exposures, symptoms, and chemicals from those present in this case. The Court noted that the expert extrapolated from the findings in the literature and case studies, without any scientifically valid basis for doing so:

> Although Dr. Monroe found support in the literature for a conclusion that exposure to similar levels of a different mixture of volatile organic compounds produce somewhat similar, short-term effects, he is unable to provide any scientifically valid basis to support the leap from those studies to his opinion in this case. * * * Thus, while the agreed-upon methodology appears to be scientifically valid, it does not appear to have been faithfully applied.

The immunologist was unaware of the plaintiff's level of exposure and could cite no studies or published literature to support a finding of adverse effects from the plaintiff's level of exposure. The immunologist's reliance on the temporal proximity between exposure and injury was "not the method of science." The Court did, however, state that "there may be instances where the temporal connection between exposure to a given chemical and subsequent injury is so compelling as to dispense with the need for reliance on standard methods of toxicology." Here, however, the plaintiff was merely exposed to some level of jet fuel; she was not doused with chemicals and did not thereupon suffer an immediate injury. Nor was there a mass exposure of many people who all thereafter suffered the same symptoms.

The Court closed by noting that "nothing in the Court's review of this issue required any scientific training. Rather, the Court did nothing more than use the customary legal tools of logical reasoning to carry out its gatekeeping function."

On appeal, the Court of Appeals stated that the District Court's ruling was "restrictive" but "not inconsistent with *Daubert*." The Court of Appeals concluded as follows: "Although *Daubert* eliminated the requirement of general acceptance, the five factors it established still require that the methodology and reasoning used by a witness have a significant place in the discourse of experts in the field."

Animal Studies Not Replicated: ***Ruffin v. Shaw Industries,*** 149 F.3d 294 (4th Cir. 1998): The plaintiffs sued the manufacturer and the retailer of a carpet for breach of implied warranty, alleging that they had suffered toxic injuries from chemicals in the carpet. Affirming summary judgment for the defendants, the Court found no abuse of discretion in excluding expert testimony from the plaintiffs' experts, who had tested a sample of the carpet and found that it caused adverse biological responses in mice. The experts' tests had not been replicated, peer reviewers were critical of their methodology, and the experts failed to follow the standard protocol for animal testing.

Insufficient Basis: ***Allen v. Pennsylvania Engineering Corp.,*** 102 F.3d 194 (5th Cir. 1996): The Court affirmed the grant of summary judgment in a wrongful death action, finding no error in the exclusion of expert testimony concluding that the decedent's brain cancer was caused by exposure to ethylene dioxide. The Court stated: "Where, as here, no epidemiological study has found a statistically significant link between EtO exposure and human brain cancer; the results of animal studies are inconclusive at best; and there was no evidence of the level of Allen's occupational exposure to EtO, the expert testimony does not exhibit the level of reliability necessary to comport with Federal Rules of Evidence 702 and 703, the Supreme Court's *Daubert* decision, and this court's authorities." The Court rejected the experts' "weight of the evidence" methodology, which the experts employed to reach the conclusion that EtO caused brain cancer. This methodology is used by government agencies to establish prophylactic rules governing human exposure to possible carcinogens. But this preventive perspective is based on a threshold of proof that is "reasonably lower than that appropriate in tort law."

Untested Theory: ***Wheat v. Pfizer, Inc.***, 31 F.3d 340 (5th Cir. 1994): In a wrongful death action, the principal dispute was whether the decedent's hepatitis was viral or whether it was caused by her ingestion of Feldene or Parafon Forte DSC. The trial judge granted summary judgment for one defendant and judgment as a matter of law for the other, holding that the testimony as to causation by the plaintiff's expert was inadmissible. The Court of Appeals affirmed. The expert's theory, that a combination of the two medications could cause hepatitis, was untested; no study of the combined effects of the two drugs had ever been done; and his theory was not published or subject to peer review.

Lack of Testing: ***Kirstein v. Parks Corp.,*** 159 F.3d 1065 (7th Cir. 1998): The plaintiff claimed that a combination of two household products caused him to suffer severe burns when he used them to remove linoleum. The trial court excluded the plaintiff's expert in industrial and product safety, and the Court found no abuse of discretion. The expert "did no testing on these products, either alone or in combination. Neither did he provide studies which employed such testing. In short, Dr. Nelson offered only speculation."

Scientific Rigor Lacking: ***Rosen v. Ciba-Geigy Corp.,*** 78 F.3d 316 (7th Cir.1996): The plaintiff brought a negligence action against the manufacturer of a nicotine patch. The plaintiff claimed that the use of the nicotine patch, together with his continued smoking, caused him to have a heart attack. The Court held that the testimony from the plaintiff's expert cardiologist, concerning the role of the nicotine patch in the plaintiff's heart attack, was properly excluded. The Court noted that the object of *Daubert* was "to make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work. If they do, their evidence (provided of course that it is relevant to some issue in the case) is admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as canonical in their branch of the scientific community." The Court held that the plaintiff's expert's methodology lacked "scientific rigor." The expert offered "neither a theoretical reason to believe that wearing a nicotine patch for three days * * * could precipitate a heart attack, or any experimental, statistical or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on such a theory."

Reliance on Temporal Proximity: ***Porter v. Whitehall Laboratories, Inc.***, 9 F.3d 607 (7th Cir. 1993): The plaintiff sued for damages from kidney failure allegedly caused by ingestion of ibuprofen. The trial court, before *Daubert* was decided, held that expert testimony concluding that the plaintiff's kidney failure was caused by ibuprofen was inadmissible, and granted summary judgment. The Court of Appeals held that the trial court's exclusion of the expert testimony was consistent with *Daubert*. The experts reached their conclusions solely on the basis of the temporal proximity between the plaintiff's use of ibuprofen and his kidney failure. But reliance on this temporal factor alone did not comport with the scientific method. None of the experts could point to studies, records or data which would support the conclusion that ibuprofen was linked to the particular type of kidney failure (known as anti-GBM RPGN) suffered by the plaintiff. Finally, certain of the experts' conclusions were based on factual premises inconsistent with the evidence, and therefore they were properly excluded under the *Daubert* "fit" requirement.

Subjective Methodology: ***O'Conner v. Commonwealth Edison Co.***, 13 F.3d 1090 (7th Cir. 1994): The Court held that testimony of the plaintiff's expert ophthamologist, concluding that the plaintiff's cataracts were cause by exposure to nuclear radiation, was properly excluded under *Daubert*. The expert testified that he could identify radiation-induced cataracts by simple visual observation; however, there was no scientific support for this premise. Furthermore, the studies upon which the expert purported to rely for this premise actually contradicted his conclusion. The Court noted that the defendant's experts had shown that a proper methodology for detecting radiation-induced cataracts included a medical work-up, a work-up of the patient's history, and an examination of occupation dosimetry charts.

Hypothetical and Unsupported Conclusions: ***Bradley v. Brown***, 42 F.3d 434 (7th Cir. 1994): The trial court excluded testimony of two clinical ecologists, who would have testified that the plaintiffs were suffering from Multiple Chemical Sensitivity Disorder caused by exposure to the defendant's pesticides. The Court held that the trial court had properly followed the *Daubert* framework and had not abused its discretion. The trial court had found that the etiology of MTS was not known or tested, and that the scientific literature raised doubts about the experts' methodology. Since the experts' conclusions were "hypothetical" at this point, they could not assist the factfinder and were properly excluded under Rule 702.

Speculation, and Insufficient Information about the Specific Case: ***Wintz by and through Wintz v. Northrop Corp.,*** 110 F.3d 508 (7th Cir. 1997): To defeat a motion for summary judgment, the plaintiffs proffered the testimony of a toxicologist who concluded that the plaintiff-infant's birth defects were caused by exposure to bromide in utero. Affirming the order granting summary judgment, the Court held that the Trial Court did not err in finding this testimony insufficiently reliable under *Daubert.* At the time the expert formed his opinion, he knew only that the infant's mother had worked with a chemical containing bromide, and that the infant's symptoms were consistent with bromide exposure. He did not know the amount or extent of exposure or the specifics of the work environment, nor did he attempt to correlate any specific dose the mother received with the infant's symptoms. The Court concluded as follows:

> Ellenbogen's methodology in attempting to relate the general principles of toxicology and bromide exposure to the facts of this case appears to have been based less on a scientific understanding of the specifics of Jill Wintz's workplace exposure and the potential effects on Jessica, and more on merely a general understanding of bromide, with only unsupported speculation having been used to relate the general knowledge to the facts surrounding Jill Wintz's exposure.

Insufficient Knowledge to Support the Opinion: ***Wright v. Willamette Industries, Inc.,*** 91 F.3d 1105 (8th Cir. 1996): In an action alleging personal injuries due to exposure to formaldehyde emanating from a nearby fibreboard plant, the Court reversed a judgment for the plaintiffs due to insufficient evidence. The Court held that the testimony of the plaintiff's expert on causation should not have been admitted. The expert testified that the injuries were more probably than not related to exposure to formaldehyde, "but that opinion was not based on any knowledge about what amounts of wood fibers impregnated with formaldehyde involve an appreciable risk of harm to human beings who breathe them." Therefore, the expert's testimony was speculative and unscientific under *Daubert.*

Result-Oriented Methodology: ***Sorenson By and Through Dunbar v. Shaklee Corp.***, 31 F.3d 638 (8th Cir. 1994): Affirming summary judgment for the defendant, the Court held that the trial court properly rejected the plaintiffs' experts' testimony which sought to establish a link between the plaintiffs' mental retardation and the ingestion by the plaintiff's parents of alfalfa tablets which had been coated with ethylene dioxide (EtO). The Court first held that the testimony, which concluded that EtO could cause mental retardation in children if taken by parents before childbirth, failed the *Daubert* "fit" requirement, because the plaintiffs produced no evidence that the alfalfa tablets taken by their parents contained any EtO residue. The Court also concluded that the scientific validity prong of *Daubert* had not been met, because the experts' conclusions as to causation were not based on any studies, their theories had not been published or peer reviewed, were not based on any well-accepted methodology, and did not purport to exclude or analyze other possible causes. The Court concluded: "Instead of reasoning from known facts to reach a conclusion, the experts here reasoned from an end result in order to hypothesize what needed to be known but what was not."

Improper Extrapolation: ***Schudel v. General Electric Co.,*** 120 F.3d 991 (9th Cir. 1997): In a toxic tort case alleging injuries from exposure to trichloroethane and perchloroethylene, the Court held that testimony by the plaintiff's expert on neurological symptom causation was improperly admitted in light of *Daubert.* The expert based his conclusion of causation on studies involving organic solvents other than those involved in the case. Moreover, the studies examined long-term exposure at low concentration, and short-term exposure at high concentration, rather than the short-term, moderate exposure suffered by the plaintiff. The Court stated that "[e]xtrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable."

Improper Extrapolation: ***Lust v. Merrell Dow Pharmaceuticals, Inc.,*** 89 F.3d 594 (9th Cir. 1996): In a case alleging that a drug caused a birth defect, the Court held that the testimony of an expert employed by the plaintiff in *Daubert* was properly excluded. Doctor Done testified that the plaintiff's birth defect, hemifacial microsomia, was caused by the mother's use of Clomid. Doctor Done based his conclusion on epidemiological studies which showed a link between Clomid and other types of birth defects. He concluded that since Clomid is capable of causing other birth defects, it also caused hemifacial microsomia. The Court held that this reasoning was not scientific. The Doctor's testimony "was influenced by litigation-driven financial incentive", and the Doctor's premise--that a positive association between a drug and some birth defects indicates an association with other birth defects--was not recognized by even a minority of scientists. The Court concluded as follows:

> When a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the district court should be wary that the method has not been faithfully applied.

Thus, the exclusion of the testimony in *Lust* was not based solely on the unsupported conclusion of the expert--in violation of *Daubert's* directive to focus on methodology rather than conclusion--but rather on the likelihood that the expert misapplied standard scientific methodology.

Failure to Consider Alternative Causes: ***Claar v. Burlington Northern R. Co.***, 29 F.3d 499 (9th Cir. 1994): Plaintiffs brought an action under FELA alleging that they were injured by exposure to chemicals. Affirming an order of summary judgment for the defendant, the Court held that the proffered testimony of the plaintiffs' experts was inadmissible. The experts concluded that the plaintiffs' injuries were caused by exposure to chemicals, but they failed to articulate any basis for these conclusions, and could not describe the methodology by which they reached those conclusions, despite the fact that the trial judge ordered the experts to provide affidavits explaining their methodology. Also, the experts neglected to investigate any other possible causes of the plaintiffs' injuries. Finally, the experts appeared to have first concluded that the plaintiffs were injured due to exposure to chemicals, and then consulted the relevant literature in the field to support their conclusions. The *Claar* Court stated:

> Coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method. Certainly, scientists may form initial tentative hypotheses. However, scientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed by the district court as lacking the objectivity that is the hallmark of the scientific method.

Subjectivity, Anticipation of Litigation, "Fit" Problems, and Lack of Testing: ***Cabrera v. Cordis Corporation,*** 134 F.3d 1418 (9th Cir. 1998): The plaintiff brought a product liability action against the manufacturer of a brain shunt device, which is designed to alleviate excess fluid from the brain. The plaintiff alleged that the brain shunt device was improperly composed of silicone in certain component parts, and that she suffered injury caused by her body's production of silicone antibodies in response to the brain shunt. The Trial Court granted the defendant's motion for summary judgment, after holding that the testimony of each of the plaintiff's four experts was inadmissible under *Daubert*. The Court affirmed. The first expert examined slides of the plaintiff's brain tissue, and testified at the *Daubert* hearing to the presence of a giant cell reaction to a foreign particle. But the expert could not, and was never asked to, determine whether the foreign particle was silicone. Thus, his testimony was not sufficiently connected to the facts of the case. The second expert testified that he tested the plaintiff's blood and found the presence of silicone antibodies. However, the Court noted that there is no generally accepted blood test for silicone antibodies, and that the expert's testing procedure had never been peer-reviewed. Indeed, the expert did not even have documentation of his own development of the test, as his records were destroyed in an earthquake. Thus, the expert's methodology was subjective and unreliable under *Daubert*. The third expert testified that the plaintiff injuries were

caused by the silicone in the shunt. However, the expert did not do a medical work-up of the plaintiff, could not cite any supporting research, and whatever research he did do was in conjunction with the litigation. The fourth expert testified to the design defect in the brain shunt. However, that expert had never tested any brain shunts; he had never published any articles on the point; and he could cite no research supporting his testimony. His testimony that the information he relied on was "an afficianado's knowledge kept very closed to manufacturing circles" indicated that he was relying on "underground knowledge untested and unknown to the scientific community." The Court concluded that "[a]n opinion based on such unsubstantiated and undocumented information is the antithesis of the scientifically reliable expert opinion admissible under *Daubert* and Rule 702."

Analytical Gaps and Insufficient Objective Validation: ***Mitchell v. Gencorp.,*** 165 F.3d 778 (10th Cir. 1999): The plaintiff claimed that he was exposed to benzene in the company's "flammable room" and that this exposure caused him to contract chronic myelogenous leukemia. To establish his level of exposure to toxic chemicals, he proffered the testimony of an industrial hygienist who relied on the plaintiff's statements, a review of safety data sheets, and pictures showing some chemical spills in the "flammable room." To establish causation, he proffered the testimony of four doctors, who relied on published works indicating a link between exposure to benzene and certain types of leukemia other than that suffered by the plaintiff. The Court held that the Trial Court did not err in excluding the testimony of all of these experts. As to the industrial hygienist, the Court stated that "[i]t makes little sense to argue that a scientist can look at pictures and a list of chemicals contained in a room and arrive at a level of exposure." Rather, the expert must, under *Daubert*, use "techniques subject to objective, independent validation in the scientific community." As to the doctors, there was no evidence that the plaintiff had actually been exposed to benzene, and the doctors could not scientifically conclude that the plaintiff's admitted exposure to chemicals similar to benzene would affect the body in the same way as benzene. The Court concluded that without "scientific data supporting their conclusions that chemicals similar to benzene cause the same problems as benzene, the analytical gap in the experts' testimony is simply too wide for the opinions to establish causation." Moreover, even if the plaintiff were exposed to benzene, the studies on which the doctors relied indicated that benzene caused a type of leukemia different than that contracted by the plaintiff. Again, the analytical gap between causation of one kind of leukemia and causation of another was "too broad for their testimony to endure under the strictures of *Daubert* and Rule 702."

Result-Oriented Methodology: ***Diaz v. Johnson Matthey, Inc.***, 1995 U.S. Dist. Lexis 10970 (D.N.J. 1995): The plaintiff claimed that his asthma was caused by his workplace exposure to platinum salts. The Court granted summary judgment after holding a *Daubert* hearing and concluding that the plaintiff's expert testimony as to causation was unreliable. The Court found the following flaws in the expert's testimony: 1) The expert failed to conduct a differential diagnosis, even though the plaintiff smoked a pack of cigarettes a day for fifteen years, had a

family history of asthma, and was exposed to other potential causes of asthma; and 2) The expert's only diagnosis of this specific condition was for purposes of this particular litigation.

"Working Hypothesis" Based on Speculation: ***Ballinger v. Atkins,*** 947 F.Supp. 925 (E.D.Va. 1996): The plaintiff claimed neurological damages caused by using Nutrasweet in conjunction with a ketogenic diet. After a *Daubert* hearing, the Court held that the plaintiff's biochemist expert would not be permitted to testify at trial. The expert described his opinion as a "working hypothesis"; he testified only that Nutrasweet together with a ketogenic diet "can be unsafe", and he could not state or estimate at what level of consumption the unsafe effects could arise. His methodology was not tested or peer-reviewed, no studies supported his theory, and his opinion was generated solely for litigation purposes.

No Supporting Studies: ***Schmaltz v. Norfolk & Western Ry. Co.***, 878 F.Supp. 1119 (N.D.Ill. 1995): A railroad employee claimed that he developed "reactive airway disfunction syndrome," a respiratory disease, by exposure to the herbicides atrazine and tebuthiuron. The Court granted the defendant's motion *in limine* to exclude two experts proffered by the plaintiff to prove causation, determining that neither expert's methodology could be validated. Neither expert could point to any documented cases of the herbicides causing a respiratory disease. One expert's reliance on high dose studies on rabbits, resulting in eye irritation, was plainly inconsistent with the scientific method. Neither expert was aware of the concentration of the herbicides to which the plaintiff was exposed. One expert's reliance on temporal proximity between exposure and injury was similarly insufficient because "[i]t is well-settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method." Finally, the experts could not find any peer-reviewed studies to support their conclusions (even though the herbicides had been used for many years), and indeed all of the published studies indicated that there was no harm involved in using these herbicides.

Anecdotal Evidence: ***Casey v. Ohio Medical Products***, 877 F. Supp. 1380 (N.D.Cal. 1995): The Court granted summary judgment for the defendant in a case in which the plaintiff alleged that he contracted hepatitis shortly after his exposure to halothane. The plaintiff's expert, an occupational health physician, relied solely on anecdotal evidence, and this was not sufficient scientific support for the expert's conclusion on causation.

Unsupported Speculation: ***Trail v. Civil Engineer Corps.,*** 849 F. Supp. 766 (W.D.Wash. 1994): The District Court granted summary judgment for the defendant United States in an action for alleged health risks caused by leakage and runoff from a waste disposal site at a federal facility. The Court held that the defendant's experts provided reliable scientific expert testimony which proved that any health risk from the leakage and runoff was negligible. The

plaintiff's expert testimony to the contrary did not satisfy the *Daubert* standards. The plaintiff's witness was qualified as an expert on sampling and testing for hazardous substances; but he had no expertise regarding the health effects of these substances. Any extrapolations from the level of contaminant to its health risk were simply "subjective belief or unsupported speculation not validated by any known facts or inferences presented to the court and are thus unreliable and inadmissible under the *Daubert* standard."

Speculation: ***Chikovsky v. Ortho Pharmaceutical Corp.,*** 832 F. Supp. 341 (S.D. Fla. 1993): Relying on *Daubert*, the Court granted summary judgment after holding inadmissible the plaintiff's expert's testimony that Retin-A caused the plaintiff's birth defects. The Court noted the following points: 1. No published studies have made a connection between Retin-A and birth defects; 2. The expert did not know how much Retin-A the plaintiff's mother had applied to her skin during pregnancy; 3. The expert's admitted extrapolation from Vitamin A and Accutane studies was "wanting" because the studies concerned far different circumstances, products and exposures than those existing in this case; 4. The expert was an obstetrician, not a geneticist, and so he was not able to rule out a genetic explanation for the plaintiff's birth defects; and 5. The expert's self-defined "common sense" assumption that there is evidence of the teratogenetic effects of Retin-A, but that the evidence has not been released to the public, was nothing more than speculation. **See also** ***Everett v. Georgia-Pacific Corp.,*** 949 F.Supp. 856 (S.D.Ga. 1996) (expert opinion as to causation held unreliable under *Daubert* where it was based solely on the fact of exposure to the substance; expert did not review medical history, and did not eliminate other causes; this testimony was nothing more than pure speculation).

Failure to Eliminate Alternatives, Failure to Consider Epidemiological Evidence, etc.: ***Haggerty v. Upjohn Co.,*** 950 F.Supp. 1160 (S.D.Fla. 1996): Plaintiff claimed that he was injured as a result of taking a single Halcion tablet--the injuries coming from his erratic and violent behavior after taking the Halcion. Granting summary judgment for the defendant, the court held that the testimony of the plaintiff's expert pharmacologist did not satisfy *Daubert.* The expert would have testified that the plaintiff's behavior was caused by the single Halcion tablet, but this opinion was not scientifically valid for several reasons: 1) the expert ignored the results of thousands of clinical trials and the corresponding epidemiological evidence; 2) she relied only on summaries of a few case studies; 3) she did not consider alternative causes, such as the plaintiff's diagnosed mental disorder which had led to previous violent episodes; 4) her hypothesis was untested and not peer-reviewed; 5) the general view in the scientific community is that the methodology employed by the expert "can be used to generate hypotheses about causation, but not causation conclusions."

Clinical Medical Testimony

Clinical Medical Testimony as to Causation was not Scientifically Grounded: ***Moore v. Ashland Chemical, Inc.,*** 151 F.3d 269 (5th Cir. 1998) (en banc): The plaintiff was exposed to certain vapors while cleaning spilled chemicals from the back of a tractor trailer. He was thereafter diagnosed as having Reactive Airway Disease Syndrome (RAD). He proffered experts in clinical medicine, who testified that the RAD was caused by exposure to the chemicals. The panel reversed a verdict for the defendant, holding that the clinical medical testimony was admissible, and that it was not harmless error to exclude the causation testimony of one of the experts. The panel concluded that clinical medicine, as opposed to research and laboratory medicine, "is not a hard science discipline" and that a Trial Judge assessing the reliability of testimony from a clinical medical expert "should determine whether it is soundly grounded in the knowledge, principles and methodology of clinical medicine." It stated that "the *Daubert* factors, which are techniques derived from hard science methodology, are, as a general rule, inappropriate for use in making the reliability assessment of expert clinical medical testimony."

The en banc Court reversed. It refused to draw a distinction between "hard" science and clinical medicine. In every case, the expert's testimony on scientific matters must be arrived at consistently with the scientific method. In this case, the expert relied only on inconclusive studies and the temporal proximity of exposure and injury. This was not enough to render a scientific opinion. The Court concluded that "the analytical gap between Dr. Jenkins's causation opinion and the scientific knowledge and data advanced to support that opinion was too wide."

Environmental Experts

Insufficient Investigation: ***Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.,*** 135 F.3d 526 (7th Cir. 1998): In an action between adjoining landowners, the Court held that there was no abuse of discretion in excluding testimony from an environmental consultant concluding that diesel fuel had run off from one party's land on to the other. The expert's opinion was based on sampling at a single location. It appeared that more sampling was not done because the expert "didn't want to run the risk of getting a result that he wouldn't like and wouldn't fit the conclusion he wanted to draw." Such result-oriented methodology was precluded by *Daubert.*

Speculative Assumptions as to Specific Causation: ***Thomas v. FAG Bearings Corp.,*** 846 F.Supp. 1382 (W.D.Mo. 1994): The defendant in a suit to recover response costs brought third-party actions against other property owners seeking recovery under CERCLA. The question

was whether contaminants from these other properties caused the contamination in the drinking wells at Silver Creek and Saginaw Village. The defendant's expert, a hydrogeologist, was deposed and stated that based on his investigation, there was an underground waterway running somewhere among the various properties and Silver Spring and Saginaw Village, but that more testing was required to determine the probable cause of the contamination of the drinking wells at issue. He concluded that there was a "potential" that the contaminants came from one or more of the third party properties.

The District Court granted summary judgment for the third parties on the issue of causation, holding that the hydrogeologist's testimony was inadmissible under *Daubert*. The Court explained that "a scientific opinion that cannot establish a probability cannot be the basis on which a reasonable juror can find in favor of a proposition" and that courts "are particularly wary of unfounded expert opinion when causation is the issue." Applying these principles to the expert's testimony, the Court declared as follows:

> Overton's opinions are concocted of impermissible bootstrapping of speculation upon conjecture. He first speculates that any contamination in the soil at third-party defendant sites entered the groundwater. The first conjecture is made without the benefit of any factual data about the nature or depth of the alleged contamination, the composition of the earth below the site, its proximity to the "conceptual" underwater pathway of the amount of contaminants actually released. Overton's second speculative assumption is that the contaminants * * * may have travelled this generalized, uncharted subterranean river and contaminated Silver Creek and Saginaw Village. He admits that, although he is confident of the existence of the pathway and its general flow, there is no information available to say to any degree of certainty that contaminants went from point "A" to point "B".
>
> While Overton may be permitted to testify that such groundwater pathways are generally accepted in his scientific community, opinions about causation on a particular site must be supported by some factual basis to remove them from the realm of impermissible speculation. * * * He cannot say, with any reasonable degree of scientific certainty that any cause is more than just a possibility. His opinions have nothing to do with probabilities and, therefore, are not properly the subject of expert testimony.

Fire Science

Testimony Purporting to be Scientific, But No Rational Explanation for the Conclusions Drawn: *Michigan Millers Mut. Ins. Corp. v. Benfield,* 140 F.3d 915 (11th Cir. 1998): In a declaratory judgment action brought by an insurer who denied coverage on a homeowner's policy, the insurer's expert concluded that a fire in the home was intentionally set.

After a *Daubert* hearing, the Trial Court excluded the expert's testimony, and the Court found no error. The insurer argued that *Daubert* was inapplicable to this testimony because it was based on the expert's experience rather than on scientific principles. The Court held, however, that the expert "held himself out as an expert in fire sciences, and testified that he could determine the origin of the fire through his knowledge of the science of fires." Therefore, *Daubert* was applicable, and the Trial Court was within its discretion in finding that the expert's testimony was unreliable. The expert performed no tests and took no samples; he was unable to identify the source of ignition of the fire; and he was unable to rationally explain how he came to his conclusion.

Forensic Chemistry

Impermissible Extrapolation from Unrepresentative Sample: *United States v. $141,700 in U.S. Currency,* 157 F.3d 600 (8th Cir. 1998): The Government sought forfeiture of a large sum of money that was found in baggies in the ceiling of a camper. To prove that the money was the proceeds of drug transactions, the government offered testimony that a drug-detecting dog positively alerted to the presence of drugs after sniffing one of the packages of money in a controlled testing procedure. A judgment of forfeiture was entered, and the claimant appealed, arguing that the Trial Judge erroneously excluded the testimony of the claimant's expert chemist. The chemist would have testified that 99% of United States currency is contaminated with drug residue. The Court affirmed and held that the expert's testimony was properly excluded under *Daubert.* The expert's methodology was unreliable; it consisted of taking whatever bills were brought to him from the narcotics unit of a police department, and testing them for drug residue. The Court declared that "[b]ecause bills seized during narcotics investigations are not necessarily representative of the general population of bills in circulation, Ihm's methodology cannot support the conclusion that 99 percent of bills in circulation are contaminated with drug residue." The Court also noted that the methodology bore none of the indicia of reliability articulated in *Daubert.* The expert's test results had not been submitted for peer review; the rate of error was potentially high, "especially in light of the fact that he handled many bills without changing his gloves"; and the tests could not be replicated, since the expert placed no controls over his samples.

Medical Testimony

Inadmissible PET Scan: *Penney v. Praxair, Inc.,* 116 F.3d 330 (8th Cir. 1997): To prove the existence of brain injury after a car accident, the plaintiff offered testimony from a doctor who conducted a Position Emission Tomography (PET) scan of the plaintiff's brain. The Court held that the testimony concerning the results of the PET scan was properly excluded under

Daubert. A PET scan measures brain functions, and the results of the scan are compared to a control group to detect abnormalities. In this case, the plaintiff, who was 62 years old, was compared with a control group of 31 persons, with ages from 18 to 70. The parties agreed that PET scan results can be affected by a person's age, and yet the plaintiff made no showing that comparison of his results with those of a control group of such widely disparate ages would be reliable. Moreover, PET scan results can be affected by the patient's medication; the plaintiff's test was conducted while he was on medication for his heart condition and other maladies, whereas none of the control-group subjects was on medication at the time of their PET scans. While it was not clear whether these problems actually led to an unreliable expert opinion, "it was the plaintiff's burden to establish a reliable foundation for the PET scan readings." Here, the plaintiffs failed to establish such a foundation, and there was no error in excluding the PET scan evidence.

The Court recognized that in *Hose v. Chicago Northwestern Transp.Co.,* 70 F.3d 968 (8th Cir. 1995), it had held that PET scan testimony was admissible under *Daubert.* "However, because the admission of scientific evidence in one case does not automatically render that evidence admissible in another case, we assume that *Hose* did not present the same evidentiary problems as does this case."

The Difference Between Chemical Sensitivity and Multiple Chemical Sensitivity: ***Summers v. Missouri Pacific RR System,*** 132 F.3d 599 (10th Cir. 1997): The plaintiffs claimed injury from exposure to diesel exhaust fumes. The Trial Court granted the defendant's motion to exclude expert medical testimony that diagnosed the plaintiffs as suffering from "chemical sensitivity." While chemical sensitivity is a recognized diagnosis, the defendant argued that the expert was actually applying a scientifically valid label to a scientifically invalid diagnosis of "multiple chemical sensitivity." The Court held that "Multiple Chemical Sensitivity is a controversial diagnosis that has been excluded under *Daubert* as unsupported by sound scientific reasoning or methodology." The Court noted that there are no "reliable criteria that allow a doctor to decide when somebody does not suffer from MCS which is one of the main reasons why MCS is regarded skeptically by mainstream medicine." The Court found that the Trial Court did not abuse its discretion in finding that the doctor was really diagnosing MCS and not chemical sensitivity. The Court noted that the expert performed none of the tests--a scratch test, patch test, or a RAST test for IG antibodies--that are ordinarily used to confirm whether or not a patient is suffering from chemical sensitivity, and also observed that the expert had a "propensity to use varying diagnostic technology."

Statistics

Flawed Comparisons: ***Raskin v. Wyatt Co.,*** 125 F.3d 55 (2d Cir. 1997): In an ADEA action, the Trial Court granted summary judgment for the defendant, excluding testimony from the plaintiff's expert statistician. The expert found that the defendant's employees retired earlier than comparable employees in the workforce generally, and concluded that this was attributable to the defendant's discrimination against older workers. Affirming, the Court found that this testimony was properly excluded as unreliable under *Daubert*. The statistical conclusion was defective in at least two respects. First, the expert did not account for the presence in the comparison group of those without pension plans and those who were self-employed--"categories of people who tend to work longer and to an older age than people who work for companies that have pension plans." Thus, the expert artificially inflated the retirement age in the comparison group. Second, the expert failed to account for other possible causes of differentiation between the defendant's employees and the population at large.

Failure to Account for Confounding Factors: ***Sheehan v. Daily Racing Form, Inc.,*** 104 F.3d 940 (7th Cir. 1997): The plaintiff brought an age discrimination action when he was terminated from employment after his job was computerized and the offices of the employer were consolidated. The district court's grant of summary judgment in favor of the employer was upheld. In opposition to the motion for summary judgment, the plaintiff relied on an affidavit of a statistician, who compared the age of those who were dismissed and those who were retained. The statistician concluded that the probability that retention of office personnel was uncorrelated with age was less than five percent. The Court held that the expert's affidavit failed to meet the *Daubert* standard, "which requires the district judge to satisfy himself that the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting." The statistician's methodology was defective because: 1) He arbitrarily excluded certain personnel from the sample tested; and 2) He failed to correct for any potential explanatory variations other than age (e.g., that those who were retained might have had better computer skills than those who were let go, and that the employees in the office held a variety of jobs). The court concluded as follows:

> The expert's failure to make any adjustment for variables bearing on the decision whether to discharge or retain a person on the list other than age--his equating a simple statistical correlation to a causal relation ("of course, if age had not role in termination, we should expect that equal proportions of older and younger employees would be terminated"--true only if no other factor relevant to termination is correlated with age)--indicates a failure to exercise the degree of care that a statistician would use in his scientific work, outside the context of litigation. In litigation an expert may consider (he may have a financial incentive to consider) looser standards to apply. Since the expert's statistical study would have been inadmissible at trial, it was entitled to zero weight in considering whether to grant or deny summary judgment.

See also ***People Who Care v. Rockford Board of Education,*** 111 F.3d 528, 537 (7th Cir. 1997) (holding that expert testimony attributing discrimination as the cause of underperforming of minority students was unreliable under *Daubert;* the expert made no attempt to exclude causes other than poverty, and used an unreliable indicator of poverty levels: "A statistical study is not inadmissible merely because it is unable to exclude all possible causal factors other than the one of interest. But a statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in a federal court.").

Using the Wrong Numbers: ***United States v. Artero,*** 121 F.3d 1256 (9th Cir. 1997): The Court rejected the defendant's challenge to the ethnic composition of the grand jury. The defendant presented testimony from a statistician that the percentage of Hispanics on the jury wheel was substantially less than the percentage of Hispanics in the local population. This conclusion of underrepresentation was unreliable, however, because "the defense expert used the wrong numerator for the ratio of Hispanics to the general population." The expert used the percentage of Hispanics in the general population, whereas "[t]he right question is whether Hispanics eligible to serve on federal juries were unreasonably represented because of systematic exclusion." The Court declared:

> But Dr. Weeks did not provide any data responsive to that question. He provided an answer to a different question, whether Hispanics, whether eligible to serve on federal juries or not, were represented in jury wheels at a lower rate than their proportion of the population as a whole. Irrelevant question, irrelevant answer.

The percentage of Hispanics in the general population was an erroneous indicator because many Hispanics in Southern California have recently arrived in this Country and as such are ineligible for jury service. The Court, citing *Daubert,* concluded as follows:

> An expert witness's post-graduate degree does not protect the court against the tendentiousness of advocacy research. A judge must exercise independent judgment to ensure that any and all scientific testimony or evidence is not only relevant, but reliable.

III. HARD SCIENCES--EVIDENCE ADMISSIBLE

Causation in Tort Cases

Limited Gatekeeper Role: ***Ambrosini v. Labarraque,*** 101 F.3d 129 (D.C.Cir. 1996): In an action alleging that birth defects were caused by the drug Depo-Provera, the Court held that the Trial Court improperly granted summary judgment for the defendants. The Trial Court rejected the testimony of two experts, an epidemiologist and a teratologist. The Court held that the Trial Court had misconceived "the limited gatekeeper role envisioned in *Daubert."* Both of the plaintiff's experts had relied on standard methodologies and published studies. Both were highly qualified, a fact which the Court treated "as circumstantial evidence as to whether the expert employed a scientifically valid methodology or mode of reasoning." The fact that one expert had not published his conclusions was of no moment, because the drug Depo-Provera is no longer prescribed during pregnancy, and thus there would be "no reason in the world" to publish those findings. The Court also found it relevant that the teratologist had testified to his conclusions about Depo-Provera at an FDA hearing, before the instant litigation arose. Both experts sufficiently ruled out some other possible causes for the plaintiff's birth defect, including viruses and genetic defect. The fact that several possible causes might have remained "uneliminated" went only to weight and not to admissibility. Finally, the fact that the epidemiologist could not state categorically that Depo-Provera causes birth defects did not render his testimony inadmissible under the "fitness" prong of *Daubert.* The Court reasoned that the "fitness" prong is satisfied if the testimony is relevant--it need not be sufficient to prove the point. The dissenting judge argued that the experts' testimony was conclusory and unscientific.

Opinion Based on Differential Diagnosis Erroneously Excluded Under *Daubert:* *Baker v. Dalkon Shield Claimants Trust,* 156 F.3d 248 (1st Cir. 1998): The plaintiff claimed that her pelvic inflammatory disease was caused by the Dalkon Shield. To prove an alternative cause for the injury, the Trust proffered expert gynecologists who would have testified that the plaintiff's condition was caused by chlamydia, a sexually transmitted disease. The Trial Judge excluded the experts' testimony as having no "basis", and the jury returned a verdict for the plaintiff. Reversing, the Court found that the experts' testimony was reliable under *Daubert* and that the Trial Court abused its discretion in excluding it. The experts' testimony was based on a standard scientific technique, widely used in medicine, of identifying a medical cause by narrowing the more likely causes until the most likely culprit is isolated. Of two very likely causes, the experts eliminated gonorrhea, because its symptoms are more serious than those suffered by the plaintiff. The other likely cause, chlamydia, was deemed the most likely because, among other things, the plaintiff's symptoms were typical of the disease. The Court concluded as follows:

> Why this opinion should be regarded as "guesswork" or "without basis" (the

district court's terms) is nowhere explained by either the judge or by Baker's brief on appeal. [The experts'] opinion rests on a scientific method, as required by Rule 702 as construed by *Daubert*. Indeed, "differential diagnosis" is a standard medical technique. Baker has not argued that any of [the experts'] scientific premises (e.g., that chlamydia is a common cause of PID) was so faulty that it could not even be tendered to the jury for its consideration.

Generally Accepted Methodology: ***Zuchowitz v. United States,*** 140 F.3d 381 (2d Cir. 1998): In a suit for personal injury resulting from an excessive dose of Danocrine, the Court held that the Trial Court did not abuse its discretion in admitting the testimony of the plaintiffs' experts on causation. The testimony was based on epidemiological, clinical and animal studies which had been subjected to peer review and publication, and the experts used methodologies which had gained general acceptance within the relevant scientific community. The Court found that there was no requirement under *Daubert* that the expert assert his conclusions to a level of certainty. The Court was untroubled by the fact that the experts did not support their conclusions with epidemiological evidence--given the fact that so few people had ever received an overdose of Danocrine, it was no surprise that a statistically significant sample could not be found.

Standard Procedures Followed: ***Holbrook v. Lykes Bros. S.S. Co., Inc.,*** 80 F.3d 777 (3d Cir. 1996): The plaintiff alleged that he contracted mesothelioma from exposure to asbestos. He objected to testimony from defense experts that the cause of his condition was radiation. The Court held that the experts' testimony was properly admitted. One expert was a pathologist and the other was a specialist in occupational lung disease. Both relied on medical literature, their knowledge of mesothelioma and its causes, animal studies, and the plaintiff's medical history. The Court concluded: "As required by *Daubert*, their procedures for examining the facts presented to them and their own research methodologies were based on the methods of science and did not reveal opinion based merely on their own subjective beliefs."

Liberal Test of Admissibility: ***Kannankeril v. Terminix Intern., Inc.,*** 128 F.3d 802 (3d Cir. 1997): The plaintiff claimed that her exposure to Dursban, an insecticide, caused a loss of cognitive ability. The Trial Court excluded the plaintiff's medical expert, who testified to causation on the basis of the plaintiff's medical records, literature indicating that Dursban has a harmful effect on humans, and the "temporal relationship" between the plaintiff's exposure and her injuries. The Trial Court reasoned that the expert's differential diagnosis was flawed, because the expert relied only on medical records and not on any diagnostic tests of the plaintiff; the expert ignored blood tests indicating no abnormal results; the expert failed to consider other causes; the expert relied on improper information to assume a certain level of exposure; and the expert had not published in the area. The Court held that the trial court abused its discretion, confusing issues of admissibility and credibility. The expert's reliance on medical records to support a differential diagnosis was permissible--personal inspection is not required. As to the

blood test, the expert's discarding of the test and reliance on other information presented a question of weight and not admissibility. As to alternative causes, the Court held that the defendant failed to present any alternative causes for the plaintiff's injury that the expert would then be obligated to explain away. As to reliance on improper information, the court found this a question of weight and not admissibility. As to lack of publication, the Court found this to be unimportant, given the fact that the expert's opinion was "supported by widely accepted scientific knowledge of the harmful nature of organophosphates."

It should be noted that the Court, in taking a very liberal "weight rather than admissibility" view of the expert's testimony, relied on the 11th Circuit opinion in *Joiner*. As seen elsewhere in this Outline, that opinion has been subsequently repudiated by the Supreme Court. Moreover, the Court's finding that the district court abused its discretion in excluding the expert's clearly shaky testimony is suspect after *Joiner*, which prohibits appellate courts from second-guessing district court exclusions of expert testimony under *Daubert*. Finally, the *Kannankeril* Court seems clearly wrong in asserting that the burden is on the opponent to come up with alternative explanations for causation, that the proponent's expert must then explain away. Under Rule 104(a), it is the proponent of the expert that has the burden of going forward and of proving that the expert's testimony is reliable.

Standard Procedures Followed: ***Benedi v. McNeil-P.P.C., Inc.,*** 66 F.3d 1378 (4th Cir.1995): Plaintiff alleged that his liver failure was caused by his having taken Tylenol together with alcohol. Plaintiff's experts testified to causation on the basis of the following: the microscopic appearance of the plaintiff's liver, the Tylenol found in his blood when he was admitted to the hospital, the plaintiff's history of Tylenol use after alcohol consumption, the liver enzyme blood level, the lack of any evidence of a viral or any other cause of liver failure, and numerous articles and treatises that described the increased risk of liver injury when acetominophen is combined with alcohol. The Court found no error in the Trial Court's admission of the experts' testimony. The experts' methodology was reliable under *Daubert*; it was the same methodology employed daily by the medical community in diagnosing patients. The Court rejected the defendant's argument that the testimony should have been excluded because the experts did not rely upon epidemiological data. It concluded: "Under the *Daubert* standard, epidemiological studies are not necessarily required to prove causation, as long as the methodology employed by the expert in reaching his or her conclusion is sound."

Note that there is no indication in the case that any epidemiological studies had been conducted; presumably the result would have been different if the plaintiffs' experts had simply ignored reliable epidemiological studies.

MRI Comparisons Found Sufficiently Reliable to Support a Conclusion About Causation: ***Bartley v. Euclid, Inc.***, 158 F.3d 261 (5th Cir. 1998): Coal haul drivers sued a manufacturer for back injuries allegedly caused by a defectively designed coal hauler. Affirming a judgment for the plaintiffs, the Court found no abuse of discretion in the admission of testimony of a medical doctor who specialized in diagnostic radiology. The expert compared MRI scans of 90 individuals who drove the defendant's coal hauler with the MRI scans of 80 back pain patients, whose age and sex matched the coal hauler drivers. He also relied on an article stating that exposure to whole body vibrations can lead to back injuries identical to the ones suffered by the plaintiffs. The expert concluded that the plaintiffs' back injuries were caused by the vibrations of the coal hauler. The Court found no error in the Trial Court's reliance on the following factors: 1) the doctor's impressive credentials; 2) the existence of a body of literature dealing with repetitive stress back injuries; 3) the testability of the expert's thesis; and 4) the fact that the methodology used by the expert "derived from other accepted methodologies." While some of the *Daubert* factors were not met (e.g., general acceptance), the Trial Court was within its discretion to consider "the *Daubert* factors in the aggregate" and to determine that, on balance, the expert's opinion was "sufficiently reliable to merit admission into evidence and testing in the fire of cross-examination and contrary evidence." A dissenting Judge argued that the expert was essentially trying to act like an epidemiologist, but he had not used epidemiological methodology to come to his conclusions. Rather, "he generated a study for the purposes of this litigation and offered an opinion about what it shows. This is precisely the sort of ad hoc method of creating testimony that Rule 702 and *Daubert* exclude."

Peer-reviewed Studies Indicate a Reliable Methodology: ***Glaser v. Thompson Medical Co., Inc.***, 32 F.3d 969 (6th Cir. 1994): Reversing a grant of summary judgment for the defendant in an action brought by the plaintiff for alleged damages caused by ingestion of the diet pill Dexatrim, the Court held that the testimony of the plaintiff's expert created a triable issue of fact as to whether the plaintiff's acute hypertension and related injuries were caused by using Dexatrim. The expert's conclusion that there was an 80% likelihood that the plaintiff's injuries were caused by taking a single dose of Dexatrim was scientifically valid. The conclusion was based on eight clinical studies, several conducted by the expert himself, which detected a significant connection between ingestion of small doses of the active ingredient in Dexatrim and acute hypertension. None of these studies were prepared in anticipation of litigation. The *Glaser* Court concluded:

> These studies, together with Dr. Zaloga's extensive experience and work in this area, provide sufficient, reliable scientific data upon which Dr. Zaloga may base his conclusion. All of these papers have clearly explained, solid scientific methodologies upon which they have tested their theories, and all have been peer-reviewed and published in reputable medical journals * * *. The error rates are published and their impact on the studies explained.
>
> The fact that other studies disagreed with the expert's conclusion was not critical, because

the expert distinguished many of them and pointed out flaws in the techniques of others. The Court stated that "[s]uch differences in opinions among medical experts do not invalidate Dr. Zaloga's opinion, but rather create material issues of fact which must be resolved by the jury."

Anecdotal Evidence as Confirmatory Data: ***Cantrell v. GAF Corp.***, 999 F.2d 1007 (6th Cir. 1993): Plaintiffs claimed that their exposure to asbestos in the workplace created a legitimate fear that they would develop laryngeal cancer in the future. The plaintiff's expert testified that asbestos created a risk of laryngeal cancer, basing his conclusion on epidemiological evidence reported in the medical literature, and on the relatively high incidence of persons at the plaintiffs' workplace whom the expert had personally diagnosed as having laryngeal cancer. The defendants objected to the expert's testimony under *Daubert* insofar as it was based on anecdotal evidence, because the expert had not evaluated a sufficient number of cases from which to draw a proper statistical conclusion of cause and effect. But the Court held that the expert testimony was properly admitted. It stated: "Nothing in Rules 702 and 703 or in *Daubert* prohibits an expert from testifying to confirmatory data, gained through his own clinical experience, on the origin of a disease or the consequences of exposure to certain conditions." The Court noted that the expert was cross-examined and freely acknowledged that his anecdotal evidence was not dispositive but rather simply confirmatory of the medical literature. Presumably the result would have been different had the expert relied only on personal anecdotal evidence for his conclusion.

Reliance on Objective, Verifiable Information: ***Kennedy v. Collagen Corporation,*** 161 F.3d 1226 (9th Cir. 1998): The plaintiff claimed that her used of the facial product Zyderm caused her to contract lupus, an autoimmune disorder. The plaintiff's expert rheumatologist testified to causation on the basis of peer-reviewed articles, clinical trials and product studies, an investigation conducted by the Texas Department of Health, a physical examination of the plaintiff, laboratory tests, and the temporal proximity between the plaintiff's use of Zyderm and the existence of her autoimmune disorder. The fact that none of the studies indicated that Zyderm caused lupus did not warrant exclusion, since the studies indicated that Zyderm caused autoimmune disorders that are similar to lupus. The fact that the expert's opinion was not supported by epidemiological studies presented a question of weight; in this instance, epidemiological studies would be almost impossible to perform because patients who use Zyderm usually consult the treating doctor when problems arise. Since the treating doctor is typically a plastic surgeon not trained to recognize autoimmune disorders, "the causal connection goes unrecognized."The Court concluded that "Dr. Spindler set forth the steps he took in arriving at his conclusion in his deposition. Dr. Spindler's analogical reasoning was based on objective, verifiable evidence and scientific methodology of the kind traditionally used by rheumatologists. That is precisely what *Daubert* requires."

Reliable Basis in the Absence of Epidemiological Findings: *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994): Affirming a judgment for the plaintiff in an action for damages suffered from defective silicon breast implants, the Court held that testimony from the plaintiff's experts was properly admitted as proof of causation. Relying on *Daubert*, the Court concluded that the experts "based their opinions on the types of scientific data and utilized the types of scientific techniques relied upon by medical experts in making determinations regarding toxic causation where there is no solid body of epidemiological data to review." The Court also noted that the Trial Court is not required under *Daubert* to hold a formal hearing, so long as a determination is made that the expert is qualified and that the testimony is reliable.

Computers

Standard Components: *Roback v. V.I.P. Transport Inc.*, 90 F.3d 1207 (7th Cir. 1996): The defendant, a truck driver who rammed another car, brought a third-party action claiming that he was distracted by the erratic operation of a faulty cruise control system. The defendant retained an engineer who used a computerized data acquisition system he refers to as the DATAQ, to gather data on the performance of various systems within an automobile or truck. The expert took the truck on a 90 mile drive and used the DATAQ to document how the vehicle performed. He paid particular attention to the engine throttle, the position of the accelerator pedal, and the operation of the cruise control. He concluded that the cruise control, when engaged, caused the engine to rev and the speedometer to fluctuate dramatically, even though the truck would not exceed the set speed limit. The third- party defendants argued that this testimony was inadmissible under *Daubert* because the DATAQ system had not been subject to peer review. But the Court held that the testimony was sufficiently scientific to satisfy *Daubert*:

> Documenting the malfunction of a vehicle by gathering and compiling data during a test run is hardly a novel methodology. In a basic sense, Rosenbluth was no different than an eyewitness who may have observed Martin's truck malfunction on another occasion. Arguably, however, his testimony would have been more reliable because his observations were quantified. The only thing apparently unique to Rosenbluth's approach was the DATAQ, in the sense that he put together the hardware and designed the software and * * * only he had ever used them. But Rosenbluth used standard components to assemble the DATAQ, and he certainly could have been interrogated about the way in which his software worked. His data were subject to examination and independent verification. We see no way in which Rosenbluth's testimony did not qualify for admission under Rule 702.

DNA Testing

RFLP Identification Satisfies *Daubert: United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993): The Court found no error in admitting expert testimony on DNA identification, through the Restriction Length Fragment Polymorphism process, by an FBI crime laboratory. While the lower court's rulings admitting the DNA evidence were couched in *Frye* terminology, the findings were still relevant because "general acceptance is still one factor the Supreme Court has said can impact on a court's scientific validity determination * * *." The Court found that DNA identification was scientifically valid, and made the following points:

1. The methodology employed by the FBI was tested by internal proficiency testing, validation studies and environmental insult studies.
2. The methodology had been published and was exposed to some peer review, and the fact that some flaws in the methodology were exposed by peer review went to weight and not admissibility. As *Daubert* says, the very reason for requiring peer review is so that the methodology can be evaluated and criticized.
3. There was an absence of proof as to rate of error, because the FBI had failed to conduct any external blind proficiency tests to account for the possibility of laboratory error. While this was a negative factor, "the error rate is only one in a list of nonexclusive factors that the *Daubert* Court observed would bear on the admissibility question."
4. The methodology employed by the FBI for determining a DNA match was generally accepted as a reliable testing technique; acceptance need not be universal to be deemed general acceptance, and therefore the fact that the reliability of the methodology is in some dispute goes to weight and not admissibility.

The Court held that "criticisms touching on whether the lab made mistakes in arriving at its results is for the jury." Thus, in the Sixth Circuit, an admissibility hearing is not required to determine whether protocols were followed in the particular case. As the Court put it: "the criticisms about the specific application of the procedure used or questions about the accuracy of the test results do not render the scientific theory and methodology invalid or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility."

The Court in *Bonds* further held that the probability estimates employed by the FBI were admissible even though they did not take account of possible ethnic subgrouping in the sample data base. The Court stated: "This substructure argument involves a dispute over the accuracy of the probability results, and thus this criticism goes to the weight of the evidence and not its admissibility."

Errors Claimed in a Particular Test Are Part of the *Daubert* Enquiry: *United States v. Martinez*, 3 F.3d 1191 (8th Cir. 1993): Applying *Daubert,* the Court held that a trial court may

take judicial notice of the reliability and scientific validity of the general theory and techniques of DNA profiling. However, the Court held that *Daubert* requires the trial court to "inquire into whether the expert properly performed the techniques involved in creating the DNA profiles." In this respect, the Court differed with the pre-*Daubert* case of *United States v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992) (issue of whether protocols were properly performed generally goes to weight and not admissibility), and with the Sixth Circuit's view in *Bonds*, *supra*. The *Martinez* Court stated that trial courts "should require the testifying expert to provide affidavits attesting that he properly performed the protocols involved in DNA profiling" and that if the opponent challenges the application of the protocols in a specific case, "the district court must determine whether the expert erred in applying the protocols, and if so, whether such error so infected the procedure as to make the results unreliable." The Court cautioned, however, that not every error in protocol would result in exclusion of DNA profiling testimony. To warrant exclusion, the error must be such as "to skew the methodology itself."

PCR Testing Reliable under *Daubert: United States v. Beasley,* 102 F.3d 1440 (8th Cir. 1996): The Court held that DNA testing by the polymerase chain reaction method (PCR) was reliable under *Daubert*, and that courts could take judicial notice of its reliability in the future. PCR testing depends on replicating DNA samples through a heating process. It has forensic advantages over the traditional RFLP testing because an infinitesimal sample can be replicated. The Court found that any potential for contamination of samples was a question of weight rather than admissibility. The Court noted, however, that in any particular case, "the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the proper protocols, and the like." ***See also United States v. Shea,*** 159 F.3d 37 (1st Cir. 1998) (no abuse of discretion in admitting PCR evidence, including expert testimony on the probability of random match).

Questions of Weight: *United States v. Chischilly,* 30 F.3d 1144 (9th Cir. 1994): The Court held that evidence of DNA identification prepared by an FBI laboratory was admissible under *Daubert*. The defendant's objections as to potential faults in the RFLP identification process (e.g., contaminants could have affected the samples, inconsistencies in the gel could have affected allele mobility, and the use of ethidium bromide in the test could have retarded the migration of DNA fragments) went to weight and not admissibility after *Daubert*. Moreover, the defendant's contention that protocols were not followed in the particular case went to weight and not admissibility, because the *Daubert* admissibility rules are designed to regulate the reliability of methodology, not execution. As to peer review, the Court stated that the National Research Council (NRC) report on DNA identification was "the functional equivalent of a publication subject to peer review under *Daubert's* liberally framed second factor." The fact that the NRC report criticized much of the FBI's DNA analysis was not critical, since criticism is the very purpose of peer review.

The Court also rejected the defendant's attacks on the FBI's statistical techniques for

determining the probability of a match, even though the Court acknowledged that the defendant had "significant scientific backing" on the questions concerning ethnic subgrouping. The Court stated that the defendant's citations of scientific detractors might have been dispositive under *Frye*, but not under *Daubert*:

> While perhaps some support for exclusion of Chischilly's DNA test results under the superseded *Frye* test, with its requirement of general acceptance of a theory in the scientific community, these same [critical] statements take on the hue of adverse admissions under *Daubert's* more liberal admissibility test: evidence of opposing academic camps arrayed in virtual scholarly equipoise amidst the scientific journals is scarcely an indication of the "minimal support within a community" that would give a trial court cause to view a known technique with skepticism under *Daubert's* fourth factor.

PCR Testing Satisfies *Daubert: United States v. Hicks,* 103 F.3d 837 (9th Cir. 1996): The Court held that the trial court did not abuse its discretion in admitting, after a *Daubert* hearing, evidence based on the DNA testing procedure known as PCR. The Court declared that though "PCR testing is relatively new to the federal appeals courts, its novelty should not prevent the district court from exercising its sound discretion in admitting such evidence once a proper *Daubert* showing has been made." The Court held that the risk of contamination during PCR testing presented a question of weight and not admissibility, noting that similar risks apply to all forensic testing. Nor should the evidence have been excluded under Rule 403; unlike RFLP testing, which assesses the probability of a DNA match and which can lead to very high improbability numbers, PCR testing simply results in a conclusion that a person cannot be excluded from a match. Therefore, the risk of prejudicial effect is not as great.

Statistical Probability of a Match: *United States v. Davis,* 40 F.3d 1069 (10th Cir. 1994): Affirming bank robbery convictions, the Court held that evidence of DNA testing, as well as expert testimony as to the improbability of another person matching the DNA found at the scene, were properly admitted. The Court found it unnecessary to decide a question in dispute among the circuits: whether *Daubert* requires a pre-trial hearing to determine if a particular DNA test followed protocol. It held that the trial court in this case had conducted "the functional equivalent of a preliminary hearing" because the government expert testified and was heavily cross-examined at a hearing conducted before the jury, without objection from the defendant. As to the contested evidence of probability, the Court stated that "statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed."

RFLP Testing Satisfies *Daubert: Government of Virgin Islands v. Penn,* 838 F.Supp. 1054 (D.V.I. 1993): Ruling on a motion *in limine* in a rape case, the Court held that the FBI's DNA profiling process, including its assessment of improbability of a random match, satisfied *Daubert*. The opinion contains an extensive and well-informed discussion of the RFLP process, the use of probability theory, and of all the things that can go wrong in the DNA identification process. The Court made the following conclusions in its *Daubert* analysis:

> 1. The DNA profiling process can be verified because the protocol has been published and widely replicated.
>
> 2. The FBI's profiling process was subject to peer review from its inception, because independent scientists were called in to review the process and make suggestions as it was being implemented.
>
> 3. Any risk of error that could occur during the test--such as degraded DNA, improper movement of the band fragments, degraded HAE III (the cutting enzyme), and human error--would be readily determined by the protocol and would result in the FBI either rejecting the test or resolving any uncertainty in the defendant's favor.
>
> 4. It was not improper to assign bin frequencies derived from a United States Black database to the DNA bands of a Black suspect from St. John's, because the FBI provided expert testimony which indicated that the frequency estimates from the same racial group do not vary significantly by geographic location.
>
> 5. The FBI uses standard methodologies that are generally employed in the scientific community.

Fingerprint Identification

General Acceptance and Peer-Review: *United States v. Sherwood*, 98 F.3d 402 (9th Cir. 1996): Affirming convictions arising out of a kidnapping, the Court found that testimony from the prosecution's fingerprint identification expert was properly admitted. The defendant argued that the Trial Court failed to conduct a *Daubert* analysis. The Court noted that not every one of the *Daubert* factors would be applicable in every case. Here, the defendant admitted that the expert's identification technique was generally accepted and that fingerprint comparison has been subjected to peer review and publication. This was sufficient to satisfy the *Daubert* reliability requirements. And since the testimony would assist the jury in determining the identity of the kidnappers, it also satisfied the "fit" requirement of *Daubert.*

Gas Chromatography

Peer Review and General Acceptance: ***United States v. Bynum***, 3 F.3d 769 (4th Cir. 1993): In a narcotics prosecution, the government sought to link co-conspirators by expert testimony that the cocaine samples possessed by various persons came from the same batch. The experts' methodology consisted of gas chromatographic analysis. The defendant argued on appeal that gas chromatography was novel and not generally accepted under *Frye*. But while the appeal was pending, *Daubert* was decided. The *Bynum* Court held that the experts' testimony was scientifically valid under *Daubert*:

> Though it invoked *Frye*, the government's proffer of evidence could hardly have better anticipated *Daubert*. The government explained the hypotheses underlying the technique, listed the numerous publications through which the technique had been subjected to peer review, and concluded with a citation to authority that gas chromatography enjoys general acceptance in the field of forensic chemistry.

Ink Analysis

Rate of Error Only One Factor: ***Janopoulos v. Harvey L. Walner & Assocs.***, 866 F. Supp. 1086 (N.D. Ill. 1994): In an employment discrimination case, the plaintiff objected to expert testimony concluding that certain documents offered by the plaintiff had been backdated. The expert investigated the ink on the documents using a process known as thin layer chromatography ("tlc"). The plaintiff argued that under *Daubert* the testimony was inadmissible, because the expert had no information about the known or potential rate of error of tlc testing. But the Court held that the expert's methodology was a "generally accepted" test for determining the validity of documents. Citing *Daubert*, the Court stated: "Rates of error, or confidence rates, are only one factor to consider in determining the admissibility of an expert's testimony."

Medical Testimony

Standard of Care: ***Carroll v. Morgan***, 17 F.3d 787 (5th Cir. 1994): Affirming a judgment for the defendant in a wrongful death medical malpractice action, the Court found no error under *Daubert* when the Trial Court permitted the defendant's expert cardiologist to testify as to the standard of medical care owed to the decedent. The plaintiff did not allege that the expert relied on "a particularly objectionable or unconventional scientific theory or methodology." Moreover, the expert based his testimony on thirty years of experience as a cardiologist, a review of the decedent's medical records, the coroner's report, and a "broad spectrum of published

materials." The Court found that the expert's testimony was grounded in the procedures and methods of science, and was not mere "unsupported speculation."

Excluding Alternative Causes: ***Hose v. Chicago Northwestern Trans. Co.***, 70 F.3d 968 (8th Cir. 1995): The plaintiff claimed that he contracted manganese encephalopathy while at the defendant's worksite. The plaintiff's doctor conducted a "PET" scan of the plaintiff's brain, and used this to exclude alternative sources of the plaintiff's condition, such as Alzheimer's disease. He concluded that the PET scan result was consistent with menganese encephalopathy. The Court held that this testimony was properly admitted under *Daubert:*

> Dr. Gupta's testimony clearly showed the limited use of the PET scan, but that use was nonetheless relevant. In determining the cause of a person's injuries, it is relevant that other possible sources of his injuries, argued for by the defense counsel, have been ruled out by his treating physicians. Indeed, ruling out alternative explanations for injuries is a valid medical method.

The Court also noted that "the fact that Hose's treating physician ordered the PET scan prior to the initiation of litigation is another important indication that this technique is scientifically valid."

Pharmacology

Trial Court Set the Bar Too High for Expert's Dosage Testimony: ***Ruiz-Trioche v. Pepsi Cola of Puerto Rico,*** 161 F.3d 77 (1st Cir. 1998): In a diversity action arising from a fatal traffic accident, the Trial Court excluded testimony from the defendant's expert pharmacologist. The expert concluded, on the basis of an autopsy report and the half-life values of the substances involved, that the decedent had "snorted" at least 200 mg of cocaine 30 to 60 minutes prior to the accident. To reach this conclusion on dosage, the expert relied on a mathematical formula said to be supported by several published studies supporting a "half-life technique" of assessing dosages. Reversing a judgment for the plaintiff, the Court held that the Trial Court abused its discretin in excluding the expert testimony. The Court recognized that the scientific literature relied upon by the expert "does not make an open-and-shut case" because the studies recognize that the half-life of cocaine varies among individuals due to many factors. But the Court stated that the district court "set the bar too high" in excluding the expert's testimony on the basis of these possible variables. The Court noted that "no single factor disposes of a reliability inquiry" and that *"Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion." In this case, the expert's opinion was "premised on an accepted technique embodied a methodology that has significant support in the relevant universe of scientific literature, and was expressed to a reasonable degree of scientific certainty."

Photogrammetry

United States v. Quinn, 18 F.3d 1461 (9th Cir. 1994): In a bank robbery trial, the prosecution called an expert who used the process of photogrammetry to determine the height of the bank robber in the bank surveillance photographs. The process of photogrammetry derives a formula by measuring the change in dimensions of objects as they move away from the camera, and tests that formula against objects of known dimensions in the photograph. The Trial Court admitted the photogrammetry-based evidence on the ground that the process was nothing more than a series of computer-assisted calculations "that did not involve any novel or questionable scientific technique." The Court of Appeals found no abuse of discretion, and held that the defendant was not entitled to a full evidentiary hearing on the reliability of the evidence, given the fact that he could provide no evidence to question the reliability of the process used by the government's expert.

Statistics

Statistician Employs Reliable Methodology: *City of Tuscaloosa v. Harcross Chemicals, Inc.,* 158 F.3d 548 (11th Cir. 1998): Alabama municipalities brought an antitrust action against five chemical companies alleging that the defendants engaged in a conspiracy to fix prices for repackaged chlorine. The Court held that the Trial Court abused its discretion in excluding in its entirety the testimony of the statistician proffered by the plaintiffs. The Trial Court excluded the testimony because it failed to show a successful conspiracy, but the Court stated that this ruling presented "a conflation of admissibility issues with issues regarding the sufficiency of the plaintiffs' evidence." The expert was not required to prove the plaintiffs' case by himself. The Court found that the expert utilized well-established and reliable methodologies in the preparation of most of his statistics; he generated the statistics underlying his testimony from simple compilation of data from purchase records, documents obtained from the defendants through discovery, and from public sources. The Court also found that the expert's compilation of that data into utile measurements of bid prices, costs, tie bid frequencies, etc., "are the products of simple arithmetic and algebra and of multiple regression analysis, a methodology that is well-established as reliable." However, the Trial Court was found correct in excluding the statistician's testimony insofar as he characterized certain bids as "signals" to coconspirators; that testimony was outside the witness's expertise, as was his testimony about applicable legal standards.

IV. "SOFT" SCIENCE, SOCIAL SCIENCE--EVIDENCE INADMISSIBLE

Accident Reconstructions

Failure to Meet the "Fit" Requirement: ***Habecker v. Clark Equipment Co.,*** 36 F.3d 278 (3rd Cir. 1994): A product liability action for wrongful death was brought after the decedent was crushed by a forklift which fell from a ramp. In the course of remanding the case for a new trial, the Court held that the Trial Court had properly excluded testimony from the plaintiff's expert, who had conducted an investigation and attempted to simulate the accident. The Court stated that the expert's testimony did not "fit" with the facts of the case, as is required by *Daubert*, because the conditions of the simulation were far different from those existing at the time of the accident. Specifically, there was no attempt to replicate the velocity or the rearward movement of the forklift, the height of the fork was disregarded, and there was no operator in the forklift nor cargo on the fork during the purported simulation.

Insufficiently Similar Circumstances: ***Guillory v. Domtar Industries Inc.,*** 95 F.3d 1320 (5th Cir. 1996): The plaintiff was severely injured while working in a salt mine, when a fork fell off a forklift and hit him on the head. The defendant's expert, a mechanical engineer and specialist in accident reconstruction, was excluded by the Trial Court under *Daubert*. The Court found no error, because the expert would have testified on the basis of forklift models and exhibits that were not sufficiently similar to the forklift which caused the accident. The Court stated that the Trial Court's gatekeeping role is "designed to extract evidence tainted by farce or fiction. Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all. Both analyses result in pure speculation." The Court rejected the defendant's argument that any discrepancy in the expert's testimony went to weight rather than admissibility:

> Normally, the truth regarding differences in models and demonstrations surfaces with vigorous cross-examination; however, where technical information is involved, it is easier for the jury to get lost in the labyrinth of concepts. We are convinced that cross-examination of Dr. Reed could not salvage the truth. Equipment and procedures in a salt mine are foreign to the average juror. The jury, frantically grasping at complex forklift and mining concepts, could easily miss subtle distinctions revealed on cross-examination and then drown in the untrue and the unproven. This is especially true because the unreliable evidence here would have been presented in a format resembling a recreation of the event that caused the accident.

Business Appraisers

Speculative Testimony on Lost Profits Controlled by *Daubert*: *Target Market Publishing Inc. v. ADVO, Inc.* , 136 F.3d 1139 (7th Cir. 1998): The plaintiff and the defendant entered into a joint venture to market a direct mail advertising publication. When two markets were tested unsuccessfully, the defendant ceased performance. In the action for breach of contract and fiduciary duty brought in the diversity jurisdiction, the defendant moved for summary judgment on the ground that the plaintiff could not recover the requisite jurisdictional amount. The plaintiff countered with a report from an expert accountant and business appraiser who concluded that had the defendant performed its contractual obligations, the joint venture would have earned $1.4 million during the contract period. Affirming a grant of summary judgment for the defendant, the Court held that the Trial Court was within its discretion in rejecting the experts' report under *Daubert.* The report was based on the speculative assumption that the joint venture would have successfully entered 49 marketing zones, when at the time of the breach it had only operated in two marketing zones and was unsuccessful in both.

Child Sexual Abuse

No Generally Accepted Standards: ***United States v. Powers***, 59 F.3d 1460 (4th Cir. 1995): Affirming a defendant's conviction for sexual abuse of his minor daughter, the Court held that the Trial Judge properly excluded the results of a "penile plethysmograph" test offered to prove that the defendant did not exhibit the characteristics of a "fixated pedophile." The Court found that the test is not a valid diagnostic tool and that it lacked accepted standards, although it might be useful in the treatment of offenders. The Court also noted that the expert testimony violated the "fit" requirement of *Daubert*: Powers was charged with statutory rape of his daughter, not with being a "fixated pedophile." Powers had offered no supporting evidence "showing that those who are not fixated pedophiles are less likely to commit incest abuse."

Subjective Enquiry: ***Gier v. Educational Service Unit No. 16,*** 845 F.Supp. 1342 (D.Neb. 1994), *aff'd* 66 F.3d 940 (8th Cir. 1995): In an action brought against a school on behalf of mentally retarded students for alleged sexual, physical and emotional abuse, the Magistrate Judge held a *Daubert* hearing and ruled *in limine* that three experts would not be permitted to testify that the plaintiffs were abused, nor to any opinion based on such a conclusion. The Magistrate Judge reasoned that the expert had used child abuse methodology ordinarily applied to non-retarded children; as such, the witnesses "made an incorrect extrapolation by comparing the behavior of mentally retarded children to the model of abused non-retarded children." The Court also expressed concern about the subjective nature of the investigation of specific instances of

child abuse, and about the vagueness of the standard protocol, which "leaves a gaping hole in the direction it provides the master's level clinician to conduct the interview." Finally, the Court held that the *Daubert* "fit" requirement was not met, because the methodologies employed were for therapeutic rather than investigative purposes:

> The witnesses all testified that their purposes in evaluating plaintiffs were for the provision of therapy, not investigation. The methods used here may well have been sufficiently reliable for purposes of choosing a course of psychotherapy for these disturbed children, a course which must, to some extent, rely upon perception as well as reality, and upon the subjective reports of parents and others. However, the methodologies have not been shown to be reliable enough to provide a sound basis for investigative conclusions and confident legal decision-making.

On appeal, the Court of Appeals declared that the Magistrate Judge's analysis "is precisely the type of analysis the decision in *Daubert* would appear to contemplate." The Court concluded that while the evaluation methodology employed by the experts might be useful for treatment purposes, it was "not reliable enough to make factual or investigative conclusions in legal proceedings."

Failure to Meet the "Fit" Requirement: ***United States v. Reynolds,*** 77 F.3d 250 (8th Cir. 1996): The defendant, who was charged with sexual abuse of a child, proffered an expert to testify as to the unreliability of the standard techniques for interviewing children about sex abuse. The trial court excluded the testimony because no evidence was presented that the victim had ever been interviewed. The Court of Appeals found the exclusion proper, because the testimony failed, under *Daubert*, to fit the facts of the case.

Economists

Speculative Assumptions: ***Joy v. Bell Helicopter Textron, Inc.,*** 999 F.2d 549 (D.C.Cir. 1993): In a wrongful death action, the Court held that an economist's testimony as to the decedent's earning capacity was improperly admitted because it was wholly speculative. For example, the expert hypothesized, without any basis, that the decedent would have entered a different and more lucrative line of work had he lived, and that he would have built a house on an empty lot he owned and sold it at a profit. The Court relied on *In re Air Crash Disaster at New Orleans,* 795 F.2d 1230 (5th Cir. 1986), in which an economist's testimony as to a decedent's future earnings was held improperly admitted because it was based on speculative assumptions. The Court noted that the teaching from the *Air Crash* case--that the courts must take greater

control over speculative expert testimony--was supported by *Daubert*. Quoting *Daubert*, the Court concluded that an expert must testify on the basis of "knowledge" and that "knowledge connotes more than subjective belief or unsupported conclusion."

Insufficient Factual Foundation: ***Boucher v. U.S. Suzuki Motor Corp.,*** 73 F.3d 18 (2d Cir. 1996): The Court vacated a damages award for a plaintiff in a personal injury action, holding it was error to permit the plaintiff's expert to testify as to the plaintiff's lost earnings. The expert assumed that the plaintiff would work 40 hours per week, 52 weeks per year, with fringe benefits and regular pay increases for the rest of his career. These assumptions represented a "complete break" with the plaintiff's work history of seasonal and intermittent employment. The Court also found error in the expert's reliance on unsupported assumptions concerning fringe benefits, absent any evidence that the plaintiff received benefits of any kind from his employment. The Court concluded that "[s]ince Boucher's expert testimony was not accompanied by a sufficient factual foundation before it was submitted to the jury, it was inadmissible under Federal Rule of Evidence 702."

Improper Methodology: ***In re Aluminum Phosphide Antitrust Litigation***, 1995 U.S. Dist. Lexis 11026 (D.Kan. 1995): The Court held that while not all of the *Daubert* factors are applicable to expert testimony in the social sciences, "the Court has no doubt that *Daubert* requires it to act as gatekeeper" to assure that an economist's expert testimony is reliable. In this case, an expert's conclusion about the damages suffered by victims of price-fixing was unreliable. The expert purported to employ the standard "before and after" methodology used by economists, but he did not employ it properly. He did no assessment of the period before the price-fixing; his choice of a time period to evaluate after the price-fixing was arbitrary; and he failed to conduct a multiple regression analysis to determine whether other market forces may have affected pricing.

Ergonomics

Insufficient Basis: ***Bennett v. PRC Public Sector, Inc.,*** 931 F.Supp. 484 (S.D.Tex. 1996): The plaintiffs, who worked at computer keyboards, alleged that they suffered repetitive motion disorders as a result of a defectively designed work station. The Court held that the plaintiff's expert on ergonomics would not be permitted to testify at trial. The expert would have testified that the plaintiffs suffered from repetitive motion disorders because the workstation was defectively designed, in that it could not be easily adjusted to fit the requirements of individual workers. However, the expert never met or interviewed any of the plaintiffs; he made no attempt

to exclude other potential causes of the plaintiff's injuries; and he made no attempt to do any statistical analysis of the frequency of injuries at the workplace, or to compare that frequency with injuries at adjustable workstations. Thus, the expert's methodology was inadequate under *Daubert*. The methodology consisted of only a superficial review of medical records, some measuring of the offending equipment (with uncertainty as to which stations were used by the plaintiffs), and a brief visual observation of certain workers performing the jobs in issue. The Court concluded that this methodology "is not consistent with the methodologies described by the authors and experts whom Dr. Schulze identifies as key authorities in the field."

Hedonic Damages

Insufficiently Scientific: ***Hein v. Merck & Co.,*** 868 F. Supp. 230 (M.D. Tenn. 1994): Ruling on a motion *in limine* to exclude expert testimony, the Court held that testimony as to the "hedonic damages" suffered by the plaintiff in a tort action would not be admissible. The Court reasoned as follows: 1. The theory could not be tested by any independent verification; 2. The thesis that life can be valued by what an individual would pay for the reduced probability of dying was subject to dispute in the literature; 3. The potential rate of error was great given the wide disparity of hedonic damages valuations among experts in the field; 4. The methodology is based on a faulty assumption that "people have complete freedom of choice in the decisions they make and that they perceive the risks accurately"; and 5. To the extent the conclusion is based on surveys of people to determine how much they would pay to decrease their chance of dying, it is based on unreliable hearsay.

Failure to Meet the Fit Requirement: ***Ayers v. Robinson,*** 887 F.Supp. 1049 (N.D. Ill. 1995): The Court held that expert testimony on hedonic damages--an economic attempt to place a value on human life--was inadmissible under *Daubert*. The hedonic damages theory is based on a willingness to pay model--how much would a person pay to decrease his chance of dying. But that model estimates the value of a statistical life, not necessarily the life of the decedent with all its individual circumstances. Consequently, the expert testimony failed the *Daubert* fit requirement. Also, the willingness to pay model is scientifically flawed, because it rests on assumptions that people have freedom of choice in deciding to confront risk, that people perceive risks accurately, that people never make decisions based on other considerations than a willingness to live, and that government regulation has no effect on the model. But these assumptions are not grounded in scientific knowledge or method. Therefore the testimony fails the scientific knowledge prong of *Daubert* as well.

Failure to Meet the Fit Requirement: ***Sullivan v. United Gypsum Co.***, 862 F. Supp. 317 (D. Kan. 1994): The Court granted a motion to preclude expert testimony on hedonic damages. It reasoned that the "willingness-to-pay" studies on which the expert's testimony was based had "no apparent relevance to the particular loss of enjoyment of life suffered by a plaintiff due to an injury or death." Accordingly, the testimony failed the *Daubert* "fit" requirement. The Court concluded that hedonic damages are, "by their very nature, not subject to such analytical precision."

Hypnotically Refreshed Testimony

Competency Question Does Not Implicate ***Daubert: Borawick v. Shay***, 68 F.3d 597 (2d Cir. 1995): In a case alleging sexual abuse and based heavily on the plaintiff's repressed memories, the Trial Judge granted the defendant's motion *in limine* to exclude the plaintiff's testimony. The Judge reasoned that the testimony was "hypnotically refreshed" and consequently would not be admissible under *Daubert* unless the hypnotist was qualified and certain procedural safeguards were met. Here, the plaintiff's hypnotist had no college or graduate degree, had worked with faith healers and as a hypnotist on the theatrical stage, and had failed to preserve a record of the plaintiff's hypnosis session. The Court of Appeals affirmed the Trial Court's exclusion of the testimony and grant of summary judgment, but used a somewhat different analysis. The Court of Appeals found that *Daubert* was not directly applicable since there was no testimony from any expert witness that was being challenged. Rather, the question was whether the plaintiff was a competent witness after having had her memory refreshed by hypnosis. Applying a totality of the circumstances test under Rule 403, the Court agreed with the Trial Court that exclusion was appropriate due to the unqualified expert and the failure to preserve the hypnosis session.

Identification Evidence

Failure to Explicate Methodology: ***United States v. Brien***, 59 F.3d 274 (1st Cir. 1995): The Court declined to adopt a per se rule either admitting or excluding expert testimony concerning the unreliability of identification evidence. It found no abuse of discretion, however, in the trial court's exclusion of the defense expert in this case. The expert's proffered testimony was very general, and did not fit with many of the circumstances underlying the identifications in this case. Nor did the expert explicate the methodology by which he concluded that the identifications were unreliable. The Court concluded:

> If presented with a fair sample of the underlying data, the district court might have decided (as the trial judge here offered to consider) that some of the warnings were best reflected in instructions; that other portions of the proposed testimony were reliable and helpful; and that still other portions failed one or both of these criteria or met them but were outweighed by confusion or misleading character. *Daubert*, as well as common prudence, entitled the judge to require such underlying information, and the failure to provide it supplies an adequate basis of the trial court's decision to reject that proffer.

Daubert* Factors Not Met: *United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995): Affirming a conviction for bank robbery, the Court found no abuse of discretion in the exclusion of the testimony of two forensic anthropologists who would have testified that the person depicted on surveillance photographs was not the defendant. The Court held that the testimony was not scientifically valid because the methodology had not been tested, there was no peer review, the potential rate of error was high due to differing camera angles, and there was no general acceptance of the methodology used by the experts. Moreover, the testimony was not helpful because the "the comparison of photographs is something that can sufficiently be done by the jury without help from an expert," and it was impermissible to introduce expert testimony simply to cast doubt on the credibility of identification witnesses.

Testimony Not Helpful Under *Daubert: United States v. Smith,* 122 F.3d 1355 (5th Cir. 1997): In a bank robbery case, the Court held that testimony from the defendant's expert concerning the unreliability of identification procedures was properly excluded. The Circuit's prior case law excluding this testimony was not put in question by *Daubert*. Under *Daubert*, expert testimony must assist the jury to be admissible. Expert testimony concerning the unreliability of identification procedures does not assist the jury; it is not needed, "because the jury [can] determine the reliability of identification with the tools of cross-examination."

Subjective Methodology: ***United States v. Jones***, 24 F.3d 1177 (9th Cir. 1994): Affirming a narcotics conviction, the Court found no abuse of discretion when the Trial Court refused to allow a defense witness to testify as an expert in voice identification. While the Trial Court prohibited the testimony under the then-applicable *Frye* test, the same result was appropriate under *Daubert*. The witness' methodology for voice comparison "involved an aural, subjective" comparison between the defendant's recorded voice and the voice on tape recordings derived from government surveillance. The witness did not employ a voice spectrograph, had done no research to verify his theory, and had not subjected it to peer review or publication. No other expert used this subjective technique. The *Jones* Court concluded: "[E]ven under *Daubert*, Jones failed to establish the scientific validity of his proffered expert's voice identification technique."

Individualized Enquiry Mandated: ***United States v. Rincon***, 28 F.3d 921 (9th Cir. 1994): In a bank robbery trial, the Trial Court excluded, under *Frye*, expert testimony proffered by the defendant on the unreliability of identification evidence. Ultimately, the Supreme Court remanded for reconsideration in light of *Daubert*. Applying *Daubert* on remand, the District Court again excluded the testimony, and the Court of Appeals affirmed. The Court held that the defendant had failed to prove that the testimony was on a scientific subject, because the defendant had not proffered any research or studies which supported the expert's conclusions. The Court also found that the District Court had not erred in excluding the testimony under Rule 403 as unduly confusing. The Court noted that the jury was instructed about the perils of identification evidence in much the same terms as the proffered expert testimony. The Court then added a cautionary note:

> Notwithstanding our conclusion, we emphasize that the result we reach in this case is based upon an individualized inquiry, rather than strict application of the past rule concerning expert testimony on the reliability of eyewitness identification. Our conclusion does not preclude the admission of such testimony when the proffering party satisfies the standard established in *Daubert* by showing the expert opinion is based upon "scientific knowledge" which is both reliable and helpful to the jury in any given case. District courts must strike the appropriate balance between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible approach outlined in *Daubert*.

Expert Testimony Could Be Admissible, But No Abuse of Discretion to Exclude In This Case: ***United States v. Smith,*** 156 F.3d 1046 (10th Cir. 1998): Appealing theft and related convictions, the defendant argued that his expert on identification practices was erroneously excluded. The expert would have testified about the circumstances that give rise to erroneous identifications, such as stress, lighting, and the fact that post-event information may affect the accuracy of memory. The Court held that after *Daubert* expert testimony on the unreliability of identification evidence could not be excluded automatically. In this case, however, there was no per se exclusion; the Trial Court, after conducting a *Daubert* hearing, excluded the expert on the ground that his testimony touched on "matters of common knowledge." This was not an abuse of discretion, especially since there were five eyewitness identifications, not one.

Police Practices

Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994): In a case brought against the city for the use of excessive force by one of its police officers, the plaintiff called an expert to testify that the particular act of excessive force was caused by the police department's failure to previously discipline other officers who had committed similar acts. The Court held that the admission of this testimony was reversible error. It stated that the *Daubert* principles applied to all

expert testimony, not just scientific testimony, and that in this case the expert's conclusion was unreliable within the meaning of *Daubert*. The expert's theory--that police excessiveness can be caused by failure to discipline other officers--had not been tested, published or peer reviewed. There was no indication that other experts ascribed to this discipline theory. Finally, the expert misinterpreted data which he claimed showed a rise of unjustified shooting incidents on the Detroit police force.

Polygraphs

Per se Exclusion Does Not Violate Accused's Constitutional Right to an Effective Defense: ***United States v. Scheffer,*** 118 S.Ct. 1261 (1998): In a military prosecution, the Court upheld Military Rule of Evidence 707 against a constitutional attack. Military Rule 707 is a per se rule excluding polygraph evidence. The Court rejected the argument that this per se rule violated the defendant's constitutional right to an effective defense when it operated to exclude the defendant's exculpatory polygraph test results. The Court noted that the right to an effective defense is tempered by the government's right to exclude unreliable evidence from a criminal trial, and that "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." The Court found that Rule 707 was "a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." The Court also declared that the right to an effective defense is only implicated when the government "significantly undermine[s] fundamental elements of the accused's defense." Such is not the case with polygraph evidence. In this case, the trier of fact "heard all the relevant details of the charged offense from the perspective of the accused, and the Rule did not preclude him from introducing any factual evidence. Rather, respondent was barred merely from introducing expert opinion testimony to bolster his own credibility." The decision was on constitutional grounds and the Court did not consider whether and under what conditions polygraph evidence might be admissible under the Federal Rules of Evidence.

Ambiguous Questions: ***United States v. Kwong,*** 69 F.3d 663 (2d Cir. 1995): Without deciding whether polygraph evidence was sufficiently reliable to be admissible under *Daubert,* the Court held that the polygraph testimony offered by the defendant in an attempted murder case was properly excluded under Rule 403. The defendant was charged with an attempt to murder a United States Attorney by sending her a booby-trapped briefcase. The Court found that the

questions posed to the defendant were inherently ambiguous no matter how they were answered. Question one asked whether Kwong conspired with anyone--but Kwong was not charged with conspiracy. Question two asked whether Kwong was the one who sent the package--but "even if Kwong honestly answered that he did not personally mail the package, this does not mean that he did not construct the booby-trap and arrange to have it mailed." Question three asked whether Kwong "knew for sure" who bought the gun in question. This phrasing rendered the negative answer "chimerical at best."

No *per se* Rule of Exclusion, But Test Results Excluded on Remand: *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995): Concluding that the Circuit's per se rule against admission of polygraph testimony could not survive *Daubert*, the Court reversed drug convictions due to the Trial Court's exclusion of defense polygraph evidence, and remanded the case for further proceedings. The Court reasoned as follows:

> There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since *Frye*. * * * Current research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time. Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. Such variation also exists in many of the disciplines and for much of the scientific evidence we find admissible under Rule 702. Further, there is good indication that polygraph technique and the requirements for professional polygraphists are becoming progressively more standardized. In addition, polygraph technique has been and continues to be subjected to extensive study and publication. Finally, polygraphy is now widely used by employers and government agencies alike.

The Court emphasized that it was not holding that polygraph examinations are scientifically valid or that they always will assist the trier of fact. In removing the per se exclusion of polygraph evidence, the Court recognized that Rule 403 might appropriately be invoked to exclude polygraph evidence in some cases.

On remand in *Posado,* the District Court held a *Daubert* hearing and found the polygraph results to be inadmissible. ***United States v. Ramirez,*** 1995 WL 918083 (S.D.Tex. 1995). The Court found that the low rate of error asserted was unreliable, because the error rate was determined in laboratory tests, in which the participants had no real stake in the outcome. It also noted that people can use countermeasures (such as self-infliction of pain) to fool the examiner, and that while these can be detected with an activity monitor, no activity monitor was used in the present case. Moreover, the results can be skewed if, as in the instant case, an interpreter is required, and the interpreter is familiar with the case. Finally, the Court noted that "polygraph theory is based on the underlying presumption, which may or may not be accurate for a given subject, that telling lies is stressful. A polygraph examination of subjects who provide false

information without fear or stress will not measure truthfulness."

Rule 403 Analysis: ***United States v. Pettigrew***, 77 F.3d 1501 (5th Cir. 1996): The Court concluded that the Trial Judge did not err in excluding polygraph evidence offered by a defendant. Two of the questions asked by the polygraph examiner were not relevant to any disputed issue and the third question was not conclusive. The Court emphasized the enhanced role that Rule 403 may play when polygraph evidence is offered, and the safeguards that might increase the potential for admissibility of polygraph evidence--e.g., affording the other side the opportunity to participate in the examination, and offering the evidence in a bench rather than jury proceeding.

Unilateral Testing: ***Conti v. Commissioner of Internal Revenue***, 39 F.3d 658 (6th Cir. 1994): Affirming a Tax Court finding that the taxpayers had substantially understated their income, the Court found no error in the exclusion of polygraph evidence offered by the taxpayers. The Court noted that the taxpayers had unilaterally arranged for polygraph tests after the Commissioner refused to agree to such tests. Under circuit precedent, unilaterally obtained polygraph tests are excluded under Rule 403 because the results of the tests would not be disclosed if they were unfavorable, and therefore the party offering them does not have a sufficiently "adverse interest at stake while taking the test." Given its rationale for exclusion, the *Conti* Court found it unnecessary to decide whether polygraph evidence is sufficiently reliable under *Daubert*. ***See also United States v. Sherlin***, 67 F.3d 1208 (6th Cir. 1995)(relying on Rule 403 and finding that the results of a polygraph examination were properly excluded where the defendant took the test without an agreement in advance that the results would be admissible no matter what); ***Barker v. Jackson National Life Insurance Co.,*** 896 F.Supp. 1159 (N.D.Fla. 1995) (results of unilateral polygraph tests are inadmissible).

Unreliable Application of the Probable Lie Control Question Technique: ***United States v. Taylor,*** 154 F.3d 675 (7th Cir. 1998): The defendant appealed from convictions for narcotics and firearms offenses, challenging the Trial Court's refusal to admit polygraph testimony of the defendant's girlfriend. The Court affirmed, finding no error in the Trial Court's reliance on *Daubert* to exclude the polygraph testimony. While polygraph testing can be reliable when the expert employs the probable lie control question technique, the expert's application of that technique was not reliable in this case. The expert used "stock" questions rather than questions tailored to the circumstances of the case. The expert also used a subjective visual scoring technique in calculating the results, rather than the more reliable objective numerical scoring system. The expert also testified that he was not familiar with any social science studies of the last few years regarding the validation of polygraph technique.

Questions Peripheral to the Crime: ***United States v. Williams,*** 95 F.3d 723 (8th Cir. 1996): The Court held that the results of a polygraph test conducted on a prosecution witness were properly excluded under Rule 403. The questions asked the witness concerned only peripheral details of the crime; the defendants rejected the government's proposal to conduct a new test that would go to the "heart of the matter." The Court concluded as follows:

> Introducing evidence that Campbell failed a polygraph examination on questions relating to the murder without permitting the jury to know whether he could have passed a test asking far more relevant questions would be unfair and misleading. It is, of course, relevant that Campbell was found to be dishonest, no matter what the questions were. Still, in light of the potential for misleading the jury, the court did not abused its discretion in ruling that evidence of the first test alone would be more prejudicial than probative.

Excluded Under Rule 403: ***United States v. Call,*** 129 F.3d 1402 (10th Cir. 1997): In a drug case, the central question was whether the defendant knew that drugs were hidden in his car. The defendant proffered expert testimony regarding the results of his polygraph test, but the trial court excluded the evidence. The Court found that after *Daubert*, the Circuit's rule of *per se* inadmissibility of unilaterally taken polygraph tests was no longer tenable. However, this did not suggest "a newfound enthusiasm for polygraph evidence." The Court found it unnecessary to determine whether the defendant satisfied the *Daubert* standards, choosing instead to uphold the Trial Judge's decision to exclude the evidence under Rule 403. The Court noted that the evidence was proffered to bolster the defendant's credibility, and that expert testimony in support of a witness's credibility "is often excluded because it usurps a critical function of the jury." It also noted "the danger that the jury may overvalue polygraph results as an indicator of truthfulness because of the polygraph's scientific nature."

Hybrid Questioning Technique Not Reliable: ***United States v. Gilliard,*** 133 F.3d 809 (11th Cir. 1998): The Court found no abuse of discretion in the Trial Court's exclusion of the defendant's exculpatory polygraph results, where the parties did not stipulate in advance that the tests would be admissible. The polygraph examiner used the process known as hybrid control questioning, a combination of probable lie control questioning and directed lie control questioning. This combination has not been generally accepted as a reliable methodology, however, and the government presented evidence that the methodology could lead to a significant rate of false negatives. Therefore, the polygraph evidence was properly excluded under *Daubert.* Moreover, the polygraph evidence was properly excluded under Rule 403, for the following reasons: 1. Admission of the evidence "likely would have diverted the jury's attention from the real issue in the case, that of guilt or innocence, to the issue of the validity of polygraph evidence in general and the validity of the hybrid technique in particular"; 2. The polygraph answers did not cover all counts in the indictment, creating the risk that the jury would acquit on the counts not

covered without looking at the evidence specifically addressing those counts; and 3. The unilateral nature of the polygraph "hindered the Government's ability to cross examine Gilliard's experts and to have its own experts conduct an independent review" of the test results.

Testimony of Psychophysiologist Required: ***Jesionowski v. Beck,*** 995 F.Supp. 149 (D.Mass. 1997): The Magistrate Judge ruled that polygraph evidence would be excluded in the absence of specific testimony by a psychophysiologist "as to the reasons why the measurable physiological reactions are reliable indicators of whether the examinee is being truthful." Reliance on court opinions finding polygraph evidence to be reliable was an insufficient predicate to admissibility. Likewise, testimony by a certified polygrapher would not establish admissibility.

Excluded Under Rule 403: ***United States v. Lech,*** 895 F.Supp. 582 (S.D.N.Y. 1995): In a bribery and conspiracy case, the defendant sought to introduce his responses to certain questions on a polygraph examination. The defendant was asked whether he tried to bribe or take part in bribing anyone, and he answered no. The Court, while questioning the reliability of polygraph results, found it unnecessary to decide the *Daubert* issue, because the answers to the general questions were substantially more prejudicial than probative. It reasoned as follows:

> Each of the questions Lech seeks to introduce call for his belief about the legal implications of his actions, without setting forth the factual circumstances underlying such a conclusion. In other words, the jury would receive evidence showing Lech's personal belief that he did not violate any federal criminal statute, but would not receive any information that would assist its inquiry to find the facts.

The Court noted that the case might be different where a defendant completely denies any connection or involvement with the charged conduct. Under those circumstances, "the factual predicates for the polygraph examiner's conclusions are relatively simple, and thus may be less likely to confuse the jury."

Nothing Changed by ***Daubert: United States v. Black,*** 831 F.Supp. 120 (E.D.N.Y. 1993): The Court held that nothing in *Daubert* required a change in the Circuit's long-standing rule that polygraph evidence is inadmissible. Polygraphs are excluded because they are unreliable, and *Daubert* supports the view that unreliable evidence is inadmissible.

Subjective Enquiry: ***Meyers v. Arcudi,*** 947 F.Supp. 581 (D.Conn. 1996): The Court excluded the results of a unilateral polygraph. The Court engaged in an extensive analysis of many of the reasons why polygraphs are unreliable under *Daubert*. Among others: there is still dispute

in the relevant field as to whether polygraph results are reliable; the risk of error is significant; and the control questions, which are needed to compare to the relevant questions, vary from subject to subject and examiner to examiner.

Subjective Analysis and Unacceptable Rate of Error: *United States v. Dominguez*, 902 F.Supp. 737 (S.D.Tex. 1995): The Court refused to admit an exculpatory polygraph offered by the defendant. The Court, after holding a *Daubert* hearing, found as follows: polygraph tests enjoy only a 70 to 90 percent rate of accuracy; that people of different cultures have different value systems, and thus respond to the questions differently; test results are measured against the subjective values of the test examiner; the test is begun by telling the suspect an untruth, and the procedure involved varies from examiner to examiner.

The Court concluded that the following requirements were relevant to determining whether a polygraph test was admissible:

> 1. All parties should be present to observe the proceedings; 2. The parties should agree in advance to allow the admission of the results by either side; 3. The subject should agree to be examined by any polygraphic expert designated by the other side; 4. When more than one exam is contemplated, the choice of the first examiner should take place by chance; 5. All parties should be present at the pre-test interview; 6. All parties should be present at the post-test interview; 7. Immediately prior to the test, the subject should be tested for drug use; 8. The parties should waive the rules limiting the admissibility of character evidence; 9. No questions should be permitted as to the mental state of a defendant at the time of the alleged commission of the event; and 10. The subject should make himself available for cross-examination at trial.

Since none of these factors were met in the instant case, the Court refused to admit the results of the polygraph test.

Insufficient Specific Showing of Reliability: *Miller v. Heaven,* 922 F.Supp. 495 (D.Kan.1996): In an excessive force case, the Court excluded evidence that the plaintiff passed her polygraph test and the defendant failed his. The Court concluded that the polygraph examiner, "although able to discuss the reliability of polygraph examinations in general terms, was unable to articulate with sufficient precision the reasons for its reliability and the manner with which the polygraph examinations such as those he performed on Miller and Officer Heaven have been proven reliable."

Product Warnings

Insufficient Basis From Which To Conclude That Warnings Were Inadequate: ***Robertson v. Norton Co.,*** 148 F.3d 905 (8th Cir. 1998): The plaintiff was injured when he was operating a sander/grinder on a concrete bridge and a grinder wheel exploded. At trial he called a ceramics expert, who testified not only that the grinding wheel was defectively manufactured, but also that the defendant's product warnings were "completely inadequate." The Court found reversible error in admitting the testimony as to the product warnings. Among other things, the testimony was not supported by the kind of scientific theory, practical knowledge and experience, or empirical research and testing that is required by *Daubert.* The expert did not consider whether the defendant "could feasibly provide a description of 'improper use' that would accurately and effectively encompass all the machines in which its grinding wheels might be used." Nor had the expert considered whether effective warnings might have been given in the end-user products in which grinder wheels are used. Because the testimony was inadequately grounded, it was inadmissible under *Daubert.*

Psychiatric Testimony

Speculation as to Past Mental State: ***Goomar v. Centennial Life Ins. Co.,*** 855 F. Supp. 319 (S.D. Cal. 1994): In an action to recover from disability insurers for psychiatric disability, the plaintiff proffered two psychiatrists who testified that he suffered from a psychotic condition from 1980-84 (the relevant time period). These experts did not see the plaintiff until 1992 and 1993 respectively, but claimed that they could opine as to the plaintiff's previous condition based upon his self-report to them. The Court held that this testimony was speculative and unscientific and excluded it under *Daubert.* It stated: "Retrospective expert testimony regarding the existence or onset of a mental illness is inadmissible speculation." Since there was no competent medical evidence that the plaintiff suffered from a psychiatric disability during the relevant time period, the District Court granted the defendants' motion for summary judgment.

Surveys

Unreliable Methodology: ***Arche, Inc. v. Azaleia, U.S.A., Inc.,*** 882 F. Supp. 334 (S.D.N.Y. 1995): In a trade dress infringement action involving shoe styles, the results of a survey intended to show the likelihood of consumer confusion were excluded as unreliable. The survey

was unscientific because it was conducted by a single interviewer, wearing the defendant's shoes, who stood in a park within blocks of one of the plaintiff's stores and asked well-dressed passers-by whether they had an opinion as to the brand of the shoes. The interviewer often departed from her prepared script, and interviewed only 46 people. The survey was unreliable because, among other things, it drew from an unrepresentative universe of likely consumers; since the plaintiff's shoes sold for more than the defendant's, the plaintiff's choice of wealthy respondents was self-selected to reach a predetermined result. This was especially so since the survey was conducted near one of the plaintiff's stores. The plaintiff was allowed to introduce the testimony of some of the individual survey respondents, however.

V. "SOFT" SCIENCE, SOCIAL SCIENCES--EVIDENCE ADMISSIBLE

Accident Reconstructions

Cautionary Approach: Robinson v. Missouri Pacific R.Co., 16 F.3d 1083 (10th Cir. 1994): Affirming an award for fatal injuries arising from a collision at a railroad crossing, the Court held that a videotaped simulation of the accident, prepared by the plaintiff's expert, was properly admitted to illustrate the expert's opinion. However, the Court expressed caution about such evidence in light of *Daubert*:

> Here, the physical phenomena of crash movements may be explained on scientific principles but an argument can be made that it is outside scientific knowledge to opine in a crash such as this one that a car struck at an angle will necessarily leave the railroad tracks on impact.
>
> Concerning future similar issues under Rule 702, we suggest that as "gatekeeper" the district court carefully and meticulously make an early pretrial evaluation of issues of admissibility, particularly of scientific expert opinions and films or animations illustrative of such opinions. Recent amendments to the federal discovery rules will permit an early and full evaluation of these evidentiary problems.

Economists

Standard Economics Methodology: ***Khan v. State Oil Co.,*** 93 F.3d 1358 (7th Cir. 1996): The plaintiff leased a gas station and alleged that the defendant engaged in maximum price-fixing, thereby damaging the plaintiff's ability to make a profit. In order to prove damages resulting from the maximum price-fixing, the plaintiff presented expert testimony from an economist, who concluded that the plaintiff could have made a profit if the retail price of the gas and the plaintiff's profit margin had not been capped by the defendant. The economist based this conclusion on the operation of the gas station by a receiver after the plaintiff failed. The receiver's records showed a profit margin greater than that permitted the plaintiff by the defendant, from which the economist concluded that the receiver charged more for gas than was permitted under the plaintiff's contract. The Court held that this testimony was improperly excluded. It was possible that the plaintiff may not have been able, due to differing market conditions, to charge more for gas than the retail price set forth in the contract, in which case there would have been an antitrust violation but no injury. "But this is just to say that the evidence presented by the expert

was not conclusive on the subject of injury." The Court elaborated as follows:

> The only ground on which it could be argued to be inadmissible would be that the expert, although a Ph.D in economics from a reputable university and an experienced consultant in antitrust economics, * * * had failed to conduct a study that satisfied professional norms. As we have emphasized in cases involving scientific testimony--and the principle applies to the social sciences with the same force that it does to the natural sciences--a scientist, however reputable, is not permitted to offer evidence that he has not generated by the methods he would use in his normal academic or professional work, which is to say in work undertaken without reference to or expectation of possible use in litigation. The district judge identified no basis, and State Oil can point to none, for supposing that the expert's report flunked this test. The inference regarding the receiver's profit margin, drawn from the station's cost and revenue data, was straightforward, and, so far as appears, was made in just the way that an economist interested in a firm's profit margins for reasons unrelated to litigation would make it; and likewise the inference that if Khan had enjoyed the freedom that the receiver evidently thought *he* had he would have charged a higher price, and made more money, than he did. If anything, the economist was overqualified to give evidence that could as easily have been given by an accountant; but over-qualification is not yet a recognized basis for disqualification.

Testimony Not Based on Rampant Speculation: ***Boyar v. Korean Air Lines,*** 954 F.Supp. 4 (D.D.C. 1996): Testimony from an economist on the decedent's future earnings was held admissible. The expert's factual assumptions were not speculative as a matter of law. While all predictions of future earnings are to some extent speculative, the expert's testimony in this case was not impermissibly so. He reasonably assumed that the decedent's business would have expanded, given the expansion the two years before the decedent's death, and given the decedent's own statements of intent. Unlike other cases in which an economist's testimony has been excluded as speculative, the expert in this case did not assume a complete break from the decedent's previous work history, and did not assume facts that were completely contradicted by the record.

Permissible Extrapolation: ***Newport Limited v. Sears, Roebuck and Co.,*** **1995 WL 328158 (E.D.La. 1995):** An economist was permitted to testify to the amount of lost profits suffered by the plaintiff as a result of a breach of a real estate contract. The economist used a multiple regression analysis, which is "an appropriate methodology to determine the absorption rate of land because it is a viable method to attain simultaneous control of variables and give each characteristic the weight it deserves." While this methodology may never have been used in the context of industrial park real estate, such as at issue in this case, there is no indication that the methodology should be differently applied in this instance. The expert's use of national statistics of industrial park absorption did not render his opinion unreliable--the validity of his choice of comparables was a question of weight. While some of the expert's underlying assumptions were

not sufficiently established at the *Daubert* hearing, the Court did not find this problematic: "the Court believes that Newport could not be expected to demonstrate the true viability of these assumptions in the context of a *Daubert* hearing; indeed, the matter of damages would have then been tried twice. Instead, the Court will require that Newport satisfy the Court of a significant number of these factors prior to Dr. Conte taking the stand."

Ergonomics

"Fit" Close Enough: ***Vice v. Northern Telecom, Inc.***, 1996 WL 200281 (E.D.La. 1996): The plaintiff alleged that she suffered repetitive strain injury (RSI) as a result of operating a defectively designed computer keyboard. The defendant challenged the testimony of two experts under *Daubert*, but the Court found that the testimony of both experts was sufficiently reliable. The first expert, a professor of clinical medicine, testified to the connection between RSI and the use of computer keyboards. While the expert did not rely on epidemiological studies, the Court rejected the proposition that "expert testimony is rendered unreliable merely because it does not rely on such data, particularly where, as here, the party seeking to exclude the testimony has offered no epidemiological data repudiating the existence of an exposure-response relationship." The Court noted that the expert's conclusion was properly based on a substantial body of scientific literature demonstrating a positive temporal relationship between the number of hours spent typing at a keyboard and the incidence of RSI symptoms. Although these studies contained weaknesses--including the existence of confounding factors such as the failure to adjust for different height and weight of persons, and different working conditions--the differences were not "so grievous as to render the testimony inadmissible."

The second expert, an ergonomist, reached a cause/effect conclusion by considering the studies of factory workers that have demonstrated a correlation between the forcefulness and repetitiveness of manual work and RSI, and applying this learning to other tasks such as keyboard operation. "While the fit might be less than perfect, this does not render the methodology wholly unreliable, particularly in light of the growing number of peer reviewed studies and papers on the subject."

Human Factors Experts

Flexible Approach Required: ***Surace v. Caterpillar, Inc.,*** 1995 U.S. Dist. Lexis 6683 (E.D.Pa. 1995), *affirmed in pertinent part,* 111 F.3d 1039 (3d Cir. 1997): The plaintiff was struck by a pavement profiler that was being operated in reverse with its back-up alarms sounding. The plaintiff, a worker, was wearing earplugs as protection against the noise of the machinery, and did not move out of the machinery's path. The plaintiff's witness, an expert in human factors, testified at the *Daubert* hearing as to the inadequacy of the alarm on the profiler in light of human behavioral patterns, including a phenomenon known as "habituation" i.e., that workers would become accustomed to the alarm sound and would not respond to it. The Court found that the expert's opinion was based on "good grounds" and was sufficiently reliable under *Daubert.* The expert began his analysis with a review of pertinent literature on human factors and auditory warning devices, then proceeded to review material specific to the pavement profiler. He also reviewed measurements of decibel levels of the machine and the effect of the earplugs worn by the plaintiff. Combining this background with his knowledge and experience, the expert evaluated whether the alarm, under usual operating conditions, would be subject to habituation, and determined that it was. He then considered various devices that would address the deficiencies he found with the current alarm system. The Court concluded as follows:

> Dr. Lambert thus approached this issue in a methodical, reasoned manner, and his result is therefore reliable. * * * Given his experience and knowledge, he is qualified to analyze the alarm sound and to determine, under ordinary operating conditions, whether that sound would be subject to habituation. No peer review or testing is necessary in order to form an opinion based on the relevant facts and his knowledge.
>
> With respect to Dr. Lambert's opining as to the type of alarms that would counteract the deficiencies he found, his opinion is also on solid footing. He analyzed the deficiencies of the current alarm system based on his experience; having done so, he is also qualified to determine what alarms possess the characteristics that would not present similar defects. Given the nature of his opinion, he need not develop prototypes or submit his opinion as to this particular piece of machinery to peer review in order to validate his conclusions.

The *Surace* Court noted that with experts in soft sciences such as human factors, the *Daubert* analysis requires some modification, because such experts do not employ "the objectively quantifiable data that lend itself to the methodical and quantifiable [*Daubert*] factors."

Polygraphs

No per se* Rule of Exclusion: *United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997): The Court revisited the Circuit's rule that unstipulated polygraph evidence is *per se* inadmissible. The Court held that under the "flexible inquiry" mandated by the Supreme Court's decision in *Daubert,* such a *per se* rule of exclusion is no longer tenable. The Court reasoned further that while *Daubert* did not deal directly with Rule 403, a *per se* rule of inadmissibility under Rule 403 would be as inconsistent with *Daubert* as it would under Rule 702. The Court remanded for a determination of whether the defendant's exculpatory polygraph examination was sufficiently reliable under *Daubert.* It emphasized that its opinion was not to be taken as an indication of enthusiasm for unstipulated polygraph evidence, but rather was simply a recognition that a *per se* rule of exclusion is inconsistent with *Daubert.*

Test Results Sufficiently Reliable: *Ulmer v. State Farm Fire and Casualty Co.,* 897 F.Supp. 299 (W.D.La. 1995): In a civil case to collect on fire insurance, an exculpatory polygraph test of plaintiff-insureds satisfied *Daubert.* The Court declaraed that polygraph theory has been tested and peer reviewed, and a 10-30% error rate is not an unreasonable potential rate of error. Most importantly, the instant test was administered by a licensed polygraphist at the request of a law enforcement official, presumably with interests adverse to the insureds.

Exculpatory Polygraph Results Reliable: *United States v. Crumby,* 895 F.Supp. 1354 (D.Ariz. 1995): The Court held that exculpatory polygraph results are sufficiently reliable to be admissible under *Daubert.* It concluded that polygraph research had been peer reviewed, and was conducted outside the realm of litigation. It stated that "the science of polygraphy has been subjected to vigorous scientific testimony and the assumptions underpinning the science have been deeply analyzed by those in the field of polygraphy and psychophysiology." The Court ruled that polygraph evidence could only be admissible for the limited purpose of rebutting an attack on the subject's credibility; the parties would not be allowed to bring in the specific questions used or the specific answers.

Test Results Sufficiently Reliable: *United States v. Galbreth,* 908 F.Supp. 877 (D.N.Mex. 1995): The Court held that the defendant could present testimony that he passed a lie detector test, where the relevant questions were whether the defendant knowingly failed to report

certain items of income on his tax return. The Court held that under *Daubert,* the proponent of the expert testimony must show not only that the scientific technique is reliable, but also that the specific application of the technique was reliably conducted. As to the general question of reliability of polygraph tests, the Court relied on laboratory studies (known as "mock crime" studies) which indicate an error rate of false positives at 5%, and an error rate of false negatives at 10%. It also relied on field studies in which "ground truth" was assessed on the basis of the defendant having confessed after failing a polygraph test. The Court noted that the "numerical" method of evaluating polygraph results "helps to ensure a rigorous, semi-objective evaluation of the physiological information contained in the charts, thereby guarding against examiner bias."

The Court stated that for the results of polygraph tests to be admissible, it is critical that the test be conducted by a competent examiner, since it is the examiner "who determines the suitability of the subject for testing, formulates proper test questions, establishes the necessary rapport with the subject, stimulates the subject to react, and interprets the charts." It also noted that it was critical for the session to be taped, in order to allay the otherwise legitimate concern that the polygraph examiner might "manipulate the subject and the examination in such a way as to produce a desired result." On the question of properly conducting the test, the Court concluded as follows:

> It is clear from the studies and even proponents of the polygraph technique readily concede that the polygraph technique produces reliable results only where certain conditions exist, such as administration of the test by a well trained, experienced and competent examiner, the utilization of the control question technique and the utilization of a quantitative scoring system.

The Court noted the legitimate concern of "habituation" if more than one test is conducted, but noted that this concern was not applicable in this case. The Court rejected the argument that drug use can act as a countermeasure against a polygraph examination. It reasoned that "the control question technique requires differential reactivity between the control and the relevant questions and there is simply no drug that can selectively reduce the reaction to relevant questions while leaving the control questions unaffected." The Court also rejected the argument that polygraph tests are unreliable where the subject knows that negative test results would remain undisclosed. This argument was found flawed on a theoretical basis because "in order for it to work, the subject would still have to react to the control questions. If the subject is not worried or concerned about the outcome of the test, then the subject would not react anymore to the control questions that to the relevant questions."

The Court recognized that countermeasures (such as biting the tongue unobtrusively while answering control questions) can be used to defeat polygraph tests. However, "because an individual must receive highly specialized, hands-on training in order to successfully engage in countermeasures, the possibility that a subject will succeed is very slight." The Court considered this problem to go to weight rather than admissibility.

Test Results Admissible If Credibility Attacked: ***United States v. Padilla,*** 908 F.Supp. 923 (S.D.Fla. 1995): The Court held that the defendant's polygraph results would be admissible to bolster her credibility if she were to take the stand and testify that her confession was coerced, and if the government then attacked her credibility. The Court found that a sufficient showing of reliability was made, and held that the use of a translator from the Public Defenders Office presented a question of weight rather than admissibility.

Psychologists and Psychiatrists

Daubert **Applicable, Testimony Helpful**: ***United States v. Hall,*** 93 F.3d 1337 (7th Cir. 1996): The Court vacated a kidnapping conviction because the defendant had not been permitted to introduce testimony from a psychologist and a psychiatrist that would have shown his susceptibility to giving a false confession. The Trial Judge erred in failing to apply the *Daubert* framework. The first question that a Trial Judge should address in ruling on the admissibility of expert testimony is whether the proffer demonstrates that a sufficiently reliable body of specialized knowledge exists. the Court recognized that "because the fields of psychology and psychiatry deal with human behavior and mental disorders, it may be more difficult at times to distinguish between testimony that reflects genuine expertise--a reliable body of specialized knowledge--and something that is nothing more than fancy phrases for common sense." In the instant case, the prosecution did not challenge the scientific basis for the proffered testimony, so the Court assumed it was valid. The Court concluded that "it was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will case individuals to make false confessions that the testimony would have assisted the jury in making its decision."

Per se Exclusion of Psychological Expert Testimony Was Abuse of Discretion: ***Jenson v. Eveleth Taconite Co.,*** 130 F.3d 1287 (8th Cir. 1997): In the damages phase of a Title VII action arising from sexual harassment in the workplace, the Special Master relied on *Daubert* to exclude all of the plaintiffs' testimony from psychological experts. The Special Master reasoned that the experts had not "advanced a validated theory which furnishes a scientific basis for distinguishing between the causal effect of multiple psychological stresses or trauma, or for assigning relative impact or degree of impact to different trauma or stresses." The Court, finding the per se exclusion to be error, held that it did not have to decide whether the *Daubert* standards applied to the soft sciences, since even if they did, the plaintiffs' experts had satisfied *Daubert.* The testimony of the expert psychologists was "thorough and meticulously presented" and the experts' methodology "was laid out clearly by each witness." The Court, in remanding for reconsideration of damages, emphasized "the probative value of expert psychological proof regarding causation of the claimant's depression and emotional distress."

Daubert* Inapplicable To Sex Abuse Syndrome Testimony: *United States v. Bighead, 128 F.3d 1329 (9th Cir. 1997): In a child sex abuse prosecution, the government was permitted to call a director of forensic services at a children's advocacy center as an expert witness. The expert testified about general characteristics of child sex abuse victims, specifically the timing and their recollection of details. The defendant argued that this testimony did not satisfy *Daubert* because it lacked foundation, was untested, and had not been peer reviewed. But the Court held that "Daubert's tests for the admissibility of expert scientific testimony do not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory." Because the expert's opinion was based upon "many years experience interviewing many, many persons, interviewed because they were purported victims of child abuse," the testimony was properly admitted. The dissenting judge noted that the 9th Circuit has not been consistent in its holdings on the applicability of *Daubert* to non-scientific testimony, and that at any rate the expert's testimony should have been scrutinized under *Daubert* because the expert "was offering testimony based on what is purportedly a novel scientific technique", i.e., child sex abuse syndrome.

Repressed Memory

Permissive View: *Isely v. Capuchin Province,* 877 F.Supp. 1055 (E.D.Mich. 1995): In a pretrial ruling, the Court held that the plaintiff's expert would be permitted to testify about the plaintiff's repressed memory of acts of sexual abuse in his childhood. The Court noted that repressed memory was the subject of a good deal of psychological literature and that a fair number of clinicians in the field have accepted repressed memories as being reliable accounts of the past. The Court concluded as follows:

> In this case, Dr. Hartman knowledgeably testified about several studies which have validated the theory of repressed memory. Whether other experts agree with the theory or not, because there is no absolute empirical way to prove that (1) an event happened and/or (2) that the memory of it was repressed, it will be up to the jury to determine the probative value of Dr. Hartman's opinion. In the Court's view, there is a sufficient scientific basis of support for the theory in Dr. Hartman's field of expertise, through the studies and writings, to permit the issue to go to the jury.

The Court emphasized, however, that the expert would not be permitted to give her opinion that the plaintiff was telling the truth about the alleged instances of child sexual abuse, since that would "invade the province of the jury by vouching for the credibility of Isely and would, in any event, be unhelpful to the jury since everything she knows about the alleged events is hearsay from Mr. Isely."

Note: It is notable that the *Isely* Court assumed that the expert testimony should go to the

jury so long as it satisfied the standards of Rule 104(b)--in this instance, that the proponent established that a reasonable juror could find the expert testimony to be reliable. This is why the Court was rather permissive in assessing the reliability of the proffered testimony on repressed memories. In fact, however, after *Daubert*, the admissibility of expert testimony is governed by Rule 104(a). The proponent must prove to the judge that the expert testimony is reliable by a preponderance of the evidence. Applying the more permissive standard of Rule 104(b) is inconsistent with the "gatekeeper" role that the Court established for trial judges in *Daubert*.

Sociology

Daubert* Framework Applies: *Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996): The plaintiffs appealed a judgment rendered for the defendants in a suit alleging that advertising for a rental building targeted only whites, in violation of the Fair Housing Act. The plaintiffs proffered two social science experts at trial. One would have testified to how an all-white advertising campaign affects African-Americans. The other would have described the history of racial discrimination in the local market. The Trial Court, without conducting a *Daubert* analysis, excluded both experts on the ground that their testimony was too general to be helpful. The Court found that the Trial Court erred in failing to scrutinize the expert's testimony under the *Daubert* "framework", and reversed the judgment. The Court declared that the central teaching of *Daubert*--that expert testimony "must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work"--was fully applicable to the testimony of experts in the social sciences. The Court noted the following caveat:

> It is true, of course, that the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, we agree * * * that genuine expertise may be based on experience or training. In all cases, however, the district court must ensure that it is dealing with an expert, not just a hired gun.

The Court found that the Trial Court erred in excluding the expert who would testify about the effect of the advertisements. Such testimony "would have given the jury a view of the evidence well beyond their everyday experience"; moreover, the expert's research was based on peer-reviewed articles, and his "focus group" method was a well-accepted methodology in the field of social science. As to the expert who would testify to the history of local discrimination, the Court recognized that the Trial Court had the discretion to exclude the testimony under Rule 403. However, the Trial Court's failure to use the *Daubert* framework put the Court at a "significant disadvantage" in determining whether error occurred. Therefore, the proper course was to leave the matter open for another proffer by the expert at the retrial.

Surveys

Accepted Principles Establish Reliability: ***Southland Sod Farms v. Stover Seed Co.,*** 108 F.3d 1134 (9th Cir. 1997): Reversing a grant of summary judgment for the defendant in a suit brought under the Lanham Act, the Court found that survey evidence proffered by the plaintiff's expert was improperly excluded. The defendant contended that the survey was unreliable because it was improperly confined to a certain geographical area, and the people conducting the survey used leading questions. The Court, however, concluded that the survey was conducted pursuant to well-accepted principles, including the use of closed-ended rotating questions. The Court declared: "[A]s long as they are conducted according to accepted principles, survey evidence should ordinarily be found sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able to determine whether asserted technical deficiencies undermine a survey's probative value."

VI. NON-SCIENTIFIC TESTIMONY (INCLUDING TESTIMONY ON TECHNICAL SUBJECTS)--INADMISSIBLE

Accountants

Failure to Consider Obvious Factors: ***Frymire-Brinati v. KPMG Peat Marwick***, 2 F.3d 183 (7th Cir. 1993): In an action for securities fraud, plaintiff's expert, an accountant, was allowed to testify that a Peat Marwick audit had overvalued certain property interests. To reach this conclusion, the accountant used a discounted cash flow analysis, by which he assessed property value solely on the basis of net, rather than potential, cash flow. Reversing a judgment for the plaintiff, the Court held that the Trial Court abused its discretion in admitting the expert's valuation, because the expert's methodology was faulty: the expert failed to consider potential cash flow, and his methodology would lead to the conclusion that "raw land is worthless and that a large office building in the final stages of construction also has no value even though it is fully leased out and could be sold for a hundred million dollars." As such, the expert's testimony lacked validity within the meaning of *Daubert*.

Banking Practices

Legal Analysis in the Guise of Banking Expertise: ***Minasian v. Standard Chartered Bank,*** 109 F.3d 1212 (7th Cir. 1997): Plaintiffs claimed that they were defrauded by a bank. They bought a business which had a line of credit with the bank, and claimed that the bank fraudulently asserted that it would continue the line of credit unabated. The bank eventually financed a loan with the plaintiffs, but on different terms and in a lesser amount than that allegedly agreed to previously. The plaintiffs defaulted on the loan. To defeat summary judgment, the plaintiffs proffered an affidavit of an expert on banking practices. The Court found that the affidavit was properly rejected, as it "did little beyond demonstrating how vital it is that judges not be deceived by the assertions of experts who offer credentials rather than analysis." The Court provided a further critique of the expert's affidavit:

> Schroeder's affidavit exemplifies everything that is bad about expert witnesses in litigation. It is full of vigorous assertion (much of it legal analysis in the guise of banking expertise), carefully tailored to support plaintiffs' position but devoid of analysis. Schroeder must have allowed the lawyers to write an affidavit in his name. He does not identify and test

any hypothesis; he does not identify hypotheses considered and rejected; indeed, he does not suggest any way in which his views may be falsified. For example, Schroeder declared that it was not "commercially reasonable" for the Bank to declare Par-Inco in default, just because it gave away collateral, failed to deposit proceeds into a cash collateral account, neglected to inform the Bank of the status of the collateral, and refused to allow inspections of its books. This assertion (a) is unreasoned; (b) is economically ludicrous (a secured creditor is vitally interested in the status and disposition of the collateral); [and] (c) ignores the contract between Par-Inco and the Bank, which made violation of the commitments concerning collateral good reasons to accelerate payment and did not require that the defaults be material * * *. Schroeder asserts that banks just don't accelerate the principal indebtedness because of shortcomings of the kind Par-Inco displayed. Apparently we are supposed to take this on faith, because Schroeder did not gather any data on the subject, survey the published literature, or do any of the other things that a genuine expert does before forming an opinion. An expert is entitled to offer a view on the ultimate issue, see Fed. R. Evid. 704(a), but an expert's report that does nothing to substantiate this opinion is worthless, and therefore inadmissible.

Design Engineering

Engineering Testimony Concerning Faulty Automobile Design Held Inadmissible: ***Bogosian v. Mercedes-Benz of North America, Inc.,*** 104 F.3d 472 (1st Cir. 1997): The plaintiff was run over by her car after putting it in park and exiting the vehicle. She sought to have an engineer testify about the phenomenon of "false park detent"--where the car feels as if it is in park but is not. The Court held that this testimony was properly excluded under *Daubert*. The Court found it unnecessary to determine whether the evidence was "scientific" or "technical"--"even if *Daubert's* specific discussion of the admissibility of scientific principles did not strictly apply to Davidson's testimony, the admissibility of the testimony was still controlled by the requirement of factual relevance and foundational reliability." The expert's testimony was unreliable in this case because he rested on a factual premise--that the plaintiff did not look at the console shift before turning off the car--that was at odds with the plaintiff's own testimony: "The district court appropriately found it very odd that Bogosian would present an expert witness who would testify that her own unwavering testimony was incorrect."

Daubert **Applicable, Engineer's Conclusions Unreliable:** ***Watkins v. Telsmith, Inc.,*** 121 F.3d 984 (5th Cir. 1997): A wire rope supporting a conveyor snapped and the conveyor fell on and killed the decedent. Plaintiff's engineering expert, who would have testified that the design of the conveyor was defective and alternative designs were reasonable, was excluded under

Daubert. The Court found no error and affirmed the grant of summary judgment in favor of the defendant. The Court rejected the position of the Tenth Circuit (see *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (5th Cir. 1996)), that *Daubert* is inapplicable to expert testimony based on technical experience. The Court recognized that "[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience." However, the Trial Court is still obligated under Rule 702 to determine whether expert testimony is reliable. Therefore, "[w]hether the expert would opine on economic evaluation, advertising psychology, or engineering," the Court must determine under *Daubert* "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 Court noted that the *Compton* view leads to the anomalous proposition "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. The moral of this approach would be, the less factual support for an expert's opinion, the better. *Compton's* view of the admissibility of expert testimony is untenable."

Turning to the testimony of the plaintiff's engineering expert, the Court found that it was not reliable under *Daubert*. The expert had not tested any of his expressed alternatives; his stated experience with conveyors was vague; and the expert "did not even make any drawings of perform any calculations that would allow a trier of fact to infer that his theory that the conveyor design was defective and that alternative designs would have prevented the accident without sacrificing utility were supported by valid engineering principles."

Lack of Testing: ***Smelser v. Norfolk Southern Ry. Co.,*** 105 F.3d 299 (6th Cir. 1997): The Court reversed a judgment for an employee in an FELA case, finding that testimony from a biomechanical engineer did not satisfy *Daubert*. The expert testified that a shoulder belt, not a lap belt, failed in an accident in which the plaintiff was rear-ended. He further testified that the defective shoulder belt was the cause of the plaintiff's neck injury. The Court concluded that neither of these opinions were sufficiently reliable to withstand a *Daubert* enquiry. The main problem with the conclusion as to the shoulder belt was lack of sufficient testing. The Court stated:

> *Daubert* teaches that expert opinion testimony qualifies as scientific knowledge under Rule 702 only if it is derived by the scientific method and is capable of validation. Huston's opinion that the shoulder belt, but not the lap belt, failed in the August 29, 1989 accident cannot be based on "good science" when he (1) failed to perform any tests on the lap belt yet concluded it was in proper working condition; (2) conducted no testing to verify his conclusion the shoulder belt was damaged in the June 1989 accident; (3) failed to adequately document testing conditions and the rate of error so the test could be repeated and its results verified and critiqued; and (4) failed to discover, use or at least consider the degree the restraint system was actually mounted at in the subject vehicle and explain whether that information would affect his pendulum test for compliance with the federal

> safety standard. Smelser failed to establish that any of Huston's seat belt tests were based on scientifically valid principles, were repeatable, had been the subject of peer review or publication or were generally accepted methods for testing seat belts in the field of biomechanics. Accordingly, Huston's opinion testimony that the pick-up truck's shoulder belt, but not the lap belt, was defective should have been excluded.

As to the opinion on causation, the Court held that the testimony was improperly admitted because it was beyond the biomechanical engineer's field of expertise to determine that an injury was caused by a defective shoulder belt. Moreover, the testimony was unreliable because the expert failed to take account of the plaintiff's pertinent medical history.

Lack of Testing: ***Cummins v. Lyle Industries,*** 93 F.3d 362 (7th Cir. 1996): Affirming a judgment for the defendant in a product liability case, the Court held that the testimony of the plaintiff's design engineer, to the effect that the defendant should have used a different design to make its product safer, was properly excluded under *Daubert*. The Court held that the *Daubert* analysis was fully applicable to testimony which "involves the application of science to a concrete and practical problem." It concluded that the expert's testimony was unscientific, because the expert had never tested his proposed alternative design. The Court noted that a number of factors must go into the conclusion that an alternative design should have been employed:

> These include, but are not limited to, the degree to which the alternative design is compatible with existing systems and circuits; the relative efficiency of the two designs; the short- and long-term maintenance costs associated with the alternative design; the ability of the purchaser to service and to maintain the alternative design; the relative cost of installing the two designs; and the effect, if any, that the alternative design would have on the price of the machine. Many of these considerations are product-and-manufacturer-specific, and most cannot be determined reliably without testing.

See also ***Ancho v. Pentek Corp.,*** 157 F.3d 512 (7th Cir. 1998): Mechanical engineer's testimony that cardboard factory should have been completely redesigned to make it safer was properly excluded under *Daubert*; the expert had never inspected the current conditions, and had no experience in the implementation of his alternative design.

Subjective Observation: ***Deimer v. Cincinnati Sub-Zero Products, Inc.***, 58 F.3d 341 (7th Cir. 1995): The plaintiff was injured when some mobile medical equipment fell on her. The Trial Court excluded the plaintiff's expert, who would have testified about the equipment's faulty design. The Court held that this testimony was properly excluded under *Daubert*. The expert gave an opinion without foundation; he had no basis upon which to conclude that the accident happened in any particular way; rather, the conclusion was simply a subjective observation. Moreover, the testimony failed the "fit" requirement because the witness did not have the requisite

experience to assess the equipment's suitability for use where the accident occurred.

Unsupported Conclusion: ***Navarro v. Fuji Heavy Industries, Ltd.***, 117 F.3d 1027 (7th Cir. 1997): Affirming the grant of summary judgment in favor of the defendant in a personal injury case, the Court held that the Trial Court properly excluded an expert's affidavit under *Daubert.* The expert asserted that the defendant, a car manufacturer should have known about the risk of internal rusting, but the expert had not conducted a study of the matter and was thus his assertions were "nakedly conclusional". The Court rejected the plaintiff's argument that the gaps in the expert's testimony would have been filled in if the defendant, before moving for summary judgment, had deposed the expert. The Court declared that "there is no duty to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit. An expert's affidavit must be sufficiently complete to satisfy the *Daubert* decision, and one of those criteria * * * is that the expert show how his conclusion * * * is grounded in--follows from--an expert study of the problem."

Insufficient Testing: ***Pestel v. Vermeer Manufacturing Co.***, 64 F.3d 382 (8th Cir. 1995): The plaintiff was injured when he slipped on the ground while operating a stump cutter and his foot went into the cutter wheel. The plaintiff's expert designed a guard for the stump cutter. While he was working on the design, the expert did not look at any other manufacturer's stump cutters. The expert had never used a stump cutter, and he did not consult with anyone to determine how his design would work in the field. The defendant then manufactured a guard according to the expert's design; videotaped demonstration indicated that the guard rendered the stump cutter difficult to operate in several recurring situations. The expert admitted that the design needed some modification. The Court held that the expert's testimony, that the stump cutter should have been designed with a guard, was properly excluded under *Daubert.* The expert's design had not been sufficiently tested, and there was no general acceptance of the premise that guards were necessary for stump cutters.

Insufficient Testing: ***Peitzmeier v. Hennessy Indus., Inc.,*** 97 F.3d 293 (8th Cir. 1996): The Court affirmed a summary judgment for the manufacturer of a tire changer sued by a mechanic who was injured while using the changer when a tire exploded. It held that an engineering expert's testimony was properly excluded where the expert had not designed or tested any of the proposed safety devices he claimed were missing from the tire changer, and the expert had never designed or tested a platform for a tire changer. The Court also rejected the argument that review of an expert's methodology by other courts could constitute "peer review" within the meaning of *Daubert.* **See also** ***Dancy v. Hyster Co.,*** 127 F.3d 649 (8th Cir. 1997) (mechanical

engineer's testimony that a fork lift was defectively designed was properly excluded under *Daubert;* the expert's theory as to the safety of an alternative design could be, but had not been, tested). In both *Peitzmeier* and *Dancy,* the Court declared that *Daubert* applies to expert testimony even where that testimony does not rely on scientific principles or methods.

Testimony Subjective and Not Helpful: ***Diviero v. Uniroyal Goodrich Tire Co.,*** 114 F.3d 851 (9th Cir. 1997): The district court granted summary judgment in a personal injury case alleging that an accident was caused by a defectively designed tire. The Court affirmed and held that the testimony of the plaintiff's expert was properly excluded. The expert concluded that an adhesion defect caused the steel belts of the tire to separate. But the Court found the testimony "unsubstantiated and subjective" and therefore inadmissible. The expert could not dismiss other possible causes, he knew nothing about adhesion failures generally, and he could not explain the reasoning behind his opinion. The Court concluded that it did not have to decide whether *Daubert* applied to the expert's testimony, "because we find that his testimony does not meet Rule 702's reliability standard."

Relevance of Testing in Design Cases: ***Tassin v. Sears Roebuck,*** 946 F.Supp. 1241 (M.D.La. 1996): The plaintiff was injured while operating a power saw, and proffered an engineer who concluded that alternative designs were safer, and that the defendant failed to provide adequate warnings. The Court provides an excellent survey of the post-*Daubert* cases dealing with design engineers. On the relevance of the *Daubert* analysis, the Court declared as follows:

> [T]his Court does not believe that the *Daubert* factors are irrelevant to a case involving alternative product designs. If an engineering expert can demonstrate that his proposed design has been tested, peer reviewed, or is generally accepted, so much the better. On the other hand, this does not mean that engineering testimony on alternative designs should be excluded automatically if it cannot withstand a strict analysis under *Daubert.* * * * It may well be that an engineer is able to demonstrate the reliability of an alternative design without conducting scientific tests, for example, if he can point to another type of investigation or analysis that substantiates his conclusions. For example, an expert might rely upon a review of experimental, statistical, or other technical industry data, or on relevant safety studies, products, surveys, or applicable industry standards. He could also combine any one or more of these methods with his own evaluation and inspection of the product based on experience and training in working with the type of product at issue. The expert's opinion must, however, rest on more than speculation, he must use the types of information, analyses and methods relied on by experts in his field, and the information that he gathers and the methodology that he uses must reasonably support his conclusions. If the expert's opinions are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches, then rigid compliance with *Daubert* is not necessary.

Applying these standards to the facts, the Court excluded the expert's testimony on certain alternative designs based on parts that he had never tested or even seen, and the safety of which was not supported by the tests of others nor by any relevant literature. However, the Court held testimony as to another alternative design admissible, where the expert had actually conducted some testing, and where the safety of the product received support from the relevant literature. The expert could have tested more systematically or extensively, but this presented a question of weight. Finally, the Court held the expert's conclusion as to inadequate warnings to be admissible. The alternative warnings suggested by the expert had not been scientifically tested. But the Court found that testing as to warnings (as opposed to testing alternative designs) was not critical where the expert had substantial experience in both product design and in preparing product manuals and warnings.

Untested, Subjective Hypothesis: *Brown v. Miska*, 1995 WL 723156 (S.D.Tex. 1995): The plaintiff's seatback collapsed when she was rear-ended by another car, and she claimed that the design of the seat was defective. The Court granted summary judgment for the car manufacturer, because the plaintiff's expert testimony as to defective design did not satisfy *Daubert,* which the Court found fully applicable to expert testimony of engineers:

> As presented to the court, Plaintiff's expert's opinions and methodology are untested and inherently untestable. Indeed, Cox's deposition does not reflect the application of any particular methodology. Rather, Cox only testifies about (1) his understanding of the events surrounding Plaintiff's collision, which he has developed third-hand through Plaintiff's counsel, (2) the nature of his "expert" credentials, and (3) his subjective opinion that an ultimate fact for trial -- "product defect" -- is supported by his examination of a model Mitsubishi seat and Plaintiff's counsel's version of the events. At no time has Cox ever explained the chain of reasoning that, in his mind at least, links the underlying facts to his ultimate conclusion.
>
> Without any account of Cox's intermediate reasoning of methodology, the validity of that reasoning cannot be tested. If a methodology cannot be falsified, refuted, or tested by any objective means, then it is incapable of meeting the "validity" criterion of *Daubert* because it can never be subjected to the scrutiny that any "valid" methodology must survive. Were his opinion admitted, Plaintiff's expert would bring to the jury no more than her lawyer can offer in argument.

Electrical Engineers

Failure to Follow Standard Protocol: *American and Foreign Insurance Co. v. General Electric Co.*, 45 F.3d 135 (6th Cir. 1995): In an action arising from a fire in a school

building, the Trial Judge excluded testimony from the plaintiff's expert, an electrical engineer, that the fire was caused by a defectively designed and manufactured circuit breaker. While the Trial Judge's ruling was rendered before *Daubert*, the Court held that the Judge's reasoning was equally sound after *Daubert*. The expert's testimony had been properly excluded because: 1. His theories about circuit breakers were not accepted by experts in the field; 2. He did not follow standard protocol when conducting his tests on the circuit breaker in question; 3. The raw data of the expert's test was not preserved; and 4. His instruments were not calibrated.

Lay Witnesses

Daubert* Applies to Lay Witnesses Who Testify on Technical Subjects: *Asplundh Manufacturing Division v. Benton Harbor Engineering, 57 F.3d 1190 (3rd Cir. 1995). In a trial for contribution among defendants arising out of an injury to a worker when an aerial lift collapsed, the insurance company seeking contribution called the maintenance supervisor. The witness had maintenance responsibility for the aerial lift, and had investigated it after the accident. He opined that the collapse of the lift was caused by metal fatigue and that the rod manufactured by the defendant was designed improperly. The Trial Court permitted this testimony under Rule 701. The Court of Appeals found this to be reversible error. While Rule 701 has been read to permit technical testimony from lay witnesses, the Court declared that the "spirit" of *Daubert* "counsels trial judges to carefully exercise a screening function with respect to Rule 701 opinion testimony when the lay opinion offered closely resembles expert testimony." The Court set forth the following test for assessing technical testimony from a lay witness:

> In determining whether a lay witness has sufficient special knowledge or experience to ensure that the lay opinion is rationally derived from the witness's observation and helpful to the jury, the trial court should focus on the substance of the witness's background and its germaneness to the issue at hand. Though particular educational training is of course not necessary, the court should require the proponent of the testimony to show some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion regarding the disputed factual issues in the case.

The Court held that the insurance company had failed to establish that the maintenance supervisor had a sufficient background of specialized knowledge to rationally conclude that the collapse of the aerial lift had been caused by metal fatigue. **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, expert qualification was required where the agents testified on the basis of extensive experience that the defendant was using code

words to refer to drug quantities and prices).

Doctor Testifying as a "Fact" Witness Is Not Regulated by *Daubert: Binakonsky v. Ford Motor Co.,* 133 F.3d 281 (4th Cir. 1998): In a crashworthiness case, the plaintiff alleged that the decedent died as a result of fire exploding from the gas tank. Reversing a grant of summary judgment for the defendant, the Court held that triable issues of fact existed as to the cause of the decedent's death. The doctor who conducted the autopsy testified that the cause of death was thermal injury to the larynx from breathing superheated air. The defendant argued that this was a "foundationless and preposterous opinion" that was inadmissible under *Daubert.* But the Court held that *Daubert* was inapplicable "because it pertains to the scientific validity of an expert's methodology." In this case, the doctor was "a fact witness", because the plaintiff neither engaged her as an expert nor paid her to testify. Moreover, her autopsy report was completed well before the litigation was commenced. The Court held that the defendant could not, under *Daubert,* challenge "the factual observations that she drew from her examination" of the decedent's body.

With all due respect, the Court's distinction between fact and opinion is the very analysis rejected by the Federal Rules. Clearly, a doctor cannot evade the strictures of *Daubert* by simply stating that they are testifying to "fact" rather than opinion. If what the Court meant was that the doctor was testifying as a lay witness under Rule 701, it clearly erred. A lay witness would not be permitted to testify that the cause of death was thermal injury to the larynx from breathing superheated air. The doctor was clearly an expert witness, who should have been governed by the *Daubert* standards.

Legal Questions

Safety Standards: *Bammerlin v. Navistar Intern. Transp. Corp.*, 30 F.3d 898 (7th Cir. 1994): The plaintiff was injured in a truck accident and claimed that his injuries were caused by a defective seatbelt which did not comply with Federal Motor Vehicle Safety Standards. The Court found that the Trial Court committed reversible error in permitting two of the plaintiff's experts to testify that the seat belt did not comply with two specific safety standards, because the experts were unfamiliar with the legal interpretation of the safety standards and their test protocols did not conform to those used by the National Highway Transportation Safety Administration. The Court concluded that under *Daubert,* the Trial Judge erred when he "conceived of this as a problem of credibility." The Court elaborated further:

> All questions of testing method to one side, however, the initial step here was one of legal interpretation. What do the safety standards mean? The district judge should have resolved that question and provided the jury with the proper answer, so that experts for each side could address their testimony to the governing standards. By treating the meaning of the rules as if it were an issue of fact, and the

reliability of the tests as if it were an issue of credibility, the district judge left the jury adrift * * *.

Legal Conclusions: ***Pries v. Honda Motor Co., Ltd.***, 31 F.3d 543 (7th Cir. 1994): Citing *Daubert*, the Court held that the testimony of the plaintiff's expert in a product liability case was properly rejected and summary judgment for the defendant was properly granted, because the testimony was "not scientific." The expert testified that the plaintiff's seatbelt latch was defective because it was possible for objects to strike and open it during an accident. But the Court found that this testimony was based on a misunderstanding of the word "defect." The question is not whether it is possible for something bad to happen during an accident, but whether the device is unreasonably dangerous. See also ***Berry v. City of Detroit***, 25 F.3d 1342 (6th Cir. 1994) (expert should not have been permitted to testify that the city was recklessly indifferent to the rights of citizens, as that is a legal conclusion).

Mechanical Engineers

Unsupported Conclusions: ***McMahon v. Bunn-O-Matic Corp.,*** 150 F.3d 651 (7th Cir. 1998): The plaintiff received third-degree burns when coffee prepared in a coffee maker manufactured by the defendant was placed in a styrofoam cup, and the cup collapsed. In response to a motion for summary judgment, the plaintiff submitted an affidavit from a mechanical engineer which stated in its entirety that "at the temperatures at which this coffee was brewed and maintained the structural integrity of the cup into which the coffee was poured would be compromised making it more flexible and likely to give way or collapse when its rigid lid is removed." The Court affirmed the Magistrate Judge's grant of summary judgment for the defendant, holding that the expert's affidavit was properly excluded under *Daubert*. The expert provided no reasoning, explanation, or empirical support, only a bare conclusion. The Court declared as follows:

> No engineer would put such an unsupported assertion in a scholarly article. Diller [the expert] would not accept it in a submission to the Journal of Biomechanical Engineering, which he edits; we doubt that he would accept it from a student in a term paper. Why, then, should courts pay it any heed? * * * Naked opinions cannot stave off summary judgment.

Personal Conduct

Failure to Meet the "Fit" Requirement: ***United States v. Lilly***, 37 F.3d 1222 (7th Cir. 1994): In a prosecution of a Reverend and his wife for income tax evasion, the defendant-wife sought to call an expert witness to testify about the general duties of Baptist ministers' wives. The Court held that the testimony was properly excluded for lack of "fit", because the witness' expertise "on the general duties of ministers' wives, without specific reference to whether those duties would render a minister's wife incapable of willingly evading tax, could not have aided a jury in determining the issue of Mrs. Lilly's intent."

VII. NON-SCIENTIFIC TESTIMONY (INCLUDING TESTIMONY ON TECHNICAL SUBJECTS)--ADMISSIBLE

Accountants

Standard Accounting Methodology: ***Tamarin v. Adam Caterers, Inc.***, 13 F.3d 51 (2d Cir. 1993): In a dispute concerning delinquent contributions to employees pursuant to a collective bargaining agreement, the Court held that summary judgment was properly granted against the employer. The employer argued that the payroll review prepared by the union accountant was inadmissible under *Daubert*, but the Court found that *Daubert* was inapposite because that case dealt only with scientific evidence. In this case, the expert evaluated payroll records, which are "straightforward lists of names and hours worked."

Expert Takes Into Account All Pertinent Cost Factors: ***City of Tuscaloosa v. Harcross Chemicals, Inc.***, 158 F.3d 548 (11th Cir. 1998): Alabama municipalities brought an antitrust action against five chemical companies alleging that the defendants engaged in a conspiracy to fix prices for repackaged chlorine. The Court held that the Trial Court abused its discretion in excluding testimony of an accountant proffered by the plaintiffs. The accountant properly calculated, compiled, and explained the costs borne and profits obtained by the defendants during the period of the alleged conspiracy; this information would assist the trier of fact to determine whether the defendants acted in a consciously parallel fashion. The accountant properly considered all pertinent costs, including material costs, labor costs, and insurance costs. While the accountant was not qualified to render opinions based on economic theory, the witness never did so in this case.

Automotive Engineers

Daubert **Found Inapplicable:** ***Compton v. Subaru of America, Inc.***, 82 F.3d 1513 (10th Cir. 1996): The Court affirmed a judgment finding an automobile manufacturer and its distributor liable for more than 50% of a passenger's injuries in a roll-over accident. The Court, reviewing the applicability of *Daubert* under a de novo standard, rejected the defendants' argument that the Trial Judge failed to exercise the gatekeeper role imposed by *Daubert*, and held that *Daubert* was inapplicable to the testimony of the plaintiff's engineering expert. The Court reasoned that "[t]he

language in *Daubert* makes clear the factors outlined by the [Supreme] Court are applicable only when a proffered expert relies upon some principle or methodology," and that "application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training." In the latter cases, the Court asserted that "Rule 702 merely requires the trial court to make a preliminary finding that proferred expert testimony is both relevant and reliable." The Court also observed that it did "not believe *Daubert* completely changes our traditional analysis under Rule 702." In the instant case, the plaintiff's expert relied upon general engineering principles and his 22 years of experience as an automotive engineer. The Court found that the Trial Judge erred in applying *Daubert* to the witness's testimony, but that the Trial Judge had properly admitted the testimony nonetheless. **See also *Freeman v. Case Corp.,*** 118 F.3d 1011 (4th Cir. 1997) (design engineer's testimony properly admitted: "In cases like this one, where an expert relies on his experience and training and not a particular methodology to reach his conclusion, application of the *Daubert* analysis is unwarranted."). **Compare *Taylor v. Cooper Tire & Rubber Co.,*** 130 F.3d 1395 (10th Cir. 1997) (no error in finding expert *unqualified* to testify in an exploding tire case; the witness was an expert in materials failure, and would have testified that the tire failure was a result of a manufacturing defect; the expert conducted no tests on the tire and was not an expert in tire manufacturing).

Daubert* Inapplicable to Testimony Based on Experience with Product Failure: *Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997) : In a product liability action brought against a tire manufacturer, the Trial Court applied *Daubert* and excluded the testimony of the plaintiff's tire failure expert. The Court found this to be error, reasoning that the tire failure expert did not purport to testify on the basis of a scientific methodology, but rather had based his conclusion on years of experience in analyzing failed tires. The Court held that *Daubert* was inapplicable to expert testimony grounded in non-scientific training or expertise. However, "the inapplicability of *Daubert* should not end the day regarding [the expert's] reliability" because Rule 702 requires the Trial Court to exclude any expert's testimony if it is unreliable. The Court remanded the case to permit the Trial Court to address some of the "troubling criticisms" of the expert's methodology, including the fact that the expert came to his conclusion before he had ever inspected the tire in question.

Note: The Supreme Court has granted certiorari in *Carmichael* and heard oral argument in the case on December 7, 1998.

Construction Litigation

Daubert* Inapplicable: *Iacobelli Const., Inc. v. County of Monroe, 32 F.3d 19 (2d Cir. 1994): In a case arising out of a construction contract dispute, the Court held that the Trial Court

erroneously granted summary judgment for the defendant. The Trial Court had rejected affidavits of the plaintiff's experts, a geographical consultant and an underground-construction consultant, by relying on the Court's "gatekeeping" function established by the Supreme Court in *Daubert*. The Court found that this reliance on *Daubert* was "misplaced," reasoning that the experts' affidavits "do not present the kind of 'junk science' problem that *Daubert* meant to address." Rather, the experts had relied "upon the type of methodology and data typically used and accepted in construction-litigation cases."

Contractual Damages

Use of Comparables: *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir.1995): The Court affirmed a judgment on a quantum meruit claim brought by a professional wrestler who contended that he was entitled to some of the profits from sales of videotapes on which he served as a commentator. The defendant argued that the plaintiff's expert on damages should have been excluded under *Daubert*, because he relied upon royalty percentages owed to the plaintiff that had no basis in fact. But the Court held that the expert's methodology in arriving at the royalty percentages was reliable. The expert based his opinion upon a survey of thousands of licensing agreements in the field of entertainment and sports, and it is "common practice to prove the value of an article (e.g., a videotape license) by introducing transactions involving substantially similar articles (i.e., other licenses)." The Court stated that, "[a]lthough no individual arrangement examined by [the expert] was 'on all fours' with the predicted Ventura-Titan license, in the aggregate, the licenses provided sufficient information to allow [the expert] to predict a royalty range for a wrestling license."

Design Engineering

Daubert* Requires Objector to Provide More Than Conclusory Statement That Expert Employed an Unprofessional Methodology: *DePaepe v. General Motors Corp., 141 F.3d 715 (7th Cir. 1998): In a product liability case, the plaintiff's engineering expert testified that the sun visor on a car was defective because it did not comply with federal regulations. Reversing on other grounds, the Court found that the defendant's *Daubert* attack on this testimony was properly rejected. The defendant "lampooned" the tests used by the plaintiff's expert, but failed to indicate how the methodology employed by the expert was any different from that generally employed by other professionals in the field. The Court stated that a party objecting to expert testimony under *Daubert* "has to do more than appeal to a lawyer's sense of how science should

be done."

The Court did, however, find that the Trial Judge erred in allowing the plaintiff's expert to testify in at least one respect. The expert stated that the defendant had changed the design of its sun visors "to save money." The Trial Court permitted this testimony, stating that "as an expert, he can speculate." The Court responded that "the whole point of *Daubert* is that experts can't 'speculate.' They need adequately sound bases for their opinion." Since the plaintiff's expert knew nothing about how or why the defendant reached its conclusion to change the sun visors, he could not testify as the defendant's motive.

***Daubert* Inapplicable to Expert Testimony Based on Experience Rather Than Methodology:*McKendall v. Crown Control Corp.*,** 122 F.3d 803 (9th Cir. 1997): The plaintiff was injured on the job while operating a stock picker. The Trial Court granted an in limine motion to exclude the plaintiff's expert, who would have testified that the stock picker was designed in such a way as to be unsafe, and that safer alternative designs were available. The basis for the expert's opinion was 30 years of experience in dealing with this machinery. The Trial Court reasoned that the testimony failed the *Daubert* test because it was not based on sound scientific principles. The Trial Court was especially concerned that the expert had not tested the alternative design he proposed. The Court of Appeals declared that the Trial Court erred "in applying the *Daubert* factors, which are relevant only to testimony bearing on scientific knowledge." Because the expert's testimony was "based on his engineering experience and his having investigated hundreds of fork lift cases over the past thirty years", it was admissible.

While stating that *Daubert* is inapplicable to testimony based on experience rather than a scientific methodology, the Court emphasized that it was referring to *Daubert* in a "narrow sense." It stated that "if one views *Daubert* in a broader context, the *Daubert* Court is giving strong advice to district courts: in ruling on admissibility, trials judges are the gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony. In that sense, *Daubert* applies to all expert testimony."

Emphasis on General Acceptance: *Officer v. Teledyne Republic/Sprague*, 870 F. Supp. 408 (D.Mass. 1994): The Court denied summary judgment in a product liability case, and held that the opinion of the plaintiff's expert, a design engineer, created a triable issue of fact. The defendant relied on *Daubert* and argued that the expert's opinion was unbolstered by field tests or other empirical data. But the Court stated: "While *Daubert*'s principles have valuable application in determining the admissibility of controversial and novel scientific hypotheses, they have less use in fields like design engineering where 'general acceptance' is the norm, not the exception."

Emphasis on Traditional Expertise: ***Lappe v. American Honda Motor Co., Inc.***, 857 F. Supp. 222 (N.D.N.Y. 1994): In a suit arising from a car accident in which the plaintiff alleged that the vehicle was defectively designed, the Court denied the defendant's motion for summary judgment and held that the testimony of the plaintiff's engineering expert (to the effect that the vehicle's roof and foot pedals were defectively designed) was admissible. The Court rejected the defendant's contention that the expert's testimony was not scientifically valid under *Daubert*:

> The application of *Daubert* to the testimony in the present action, however, would require an expansion of the Supreme Court's language beyond its obvious scope and meaning. *Daubert's* narrow focus is on the admissibility of "novel scientific evidence" under Fed.R.Evid. 702. * * * *Daubert* only prescribes judicial intervention for expert testimony approaching the outer boundaries of traditional scientific and technological knowledge.
>
> The participation of plaintiff's expert is not based on novel scientific evidence or testimony. In this action, he will participate as an engineer and convey opinions relating to the happening of an automotive accident. * * * [H]is opinions are based on facts, an investigation, and traditional/mechanical expertise. More important, the expert's opinions are supported by rational explanations which reasonable men might accept, and none of his methods strike the court as novel or extreme.

More Flexible Approach Required: ***Surace v. Caterpillar, Inc.,*** 1995 U.S. Dist. Lexis 6683 (E.D.Pa. 1995), *affirmed in pertinent part,* 111 F.3d 1039 (3d Cir. 1997): The Court rejected the defendant's motion *in limine* to exclude testimony from the plaintiff's expert, in a case where the plaintiff was struck by a pavement profiler that was being operated in reverse with its back-up alarms sounding. The plaintiff, a worker, was wearing earplugs as protection against the noise of the machinery, and did not move out of the machinery's path. The plaintiff's witness, an expert in mechanical and safety design, testified at the *Daubert* hearing that the single auditory alarm was insufficient in light of the noise involved in operating the machinery. The expert based his opinion on his own experience, review of literature and industry safety standards, information about the accident, and tests conducted on the pavement profiler. The Court found the expert's opinion to be sufficiently probative and reliable under *Daubert*. The Court stated that the *Daubert* factors needed a more flexible application in engineering and similar areas of expertise. It reasoned as follows:

> In *Daubert* * * *, objective, quantifiable tests and reproducible results which could be analyzed and which were achieved through standard methods were involved. In the situation at bar that is not the case. There is no real "scientific methodology" at issue. A flaw in the applied methodology of producing a scientific opinion such as that in *Daubert* * * * would adulterate the analysis and render the opinion substantially or totally flawed. Given that the opinion would inexorably

and scientifically link the injury to the defendant's action or inaction, the resultant prejudice would be overwhelming. In contrast, Mr. Stephens has opined on the existence and benefits of alternate devices and that CMI's failure to include alternate devices was a cause, not the definitive cause, of the accident.

Electrical Engineers

Engineer's Methodology Established as Properly Grounded in Established Principles of Electrical Engineering: ***Maryland Cas. Co. v. Therm-O-Disc., Inc.,*** 137 F.3d 780 (4th Cir. 1998): In a subrogation action arising from a fire, the Court found no error in the Trial Court's admission of testimony of the plaintiff's engineering expert, who concluded that the fire was caused by a malfunction in a thermostat manufactured by the defendant. The Court rejected the defendant's argument that the factors listed in *Daubert* (peer review, rate of error, etc.) must always be considered by the Trial Court in exercising its gatekeeping function: "Beyond establishing the two criteria of reliability and helpfulness, the Court has left the means by which these criteria are evaluated to the sound discretion of the district judge." In this case, there was no abuse of discretion. The witness was an electrical engineer with extensive experience, who through his testimony "established that his opinion was based on his examination of the conditions inside the disputed switch and the application of principles of electrical engineering to those conditions." He also cited numerous works of technical literature in support of his methodology.

Theory as to Causation: ***Kieffer v. Weston Land, Inc.,*** 90 F.3d 1496 (10th Cir. 1996): The plaintiff alleged that he received an electrical shock from a Pepsi machine, that resulted in a burn and a broken shoulder. The Pepsi machine was removed from the site, and the plug removed, so it could not be tested by the plaintiff. The plaintiff's expert electrical engineer testified that if the wrong type of plug had been attached to the machine, it could have produced a shock sufficient to cause the plaintiff's injuries. The defendant objected that the expert's testimony was based on speculation, but the Court found the testimony properly admitted under *Daubert*. The expert did not testify that the soda machine actually caused the injuries, but merely theorized circumstances under which the machine could have created an electical shock sufficient to cause the injuries. The Court also noted that any lack of factual basis in the expert's opinion was attributable to the defendant's own failure to preserve the evidence.

Handwriting Identification

Emphasis on Experience Rather than Experimentation: *United States v. Jones,* 107 F.3d 1147 (6th Cir. 1997): The Court affirmed convictions for credit card fraud that were based in large part on expert testimony identifying the handwriting on certain documents as the defendant's. The Court refused to evaluate handwriting analysis as scientific evidence, noting that handwriting examiners "do not concentrate on proposing and refining theoretical explanations about the world" and do not rely on experimentation and falsification, the way scientists do. Rather, handwriting analysts are governed by the "technical or other specialized knowledge" prong of Rule 702. The Court declared that "*Daubert* does not create a new framework" for analyzing technical or other specialized expert testimony. If the *Daubert* framework were extended without modification outside the realm of scientific testimony, "many types of relevant and reliable expert testimony--that derived substantially from practical experience--would be excluded." Without relying on *Daubert,* the Court concluded that handwriting analysis is a field of non-scientific expertise within the meaning of Rule 702. The Court found no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail to the jury.

Daubert* Inapplicable, But Reliability Still Required: *United States v. Starzecpyzel, 880 F.Supp. 1027 (S.D.N.Y. 1995): The defendants were charged with conspiring to steal artwork and jewelry, by delivering stolen items to auction houses and authorizing their sale by way of forged documentation. They moved *in limine* to exclude expert testimony that certain signatures were forged. The prosecution expert was a forensic document examiner. The Court concluded that forensic document examination (FDE) could not satisfy the *Daubert* reliability standard, because the process relied on subjective factors and the expert's practical experience, rather than upon any scientific method. Yet the Court held the testimony admissible anyway, reasoning that *Daubert* is not applicable to FDE testimony. The Court stated that *Daubert* merely established reliability standards "for expert testimony in fields whose scientific character is undisputed." It reasoned that many of the *Daubert* factors, "such as peer review and publication, are irrelevant for many categories of expert testimony." The Court declared that *Daubert* does not impose any new standard for the admissibility of the testimony of non-scientific witnesses.

The Court, however, rejected the notion that non-scientific testimony from a qualified expert is automatically admissible. It noted that a trial court must still scrutinize the reliability of the expert's opinion. As applied to FDE testimony, which was largely based on practical experience in comparing handwriting samples to detect forgery, the Court found a sufficient indication that the expert relied on enough points of comparison to reach his conclusion.

While permitting the FDE expert to testify, the Court held that under Rule 403, the jury must be instructed that the FDE witness was offering practical rather than scientific expertise.

Moreover, the FDE expert could not be permitted to testify as to his certainty on the basis of a nine-level scale of probability that is employed by FDE experts. Such probabilistic assertions would give the expert's testimony a scientific aura that was unjustified in light of the practical, subjective methodology employed by the expert. Finally, the Court permitted testimony only as to forgery detection, not as to forger identification (the more difficult task of identifying who committed a known forgery), since there was no showing made that the technique of forger identification was sufficiently reliable under Rule 702.

Law Enforcement Agents

Scrutiny Under *Daubert: United States v. Daccarett,* 6 F.3d 37 (2d Cir. 1993): The Court cited *Daubert* as signalling the Supreme Court's willingness to permit more active supervision by the trial court over expert testimony. It opined that active supervision was especially necessary as to law enforcement agents testifying as experts in civil forfeiture cases, given the "heavy burden placed on claimants" in such cases. See also ***United States v. Johnson***, 28 F.3d 1487 (8th Cir. 1994) (citing *Daubert* and finding no error in permitting an unindicted co-conspirator to testify as an expert on drug trafficking).

Testimony on Check-kiting Satisfies *Daubert:* *United States v. Yoon,* 128 F.3d 515 (7th Cir. 1997): The Court held that testimony from a law enforcement agent concerning a check-kiting scheme was properly admitted under *Daubert.* The agent testified on the basis of extensive experience, describing how check-kiting schemes operate. He explained that his methodology of analyzing check-kiting schemes involved examining bank records, including checks, deposit slips and bank statements, and then entering that information into a computer program called Check Kite Analysis System, which the FBI developed to analyze data in suspected check-kiting cases. The agent explained how and why he reached the opinion that check-kiting occurred in this case. The Court concluded that "the procedure here was a perfectly acceptable way to present evidence as to a complicated series of illegal financial transactions."

Daubert* Analysis Inapplicable: *United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997): In the course of remanding a drug conviction on other grounds, the Court found no error in the admission of a law enforcement agent's expert testimony that sophisticated narcotics traffickers do not entrust 300 kilograms of cocaine to someone who does not know what he is transporting. The Court found the testimony helpful to explain the modus operandi of drug dealers, in a complex criminal case. The Court rejected the defendant's argument that the expert testimony was inadmissible under *Daubert.* It concluded that "*Daubert* applies only to the admisson of scientific testimony" and that the law enforcement expert "testified on the basis of specialized knowledge, not scientific knowledge."

Gatekeeper Function Applicable: *United States v. Webb,* 115 F.3d 711 (9th Cir. 1997): In a felon-gun-possession case, the Trial Court admitted testimony from a law enforcement expert on why "people" conceal who possess a gun would conceal it in the passenger compartment of a car. The defendant challenged this testimony as unreliable under *Daubert.* The three-judge panel was divided on whether *Daubert* is applicable to testimony of a law enforcement expert. Judge Trott, writing the opinion for the Court, stated that because "the expert testimony in this case constitutes specialized knowledge of law enforcement, not *scientific* knowledge, the *Daubert* standards for admission simply do not apply. Judge Jenkins, concurring in the result, stated that while the four *Daubert* factors (i.e., publication, falsifiability, etc.) might not be applicable to law enforcement experts, the *gatekeeper* function set forth in *Daubert* was fully applicable. He reasoned that Rule 702 requires that *all* experts must speak from "knowledge", and must give testimony which is helpful to the jury. Judge Jenkins explained as follows:

> In saying that "the *Daubert* standards for admission simply do not apply" to "specialized knowledge of law enforcement," we cannot be suggesting that the district court examine less rigorously the specialized knowledge underlying proffered *nonscientific* testimony, or that the district court may abdicate its role as gatekeeper where the subject matter does not depend on the scientific method. The trial court's role as gatekeeper concerning nonscientific "specialized knowledge" proves equally crucial to the integrity of the trial process, particularly where, as here, the proffered testimony's potential for prejudice to the defendant runs so high.

Judge Jenkins criticized Judge Trott as implying that modus operandi testimony would always be admissible if the law enforcement expert was qualified. He concluded that "Rule 702 as amplified in *Daubert* requires trial courts as gatekeepers to engage in a more thoughtful, more deliberate process testing specialized knowledge and helpfulness anew in each situation." He concurred in the result on the ground that the trial judge made an implicit finding that the modus operandi testimony was helpful and reliable, and that this finding was not clearly erroneous.

Judge Fletcher concurred in Judge Jenkins's opinion insofar as it highlighted "the need for district courts to perform adequately the gate-keeper function in determining whether expert testimony is truly 'expert' and likely to be of help to the jury."

Daubert* Analysis Inapplicable to Testimony of Law Enforcement Agent Concerning Coded Conversations: *United States v. Plunk, 153 F.3d 1011 (9th Cir.1998): The defendant was convicted of offenses arising out of a drug distribution conspiracy. He claimed error in the admission of expert testimony of a law enforcement agent, who interpreted for the jury various alleged coded conversations. The defendant argued that this testimony was unreliable under *Daubert*, but the Court relied on the law of the circuit for the proposition that where testimony is based on "specialized knowledge of law enforcement, not scientific knowledge, the *Daubert* standards for admission simply do not apply." For testimony based on specialized knowledge, the Trial Court must conduct "a more traditional Rule 702 analysis and determine, first, whether or not the content of the proposed opinion constitutes a proper subject of expert testimony . . . and second, whether or not the proposed witness possesses the requisite qualifications . . . in his

claimed area of expertise." The law enforcement expert's testimony clearly satisfied these two standards in this case.

Machines

Technical Devices Covered by *Daubert: United States v. Lee,* 25 F.3d 997 (11th Cir. 1994): In a pre-*Daubert* prosecution for narcotics possession, the defendant unsuccessfully objected, under *Frye*, to evidence from two machines which detected trace amounts of cocaine on his personal effects. These machines--the Sentor and the Ionscan-- incorporate the scientific techniques of gas chromatographic luminescence and ion mobility spectography, respectively. The Court remanded for a hearing in light of *Daubert*, and in the course of doing so, rejected the contention that *Daubert* is inapplicable to the results obtained by specialized technical equipment. The Court stated:

> The results of such specialized, technical, diagnostic machinery are only admissible through the testimony of an expert witness; courts do not distinguish between the standards controlling admission of evidence from experts and evidence from machines. * * * Rule 702 specifically applies to the admission of "scientific, technical, or other specialized *knowledge*," a category of evidence that includes the results of technical devices. * * * *Daubert* applies not only to testimony about scientific concepts but also to testimony about the actual applications of those concepts.

Safety Conditions

Testifying on the Basis of Experience: *Thomas v. Newton Intern. Enterprises,* 42 F.3d 1266 (9th Cir. 1994): In a suit by a longshoreman for injuries suffered on a boat, the Court held that the Trial Court erred when it excluded the testimony from the plaintiff's proffered expert to the effect that the defendant had left a boat in an unsafe condition. The expert was sufficiently qualified due to his 29 years of experience as a longshoreman. The defendant's reliance on *Daubert* was misplaced, because "*Daubert* was clearly confined to the evaluation of *scientific* expert testimony." The Court stated: "While a scientific conclusion must be linked in some fashion to the scientific method, * * * non-scientific testimony need only be linked to some body of specialized knowledge or skills." In this case, the expert's 29 years of experience provided the necessary link.

Valuation of Property

Hybrid of Two Recognized Methodologies: ***F.D.I.C. v. Suni Associates, Inc.,*** 80 F.3d 681 (2d Cir. 1996): In a proceeding for a deficiency judgment, the F.D.I.C. offered the testimony of an expert, who valued the real estate on the basis of a sale of all of the property to a single purchaser and testified that he used a valuation methodology that was a blend of two approaches to valuation: direct sales comparison and income capitalization. The defendant objected that the testimony was based on "a developmental analysis unknown to appraisal literature, unique to [the expert] and on factual assumptions which were without any reasonable foundation." But the Court found the testimony sufficiently reliable, citing *Daubert* as establishing a flexible and permissive approach. It found the expert's "hybrid of two widely-recognized methods" of valuation to be sufficiently reliable, and dismissed the internal contradictions in the expert's testimony as a question of weight.

Straightforward Application of Economics: ***Masayesva on Behalf of Hopi Indian Tribe v. Hale,*** 118 F.3d 1371 (9th Cir. 1997): In a dispute between Indian tribes over the value of grazing land, the Navajo tribe challenged the Hopi tribe's expert's testimony under *Daubert.* The Court held that the expert, an economist with a specialty in range economics and with dozens of peer-reviewed articles to his credit, was properly qualified to testify to the value of the property. The Court stated that "[t]he Navajo's reliance on *Daubert* is misplaced because Dr. Workman's testimony derives from his relatively straightforward application of range economics, rather than on a novel scientific theory."

VIII. GATEKEEPING PROCEDURES

Burden of Proof

Who has the Burden on the Question of Reliability? ***Maryland Cas. Co. V. Therm-O-Disc, Inc.***, 137 F.3d 780 (4th Cir. 1998): A fire caused damage, and the insurer, who was subrogated to the insured's claims, sued the manufacturer of a thermostat. The insurer proffered the testimony of an electrical engineer, who would testify that the fire was caused by a malfunction in the defendant's thermostat. The defendant objected and the Trial Court held a *Daubert* hearing. At some point in the hearing, the Trial Court stated that the defendant had the burden of proving that the expert's testimony was unreliable. The expert's testimony was admitted and the defendant on appeal argued that the court had erred in placing the burden of proof on the defendant. The Court found no error. It stated that *Daubert* "makes no mention of a burden of proof regarding the decision to admit expert scientific testimony." The Court noted that *Daubert* had placed the gatekeeper function in Evidence Rule 104(a), and that the Supreme Court has stated that evidentiary questions under Rule 104(a) are governed by the preponderance standard. However, the Court refused to interpret "a preponderance of proof to refer to a *burden* of proof."

On the merits, the Court found that the Trial Court had not abused its discretion in finding the expert's testimony reliable enough to be admissible. The expert was an engineer with over 25 years of experience in analyzing switch failures; he established that his opinion was based on his examination of the conditions inside the disputed switch and the application of principles of electrical engineering to those conditions. He cited numerous works of technical literature that supported his analysis.

> **Note:** The Court's slippery use of the terms "preponderance" "burden of proof" and "burden of production" is troubling, but the bottom line is that the Court properly demanded that the proponent of the testimony show that it is reliable by a preponderance of the evidence. The Court cited Judge Becker's opinion in *Paoli, supra,* where he stated that proponents of experts "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*, they only have to demonstrate by a preponderance of the evidence that their opinions are reliable." In *Therm-O-Disc*, there was language in the record indicating that the Trial Judge shifted the burden on the question of reliability; in fact, however, the Trial Judge just made a single statement to this effect, and it appears that the Trial Court indeed satisfied itself that the expert's testimony was reliable and that the defendant had not brought in any rebuttal evidence to indicate the contrary. Thus, despite the wayward language, *Therm-O-Disc* seems consistent with *Daubert's* requirement that the proponent of the expert prove to the gatekeeper by a preponderance of the evidence that the expert's testimony is reliable.

Court-appointed Experts

Assistance in the *Daubert* Enquiry: ***DeAngelis v. A. Tarricone, Inc.***, 151 F.R.D. 245 (S.D.N.Y. 1993): In this personal injury case, the Court granted the defendant's motion for a court-appointed expert, after the plaintiff had successfully objected to neurotoxological and psychiatric examinations by defense experts. The Court held that after *Daubert*, the trial court's role in assessing the reliability of expert testimony is critical, and that court-appointed experts might often be helpful. Recognizing that a court-appointed expert may carry undue weight before the jury, the Court stated that "the source of appointment of an expert can be placed in proper perspective by awareness of the factfinder that even an impartial expert can be wrong, and the impartial expert must be subjected to the same evaluation of credibility as any other witness."

Limitations on Deposition: ***In re Joint E. and S. Dists. Asbestos Litigation,*** 151 F.R.D. 540 (S.D.N.Y. 1993): The Court denied a motion to depose court-appointed experts. The motion was made by counsel for a handful of plaintiffs in a mass tort litigation, and was not joined by counsel for the plaintiff class. The Court reasoned that, in light of *Daubert* and the gatekeeping function that it imposes, it is more efficient for a court to hold a pre-trial "*Daubert* hearing" at which the court-appointed expert could be questioned by all parties in the presence of the trial judge.

Hearing Requirement

Party Unprepared: ***Holbrook v. Lykes Bros. S.S. Co., Inc.,*** 80 F.3d 777 (3d Cir. 1996): The Court found no error in the Trial Court's admitting the defendant's expert testimony without having held a *Daubert* hearing. The Court found that the Trial Court had scheduled a *Daubert* hearing, but that plaintiff's counsel was unprepared. At that point, it was sufficient for the Trial Court to entertain a motion to strike at trial. The Court concluded: "Counsel failed to prepare appropriately and the court exercised sound discretion in controlling the efficient and orderly disposition of this case to avoid unnecessary inconvenience to the jury."

Hearing Must Be Held: ***Gruca v. Alpha Therapeutic Corp.,*** 51 F.3d 638 (7th Cir. 1995): In an action arising from a hemophiliac's death from AIDS, the plaintiffs claimed, among other things, that the decedent's death was hastened by additional exposure to HIV contained in the defendants' blood coagulant products. The plaintiffs provided expert scientific testimony based on the theory of antigenic stimulation. Under this theory, an infected person's exposure to additional HIV, other viruses, or foreign proteins shortens the asymptomatic period of the initial

infection and leads to quicker death from HIV. The defendants objected to the experts' testimony on *Daubert* grounds, but the district court declined to rule on the objection and instead directed a verdict on the merits of the plaintiffs' claim as to additional exposure--the court found no jury question on the issue of subsequent infection. The Court of Appeals held that the Trial Court's approach was improper. *Daubert* requires that when faced with the proffer of expert scientific testimony, the district court must determine "at the outset" whether it comports with the scientific method. The Court declared that the district court "abdicated its responsibility under Rule 104(a) by failing to conduct a preliminary assessment of the admissibility of the plaintiffs' expert testimony concerning antigenic stimulation before permitting the plaintiffs' experts to testify." The Court reversed the directed verdict and remanded the antigenic stimulation claim with instructions to evaluate the expert testimony under the *Daubert* framework. It emphasized that it took no view on the admissibility of antigenic stimulation testimony under *Daubert*.

Party Waives a Pre-trial Hearing: ***Hose v. Chicago Northwestern Trans. Co.***, 70 F.3d 968 (8th Cir. 1995): Affirming a judgment for an employee who brought an FELA action alleging that his employer was liable for his suffering from manganese encephalopathy, the Court upheld the Trial Judge's admission of medical testimony which the employer challenged under *Daubert*. It observed in a footnote that "[c]hallenges to the scientific reliability of expert testimony should ordinarily be addressed prior to trial," because "an early evidentiary challenge allows the trial judge to exercise properly the gatekeeping role regarding expert testimony envisioned under *Daubert*." The Court noted, however, that the employer apparently chose not to seek a pre-trial hearing in this case.

IX. APPELLATE REVIEW

Preserving Objections

Failure to Object Results in Heavy Presumption That Trial Court Conducted a Proper *Daubert* Review: *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995): The plaintiff recovered damages against her father for sexual assaults that occurred during her childhood. At trial she called an expert in repressed memories, who supported her testimony. The defendant did not object. On appeal from denial of relief under Rule 60(b), he argued that his failure to object was not dispositive, because under *Daubert* the trial court must make a *sua sponte* ruling on the admissibility of expert testimony. The Court stated that while *Daubert* does instruct district courts to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection, it does not require a court to *sua sponte* hold a hearing and make explicit on-the-record findings. In the absence of an explicit objection, "we assume that the district court performs such an analysis *sub silentio* throughout the trial with respect to all expert testimony." The Court found that the trial court's admission of the expert testimony was not a "mistake" within the meaning of Rule 60(b).

Daubert* Cannot Be Argued in Terms of Insufficiency on Appeal, Where the Party Failed to Object to Admissibility at Trial: *C.B. Fleet v. Smithkline Beecham Consumer Healthcare, 131 F.3d 430 (4th Cir. 1997): In a Lanham Act case, the major issue of dispute was the scientific reliability of tests conducted by the defendant that were the basis of the defendant's advertised claims of product superiority. The plaintiff made no *Daubert* objection to the defendant's scientific testimony at trial, choosing instead to call its own scientific experts to attack the defendant's testing procedures. The Trial Judge found in favor of the defendant, and the plaintiff challenged the evidentiary sufficiency for this finding, contending that the judge's determination was based on evidence that failed to meet *Daubert* standards. In pursuit of this claim, the plaintiff argued that it need not have made a *Daubert* objection at trial, because its challenge on appeal was not to the admissibility of the defendant's expert evidence, but rather to "its insufficiency when tested by *Daubert* principles." But the Court of Appeals rejected this argument as confusing admissibility with sufficiency. The Court explained as follows:

> *Daubert* deals with the admissibility of this kind of scientific evidence. As with all rules governing admissibility, its application to particular evidence is to be raised and resolved in the trial court. There the proponent can attempt upon objection to lay the proper foundation for admitting the evidence and the objector can challenge is sufficiency. In this way the question of admissibility can be resolved as a threshold matter. Fleet essentially would have this court engage in a first instance application of *Daubert* principles on a record completely inadequate for the purpose. This cannot be done under the guise of a challenge to the substantive sufficiency of this evidence.

Objection Not Specific Enough: ***McKnight v. Johnson Controls, Inc.***, 36 F.3d 1396 (8th Cir. 1994): Affirming a judgment for the plaintiff in an action alleging personal injury caused by an exploding battery, the Court held that the defendant failed to preserve its objection that the plaintiff's expert's testimony was not scientifically valid within the meaning of *Daubert*. The plaintiff's expert testified on the basis of tests he conducted on a battery similar to the battery which exploded. The defendant objected that the expert was using "a test on a battery, for which a foundation hasn't been laid sufficiently, to prove the ultimate issue in this case." The Court held that this objection failed "to raise any question about the scientific validity of the principles and methodology" underlying the expert's testimony. The Court rejected the argument that district judges have an obligation to exercise their *Daubert* gatekeeping function even in the absence of a specific objection.

Failure to Object Precludes Sufficiency Attack: ***Marbled Murrelet v. Babbitt,*** 83 F.2d 1060 (9th Cir. 1996): the Court affirmed the grant of injunctive relief against a logging company in an action by an environmental group to protect a nesting habitat. It held that, because the company failed to request a ruling at trial on its *Daubert* objections to expert testimony, it could not make a sufficiency of the evidence argument on appeal that seemed to be based on a *Daubert* analysis.

Standard of Review

Abuse of Discretion Standard Applies to All *Daubert* Rulings: ***General Electric Company v. Joiner,*** 118 S.Ct. 512 (1997): In a suit alleging that the plaintiff contracted cancer from exposure to PCB's, the trial court excluded the plaintiff's expert's causation testimony under *Daubert*, and granted summary judgment to the defendants because, in the absence of expert testimony, the plaintiff presented no triable issue of fact. The Court of Appeals reversed, holding that the expert's testimony was sufficiently reliable under *Daubert*. The Court applied a "hard look" standard of review to the District Court's *Daubert* rulings--a standard somewhere between abuse of discretion and de novo review. The Supreme Court reversed and reinstated the grant of summary judgment. It rejected the "hard look" standard and held that a District Court's rulings under *Daubert* are to be reviewed pursuant to the abuse of discretion standard traditionally applied to evidentiary rulings. The Court rejected any distinction between rulings admitting and excluding evidence, and likewise rejected a more searching standard of review for evidentiary rulings that are "outcome-determinative."

III-E

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public comments on, and possible revisions to, Proposed Amendment to Evidence Rule 703
Date: March 1, 1999

This memorandum discusses some of the public comments received on the proposed amendment to Evidence Rule 703, and provides some suggested language for the Committee to consider, should the Committee decide to respond to the suggestion of any particular comment.

This memorandum does not set out every comment for discussion. A full summary of all of the public comments received can be found in this Agenda Book. Likewise, a copy of the proposed amendment that was released for public comment can be found in this Agenda Book.

Working Draft

This memorandum begins by setting forth the working draft of the proposed amendment to Evidence Rule 703, which includes the revisions tentatively agreed to at the October, 1998 Advisory Committee meeting. This working draft contains five tentative changes from the proposal issued for public comment:

1. The text of the Rule was changed to refer to information "not in evidence" rather than to "otherwise inadmissible" evidence.

2. The Committee Note was amended to conform with this textual change.

3. The text of the Rule was changed in accordance with a suggestion from the Style Subcommittee--instead of beginning the new sentence with "If the facts or data . . ." the working draft now more directly refers to "Facts or data"

4. A stylistic change was made to the second paragraph of the Committee Note, with the effect of eliminating a redundancy.

5. The Committee Note was amended to address the problem of the opponent opening the door to a rebuttal with information not in evidence.

Working Draft of Proposed Amendment to Evidence Rule 703

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 703

Rule 703. Bases of Opinion Testimony by Experts*

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

COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on information **not in evidence** to form an opinion or inference, it is the opinion or inference, and not the information, that is admitted. Courts have reached different results on how to treat information **not in evidence** when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. Compare

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

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 hearsay 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 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 in evidence**, 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. **The information may be disclosed to the jury only if the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect. If the information not in evidence is admitted under this balancing test, the trial judge must give a limiting instruction 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.

The amendment governs the use before the jury of information **not in evidence** that is 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 information **not in evidence** 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. **Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information not in evidence that was reasonably relied upon by the expert, even if that information**

would not have been discloseable initially under the balancing test provided by this amendment.

The amendment provides a presumption against disclosure to the jury of information **not in evidence** that is 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.

Possible Problem Areas

Based on the public comments received, observations from Committee members, and discussion at the October Committee meeting, there are seven problems that could arise from the adoption of the working draft of the proposed amendment to Evidence Rule 703. These asserted problems are:

1. The proposed amendment is unnecessary, because courts do not permit experts to rely on unreliable information; disclosure of reliable information to the jury is not prejudicial.

2. By depriving the proponent of the ability to bring out all of the basis on direct, the rule has one of three negative consequences: it could result in conclusory expert testimony; it could result in an unbalanced presentation when the adversary attacks the expert's basis; and it could result in the disclosure on rebuttal of the information that is currently disclosed on direct. Each of these consequences cuts against adopting the proposed amendment.

3. The Rule would be costly because it would require parties to prove up information relied upon by an expert that they might not need or wish to admit as substantive evidence at trial.

4. The working draft's reference to information "not in evidence" is problematic, because it could upset a party's order of proof by requiring the party to put information in to evidence before an expert testifies, when the party might otherwise put in the evidence at a later point.

5. The Rule should describe in the text what the otherwise inadmissible information is probative of, and why it might be prejudicial.

6. The Rule as written appears to give no discretion to the trial court to preclude disclosure of the inadmissible information where the balancing test is satisfied.

7. The Committee Note should provide better guidance as to the factors that the trial court should consider in applying the balancing test.

Each of these potential problems, and the possible solutions, is discussed below.

1. The proposed rule change is unnecessary

Professor Michael Graham (98-EV-063) cannot see a problem that needs to be addressed by the proposed change to Evidence Rule 703. He argues that most courts now hold that information "reasonably relied upon" by an expert must contain circumstantial guarantees of trustworthiness. This requirement has "more or less won out" over an approach which permitted an expert to rely on anything he customarily relied upon, without regard to whether the information was actually reliable. Thus, according to Professor Graham, an expert cannot, in most courts today, rely on unreliable inadmissible information; therefore, there is little danger in having that inadmissible information disclosed to the jury. In Professor Graham's view, the proposed amendment is concerned about prejudice that is not really there. And since the prejudice is not really there, it follows, in Professor Graham's view, that the balancing test employed by the amendment would virtually always lead to the trial court's permitting the information to be disclosed on direct. Thus, he concludes, the Rule gets you nowhere.

Reporter's Comment:

Professor Graham's premise--that only reliable information can be used by an expert under Rule 703's reasonable reliance requirement--is true in some courts and not in others. As Professor Graham recognizes, some courts (which he describes as "liberal" courts) permit experts to rely on any inadmissible information that they customarily rely upon in reaching an opinion. In these courts there is no scrutiny of whether the inadmissible information is actually reliable. See, e.g., *United States v. Locascio,* 6 F.3d 924 (2d Cir. 1993) (no abuse of discretion in admitting testimony of an FBI agent that relied on hearsay as to such matters as the structure and operating rules of organized crime families, and the identification of certain voices on a tape; law enforcement agents routinely rely upon such hearsay in the course of their duties; no scrutiny into whether the hearsay was actually reliable); *Masayesva v. Hale,* 118 F.3d 1371 (9th Cir. 1997) (valuation expert can rely on hearsay statements because experts in the field customarily rely on hearsay; no scrutiny into whether the hearsay was actually reliable). Thus, the risk of prejudice resulting from disclosure of hearsay to the jury in the guise of "expert's basis" is real in many courts.

Moreover, the proposal regulates more than just the disclosure of inadmissible hearsay relied upon by an expert. It also regulates against the disclosure of any other inadmissible information relied upon by an expert. Some information is inadmissible even if it is reliable, e.g., subsequent remedial measures, character evidence, and illegally obtained evidence. Professor Graham's assumption that only reliable information will be disclosed to the jury under Rule 703 misses this point.

Finally, it should be noted that many academics disagree with Professor Graham and believe that Rule 703 should be amended to prevent the very real risk that it will be used as a backdoor to evade exclusionary rules of evidence. Among those who agree with the principle of the proposed amendment are Professors Laird Kirkpatrick (98-EV-011), Richard Friedman (98-EV-007), and Ronald Carlson (98-EV-031) (who is an acknowledged expert on this rule).

Ultimately, of course, the question of whether an amendment to Rule 703 is necessary is a judgment call for the Committee. The Committee did, in proposing the Rule, make a judgment that the risk of abuse was worth addressing, and there is no interim case law development that seems to warrant a change in that assessment at this point.

2. Negative consequences of the balancing test

A number of public commentators see negative consequences from the application of the balancing test set forth in the proposed amendment to Evidence Rule 703. These negative consequences can be discussed together usefully, because they make the cumulative argument that any result of the balancing test is problematic.

The scenario of asserted negative consequences proceeds as follows: 1. The expert will be unable to disclose his basis and will thus be forced to limit his testimony to a bare conclusion, an *ipse dixit*, as the comments put it. 2. The opponent will be permitted to attack the expert's basis as inadequate, thus giving rise to an unfair presentation of the evidence. 3. The proponent will then be permitted, in rebuttal, to disclose the basis that was not allowed to be disclosed on direct. The complaint is that this gets you right back where you started from--the jury hearing about inadmissible evidence--but with the proponent having suffered a negative inference from not having disclosed the information on direct (i.e., the jury could think that the proponent was hiding something).

Reporter's Comment:

It is likely that these criticisms overstate the impact of the proposed amendment. The proposal does not *preclude* the proponent from disclosing, on direct examination, inadmissible information relied upon by the expert. It simply sets forth a balancing test. Sometimes the probative value of the underlying information, in helping the jury to weigh the expert's opinion, will substantially outweigh the prejudice resulting from disclosure. Sometimes the expert may be permitted to disclose some pieces of inadmissible information and not others. Sometimes, as recognized in the Committee Note, the expert will be permitted to refer generally to inadmissible information, but will not be able to disclose it in detail (e.g., a doctor might be able to say that he checked another doctor's report, but might not be able to go into detail about the specifics of the report). Sometimes the trial court will determine that a limiting instruction will be sufficient to cure prejudice; sometimes not. Most importantly, the Rule imposes no regulation at all on the expert's use of admissible evidence as a basis.

Thus, the chance that an expert will be left with an *ipse dixit* --no basis disclosed at all--is remote. The chance of a court applying a balancing test to preclude the disclosure of every part of the basis of an expert's testimony, but then letting the expert testify, seems very slim. Indeed, if an expert is left with a bare conclusion, that would be a good indication that the expert should not be testifying in the first place. Such an expert would have to be relying exclusively on inadmissible information. It is hard to see how any such expert could expect to satisfy the reliability test imposed by *Daubert*.

As to the ability of the opponent to attack the expert's basis, this is consistent with the structure of most of the exclusionary rules in the Federal Rules of Evidence. It is often the case in the

Evidence Rules that opponents make arguments that might take advantage of some exclusionary rule. Defendants in product liability cases are permitted to argue that a product was not defectively designed, by taking protection from the rules on subsequent remedial measures. Criminal defendants are allowed to bring in character evidence, whereas the prosecution cannot do so in its direct case. These exclusionary rules are based on the premise that the proponent could prejudice the trial by bringing in such evidence.

There are two safeguards against exploitation of these Evidence Rules by opponents. First, if the opponent takes advantage of the exclusionary rule, the door is opened to rebuttal evidence that could not have been brought out on direct. Thus, if a product liability defendant claims that a design change was not feasible, a subsequent design change could be brought up in rebuttal. And a criminal defendant who testifies that he never did drugs could be impeached by a drug conviction that was initially excluded. Second, proponents can be permitted in certain circumstances and in the discretion of the trial court to bring out otherwise excluded evidence on direct, in order to respond in advance to an anticipated attack. For example, the prosecution can ordinarily bring out on direct examination that a witness has cut a deal. See, e.g., *United States v. Fernandez,* 829 F.2d 363 (2d Cir. 1987).

All of these standard rulings are encompassed within the balancing test set forth in the proposed amendment. For example, a trial judge could rule in some cases that inadmissible information relied upon by an expert could be disclosed on direct where it is apparent that the opponent will attack the witness' basis; under these circumstances, the probative value of disclosure could substantially outweigh the prejudicial effect. It would depend on the circumstances. But even if the trial court does not make such a ruling, the opponent will have to be careful in attacking the expert's basis on cross-examination, because of the possibility of rebuttal. Often, the opponent may consider that the risks of an attack are too great (i.e., the inadmissible information will be disclosed in rebuttal), and in these cases the risk of a skewed presentation of the evidence is accordingly diminished--that risk is diminished by the opponent's concern that the rebuttal will lose the proponent more points than the attack will gain.

It is true that the balancing test is tilted toward prevention of disclosure of inadmissible information. Thus, the chances of a bare-bones conclusion on direct, an attack on cross-examination, and disclosure of inadmissible information in rebuttal are greater than they are under the Rule 403 balancing test. But that greater chance is arguably appropriate, given the real risk that the proponent might simply be using the expert as a vehicle for obtaining backdoor admission of inadmissible evidence. Where that risk is high in the particular circumstances, the proposal essentially shifts some of the control over the disclosure from the proponent to the opponent. That would seem perfectly appropriate since it is the proponent who is creating the risk of using Rule 703 as a backdoor.

Solution:

While the critics of the proposed amendment seem to have overestimated its negative

consequences, it might be possible to allay their concerns by adding language to the Committee Note. This language might recognize, specifically, that the proponent might be able to disclose some inadmissible information on direct if it is apparent that the opponent will attack the expert's basis on cross-examination. The potential for disclosure on direct, in order to remove the sting of an anticipated attack, was recognized by two members of the Standing Committee when they authorized the proposal to be released for public comment; and it was also recognized by some public commentators.

Generally, the proposed amendment to Evidence Rule 703 might provide more useful guidance and allay certain concerns if the Note were to address more completely the questions of removing the sting on direct and the possibility of rebuttal. Something like the following language could be added to the section of the Committee Note that already discusses the question of rebuttal--the section that was tentatively approved at the October meeting:

Addition to the Committee Note on matters of anticipating an attack, and rebuttal (added to Working Draft of Note)

* * *

When information is reasonably relied upon by an expert and yet is not in evidence, 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. The information may be disclosed to the jury only if the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect. If the information not in evidence is admitted under this balancing test, the trial judge must give a limiting instruction 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.

The amendment governs the use before the jury of information not in evidence that is 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 information not in evidence 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. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information not in evidence that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. **Moreover, in some circumstances the proponent might wish to disclose information not in evidence that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference about the proponent and the expert testimony.**

The trial court should take this consideration into account in applying the balancing test provided by this amendment.

The amendment provides a presumption against disclosure to the jury of information not in evidence that is 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.

3. Requiring proponents to qualify evidence for admissibility that they would not otherwise qualify

Several public commentators expressed the opinion that the proposed amendment would force parties to admit evidence relied upon by an expert even where they would not otherwise try to admit the evidence at trial. For example, if an expert wants to rely on a business record, it might be that the proponent would have no need to admit the record itself. But under the proposal, the record would have to be admitted anyway, in order to avoid the strict balancing test that would often prohibit disclosure. The need of the proponent to admit the evidence where otherwise he would not, in the view of the commentators, leads to unnecessary costs.

Reporter's Comment:

There are several responses to the concern over unnecessary costs. First, under current law, a party will sometimes have no interest in taking the effort to qualify the evidence, not because he has no interest in getting it admitted, but rather *because he is perfectly content to let the expert bring it in through the back door*. In these cases, the cost of qualifying the evidence, imposed by the proposed amendment, is not unjustified. Rather, it is a byproduct of amending the rule to prevent it from operating as a backdoor to the exclusionary rules.

So the case where there is arguably an unjustified cost is where the party truly has no interest in admitting the underlying evidence that is *in fact admissible*. It is hard to assess how frequently this problem may arise. It if does arise, it is likely to be the following scenario--the expert is relying on a record (such as a medical record or an x-ray) that the proponent sees no reason to offer substantively; yet to get it disclosed to the jury as part of the expert's basis, the proponent would have to go to the expense of qualifying the record as a business record.

If this scenario is the basic fact situation underlying the argument of unnecessary expense, then it is answered in large part by the Committee's proposed amendments to Rules 803(6) and 902. Under those proposals, a proponent will no longer have to go to great lengths to qualify a business record. If the proponent wants the expert to rely on a record that would be admissible under Rule 803(6), and wants to have the record disclosed as part of the expert's basis without having to undergo the strict balancing test, then the proponent simply needs to get an affidavit from the records custodian or other qualified witness.

It is difficult to imagine many other scenarios, outside the business records context, where an expert would rely on information that *could* be admitted and yet the proponent would have no interest in admitting that information as substantive evidence. Given the proposed amendment to Rule 803(6) and 902, the argument that the change to Rule 703 would create unnecessary expense is significantly diminished. Whether a significant cost remains, sufficient to justify rejecting the amendment, is a question for the Committee.

4. Information "not in evidence"

The proposed amendment released for public comment refers to facts or data relied upon by an expert that are "otherwise inadmissible". At the October meeting, the Committee tentatively agreed to change the proposal to refer to facts or data relied upon by an expert that are "not in evidence", and the Committee Note was tentatively changed accordingly.

Subsequent consideration by some Committee members, especially Greg Joseph, indicates that use of the term "not in evidence" is very problematic. Assume that an expert is relying on admissible information such as a business record, but the proponent has *not yet* offered it as anything other than the basis of an expert's opinion. Such information would be subject to the strict balancing test in the working draft of the proposed amendment, since it is "not in evidence." This problem is somewhat different from the problem addressed in the section immediately above. In that section, the concern was over the relatively infrequent situation in which an expert is relying on admissible evidence that the proponent would not otherwise wish to admit substantively. In the "not in evidence" situation, which will presumably arise more frequently, the proponent is planning to admit the information that the expert has relied upon--he just has not done so yet.

Thus, the downside of referring to information "not in evidence" is not the potential cost of qualifying evidence that the proponent would not otherwise seek to admit. Rather, it is the cost, inconvenience, and disruption in the order of proof that will occur when a proponent will be forced to qualify evidence out of the ordinary sequence, in order to avoid the strict balancing test of the proposed amendment.

An example of the problem is given by ATLA (98-EV-108), which notes "the common practice during trial of using expert testimony before the jury to describe and characterize documents (not yet in evidence) produced by an opponent, for the purpose of orienting the jury to the evidence that will be adduced. Following that, the reviewed documents are authenticated and offered as evidence." If the rule subjects all information "not in evidence" to the strict balancing test, then this "common practice" will be hindered if not prevented completely.

So it seems that the tentative agreement to subject information "not in evidence" to the strict balancing test is problematic.

Solutions:

One solution is simply to return to the original conception and refer to facts or data that are "otherwise inadmissible". Presumably that term can be construed as not covering information that is *admissible but not yet admitted.* This might also be clarified by adding language to the Committee Note.

Another possible solution could be to refer to information that is offered solely for the

purpose of assisting the jury to assess the basis of the expert's opinion. While language to this effect is more wordy, it arguably captures more completely the point that the Rule should not cover information relied upon by an expert that is admissible but not yet admitted.

If the "otherwise inadmissible" language were used, the Rule and Committee Note would look like this (incorporating other changes that have been tentatively agreed to, as well as the proposed changes to the Committee Note concerning rebuttal and "removing the sting", discussed above):

Solution 1: Replacing "not in evidence" with "otherwise inadmissible":

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 703

Rule 703. Bases of Opinion Testimony by Experts[**]

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

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

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 703

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. Courts have reached different results on how to treat **inadmissible** information when it 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 hearsay 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 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 otherwise 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. **The information may be disclosed to the jury only if the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction 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.

The amendment governs the use before the jury of **inadmissible** information that is 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. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with inadmissible information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose inadmissible information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

Facts or data are "otherwise inadmissible" under this amendment when they cannot be admitted for any purpose other than to assist the jury in assessing the basis of the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for other purposes but have not yet been offered for such purposes at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of **otherwise inadmissible** information that is 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.

Solution #2: Replacing "not in evidence" with "information offered solely to assist the jury in assessing the basis of the expert's opinion" (together with Committee Note, and incorporating previous suggested changes:

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 703

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

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

COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert

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

reasonably relies on **inadmissible** information to form an opinion or inference, it is the opinion or inference, and not the information, that is admitted. Courts have reached different results on how to treat **inadmissible** information when it 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 hearsay 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 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 **admissible only for the purpose of assisting the jury in weighing the expert's opinion**, 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 **for substantive purposes** on the other. **The information may be disclosed to the jury only if the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction 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.

The amendment governs the use before the jury of information that is reasonably relied on by an expert, **where that information is not admissible for substantive purposes**. It is not

intended to affect the admissibility of an expert's testimony, nor to deprive an expert of the use of information **that is inadmissible for substantive purposes** 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. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury in assessing the basis of the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for other purposes but have not yet been offered for such purposes at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information **not admissible for any substantive purpose,** that is 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.

Reporter's Comment:

Solution #2 is more explicit. It states more directly the intent of the amendment--to control the disclosure of information that would be admissible only to explain the basis of an expert's opinion, when there is a risk that the jury will use the information for some substantive effect. But that solution is also more balky. One possibility could be reformulating the solution as covering information "**offered solely to assist the jury in weighing an expert's opinion**." Though the possible problem with that version is that the term "weighing" could be seen as vague and susceptible to abuse.

It is clear that some change must be made to the working draft, because the reference to information "not in evidence" is unworkable. The addition to the Committee Note would be useful no matter how the working draft is amended. It should be noted that the problem with the current working draft cannot be solved by a Committee Note. That Note would have to say that facts or data "not in evidence" does not cover facts or data not in evidence that will eventually be placed in evidence. That seems to be a most unsatisfactory solution.

5. Describing probative value and prejudicial effect in the text of the rule.

Several commentators suggest that the proposal's reference to "probative value" and "prejudicial effect" is too vague. They recognize that the Committee Note clarifies that the probative value is the degree to which the inadmissible information would assist the jury in weighing the expert's opinion, while the prejudicial effect lies in the risk that the jury may use the information for substantive purposes. These commentators suggest, however, that the text of the Rule should be made more explicit along the lines of the Committee Note.

Reporter's Comment:

The Committee has already considered and rejected a proposal to explicate the concepts of probative value and prejudicial effect in the text of the rule. The justification for that rejection was that none of the other balancing tests in the Evidence Rules explicate probative value or prejudicial effect (see, e.g., Rules 403, 412, 609(b)).

It should be noted that Solution #2 to the "not in evidence" problem, discussed immediately above, *does* provide some explication of how the inadmissible information relied upon by an expert might be probative. It refers to facts or data "that are offered solely to assist the jury in assessing the basis of an expert's opinion". Thus, when the rule later refers to "probative value" one can easily infer that the probative value is the degree to which the information will assist the jury in assessing the basis of an expert's opinion. So if the Committee adopts that solution, it will ameliorate some of the concern expressed over the lack of explication in the rule.

Solution:

Assuming that the Committee decides that the probative value as well as the prejudicial effect of otherwise inadmissible information relied upon by an expert should be more fully described in the text of the rule, one possible solution is that proposed by Professor James Carey (98-EV-082):

Proposal to explicate probative value and prejudicial effect in the text of the rule (using the "otherwise inadmissible" terminology:

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

Reporter's Comment:

If this solution is adopted, it would have to be together with Solution #1 to the "not in evidence" problem, i.e., the solution that refers to "otherwise inadmissible" information. Solution #2, which refers to information offered solely to assist the jury in assessing the weight of an expert's opinion, would end up creating redundant language when coupled with Professor Carey's proposal.

It is up to the Committee to determine whether it should adhere to its determination that probative value and prejudicial effect should not be further defined in the balancing test of Rule 703.

6. Mandatory nature of the proposed amendment

Both the proposal released for public comment and the working draft provide that the information covered by the rule "shall not be disclosed to the jury" unless the probative value substantially outweighs the prejudicial effect. At the October meeting, the Committee discussed the possibility that the mandatory nature of the rule might lead to troubling results; the Committee decided to revisit the question at the April, 1999 meeting.

The mandatory nature of the proposal creates two possible problems: 1. The trial judge has no power to exclude the information if the probative value substantially outweighs the prejudicial effect; and 2. The trial judge apparently has no power to admit the information if the balancing test is not satisfied, even if the parties agree to or do not contest the disclosure.

It could be argued that neither of these problems is cause for much concern. On the "no power to exclude" side, it seems unlikely that a trial judge would be justified in precluding disclosure of the information where its probative value in helping the jury to weigh the expert's opinion *substantially* outweighed its prejudicial effect. Put another way, any facts or data that satisfy the strict exclusionary test of the proposed amendment *deserve* to be disclosed to the jury. On the "no power to admit" side, it seems unlikely that a trial court would find itself without power to admit the information where the parties agree that it should be admitted. It seems axiomatic that stipulation trumps any rule of exclusion.

On the other hand, the balancing test in Rule 403 is written in discretionary, not mandatory terms. It says that evidence "may be excluded". The balancing test in Rule 412 (applicable to civil cases) states that evidence "is admissible" if the balancing test is satisfied. It does not say that the evidence shall be admitted. And the balancing test of Rule 609(b) states that old convictions are not "admissible" unless "the court determines" that the balancing test is met. So in all these other balancing tests, there is arguably some room for flexibility and judicial discretion.

Solution:

At the October meeting, Steve Saltzburg provided some proposed language that would change the rule from one of mandatory admission or exclusion to one permitting some discretion. However, because the Committee had already agreed at that time to tentatively change the proposed amendment to one referring to information "not in evidence," Steve's proposal used that terminology as well. The proposal below is Steve's proposal, changed to include references to "otherwise inadmissible" information (version 1), and to "information offered solely to assist the jury in assessing the weight of the expert's opinion" (version 2). As discussed below, version 1 is probably too open-ended to warrant adoption; and version 2 also gives rise to substantial concerns.

Proposal to permit judicial discretion (version 1):

Rule 703. Bases of Opinion Testimony by Experts

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

Reporter's Comment:

Note that this provision seems awfully open-ended without being attached to a purpose for which the facts or data are to be offered. Technically, the language is not limited to the context of expert testimony at all. It simply says that the court may permit disclosure of inadmissible material if the probative value substantially outweighs the prejudice. Thus, this version is problematic. The version immediately below provides more context and thus is less open-ended.

Proposal to permit judicial discretion (version 2):

Rule 703. Bases of Opinion Testimony by Experts

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. **The court may permit the proponent to disclose to the jury facts or data that are offered solely to assist the jury in assessing the basis of an expert's opinion, if the probative value of the facts or data substantially outweighs their prejudicial effect.**

Reporter's Comment:

The discretion-oriented proposal could be combined with the proposal to explicate probative value and prejudicial effect, simply by elaborating on the last clause of the proposal. The last line of the rule would read as follows:

The court may permit the proponent to disclose to the jury facts or data that are otherwise inadmissible, if their probative value in assisting the jury to obtain a clear understanding of the opinion substantially outweighs the risk that the jury will use the facts or data as substantive proof.

One possible criticism of the proposal is that it appears to create a negative inference when it provides that the court may permit the proponent to disclose the information. This could be read as indicating that the *opponent could not* bring out the information, thus creating a conflict with Rule 705. (While it is true that the Committee Note clarifies this point, it seems to unwise to place such an ambiguity in the text unless it is necessary to do so). In contrast, the working draft *prohibits* the proponent from disclosing the information unless the balancing test is met. This, by inference, means that the *opponent* is freely permitted to bring out the basis. Thus, the current prohibitory draft avoids the problematic negative inference that is created by the draft permitting discretion.

Another possible criticism of the proposal is that it addresses the mandatory *admission* problem but not the mandatory *exclusion* problem. If the parties stipulated to admissibility, would a trial court have to preclude the disclosure if it found that the probative value did not in fact substantially outweigh the prejudicial effect? This seems extremely unlikely, given the fact that the proposal is not cast in mandatory terms. If there is any residual concern about the matter, it could

certainly be addressed in the Committee Note.

As to the Committee Note, it would appear that no changes would be necessary if the text of the rule were changed from a mandatory to a discretionary model--other than those changes on other points that have been discussed previously in this memorandum. The Committee Note does not imply that admission is mandatory when probative value substantially outweighs prejudicial effect. Indeed, the sentence in the Committee Note stating that nothing in the Rule is intended to limit the opponent is made absolutely necessary by the negative inferences created by the discretionary model.

The question remains whether the change to the Rule to permit some discretion is actually worth it. Again, how likely is it that a trial court would need to use discretion to prevent disclosure where the probative value is so strong that it substantially outweighs the prejudicial effect? Couldn't a trial judge in such a situation simply fudge the problem by holding that disclosure is not permitted because he found that the probative value did not in fact substantially outweigh the prejudicial effect? In other words, whatever discretion is denied under the working draft could be shifted easily to the highly discretionary question of whether probative value substantially outweighs the prejudicial effect. And on the other hand, perhaps it is not a good idea to permit a trial judge to prevent disclosure even where she finds that probative value substantially outweighs prejudicial effect--maybe that is a hyper-exclusionary discretion that we don't want trial judges to have, with all due respect.

Thus, it is for the Committee to decide three questions about the proposal permitting discretion: 1. Will it make enough difference to make it worth the disruption of totally changing the proposal at this point?; 2. If it does make a difference, will it mean that trial judges can prevent disclosure of information used by an expert even where its probative value in assisting the jury substantially outweighs its prejudicial effect, and if so, is that super-exclusionary power a good idea? ; and 3) Does the language permitting the proponent to disclose the basis create a negative inference as to the opponent, so as to render such a change unwise? All in all, there is much to be said for retaining the basic structure of the current working draft, with the exception of amending the "not in evidence" language.

7. Explicating balancing factors in the Committee Note:

Several public commentators have suggested that the Committee Note provide guidance to courts and litigants as to what kind of factors might be appropriate in balancing the probative value and prejudicial effect inherent in the disclosure of inadmissible information relied upon by an expert.

The Committee previously considered such a change and rejected it as unnecessary. The rationale was that trial judges should already know what the factors are that might bear upon the probative value and prejudicial effect of information relied upon by an expert.

At the public hearing in San Francisco, several commentators addressed the Committee's point that trial judges should be aware of the relevant factors without having to be told about them in a Committee Note. These commentators gave two responses. First, while trial judges might know the relevant factors, litigants might not. Second, the Advisory Committee has set forth an extensive list of factors relevant to admissibility under Rule 702. Why shouldn't the same guidance be given for questions of admissibility under Rule 703?

Because of the vigor and volume of these comments, it might be appropriate to consider whether more guidance should be given in the Committee Note with respect to the Rule 703 balancing process. On the other hand, it could be argued that Rule 702 and Rule 703 are distinguishable. Rule 702, after all, deals with reliability, and reliability factors will necessarily differ from expertise to expertise. Rule 703, in contrast, deals with a rather discrete problem of disclosure of information relied upon by an expert. Rule 703 questions are not nearly as prevalent nor as complex as Rule 702 questions.

Solution:

If the Committee agrees that it would be useful to provide more guidance about the factors that are relevant to the balancing test set forth in proposed Rule 703, then the Committee Note could be amended to list some relevant factors. The best place to add such a discussion would be right after the discussion of the balancing test itself. A discussion of the factors relevant to the balancing test might look like this (including the proposed changes to the Committee Note that have already been discussed in this memorandum):

Addition to Committee Note concerning factors relevant to the balancing test (together with proposed changes discussed earlier in this memorandum):

* * *

When information is reasonably relied upon by an expert and yet is **admissible only for the purpose of assisting the jury in weighing the expert's opinion**, 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 **for substantive purposes** on the other. **The information may be disclosed to the jury only if the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction 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 those facts or data offered solely to assist the jury in weighing the expert's opinion.

(3) Whether those facts or data are seriously disputed.

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

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

The amendment governs the use before the jury of information that is reasonably relied on by an expert, **where that information is not admissible for substantive purposes**. It is not intended to affect the admissibility of an expert's testimony, nor to deprive an expert of the use of information **that is inadmissible for substantive purposes** 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. **Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration**

into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury in assessing the basis of the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for other purposes but have not yet been offered for such purposes at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information **not admissible for any substantive purpose,** that is 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.

Reporter's comment:

On balance, there seems little harm in adding these factors to the Committee Note. They are expressly not intended to be exclusive or dispositive, and they could be helpful to some lawyers. Moreover, they seem fairly neutral, because each factor refers to a "whether or not" situation that could go either way depending on the circumstances of the particular case.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public comments on, and possible revisions to, Proposed Amendment to Evidence Rules 803(6) and 902.
Date: March 1, 1999

This memorandum discusses some of the public comments received on the proposed amendments to Evidence Rules 803(6) and 902, and provides some suggested language for the Committee to consider with respect to Rule 902, should the Committee decide to adopt the suggestion of any particular comment.

This memorandum does not set out every comment for discussion. A full summary of all of the public comments received can be found in this Agenda Book. Likewise, a copy of the proposed amendments that were released for public comment can be found in this Agenda Book. 18 U.S.C. section 3505, which provides for proof of foreign business records in criminal cases by certification of a custodian or other qualified person, is reproduced as an appendix to this memorandum.

Working Draft

The memorandum begins by setting forth the working draft of Rule 902, which includes the revisions tentatively agreed to at the October, 1998 Advisory Committee meeting. (No changes were found necessary with respect to the proposed amendment to Rule 803(6), which simply includes a reference to the means by which foundation for a business record can be established other than by trial testimony). The working draft of Rule 902 contains three changes from the proposal issued for public comment:

1. The text of the Rule was changed to provide a more consistent use of terminology when referring to declaration and certification.

2. The text of the Rule was changed to specify that the opponent must have a reasonable chance to challenge the declaration prepared by the custodian or other qualified person.

3. The Advisory Committee Note was changed to add a reference to 28 U.S.C. 1746, which sets forth procedural standards for declarations.

Working Draft

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 902

Rule 902. Self-authentication[1]

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 that would be admissible under Rule 803(6), and that 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.

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[1] New matter is underlined and matter to be omitted is lined through.

Working Draft

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 902

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 **the declaration**.

(12) *Certified foreign records of regularly conducted activity*. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6), and that 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 **the declaration.**

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. §1746 would satisfy the declaration requirement of this amendment, as would any comparable certification under oath.

The notice requirements in Rules 902(11) and (12) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

Questions arising from public comments

There are five public comments that merit at least some consideration. They are as follows:

1. The proposed amendment potentially violates a criminal defendant's right to confrontation.

2. The reference in Rule 902(11) and (12) to admissibility under Rule 803(6) creates a problem of circularity.

3. The reference to a record "made by the regularly conducted activity" is awkward because, the assertion goes, an activity cannot make a record.

4. The type of certification/declaration required should be specified by reference to statutory and rulemaking authority in the text of the rule. Also, the Committee needs to consider the possibility that the reference added to the Committee Note in the working draft, concerning certification consistent with 28 USC 1746, should refer only to Rule 902(11) and not to the amendment as a whole.

5. The notice requirement should specify that the declaration must be produced in advance and that notice must be given in time to challenge the certification/declaration by the taking of appropriate discovery. Also, there is no provision in the notice requirement, comparable to that in section 3505, providing that failure to file a motion to exclude before trial constitutes a waiver.

Each of these comments/critiques will be discussed in turn.

1. The right to confrontation

The Federal Courts Committee of the Association of the Bar of the City of New York (98-EV-088) recommends that the proposed amendment be limited to civil cases. The Committee contends that a criminal defendant's right to confrontation will be violated if the government admits a business record by way of certification in a criminal case.

A reading of relevant case law, however, indicates that any concern over the right to confrontation is without merit. (It is notable that the ABCNY cites no case law whatsoever to support its constitutional argument). There are three separate bodies of law which, separately and cumulatively, indicate that an accused has no right to confront a qualified witness who files an affidavit that establishes the foundation for a business record that meets the requirements of Rule 803(6). These three lines of authority are: 1) Cases that uniformly reject confrontation challenges to 18 U.S.C. 3505, the statute permitting certification of foreign business records in criminal cases; 2) Cases that reject confrontation challenges to Evidence Rule 803(10), the rule permitting proof of the absence of domestic public records by way of affidavit; and 3) Cases that reject confrontation challenges to state evidence rules permitting proof of business records through certification. Each of these lines of cases will be discussed in turn.

18 U.S.C. 3505

Section 3505 permits proof of foreign business records in criminal cases by way of certification of the records custodian or other qualified person. A major reason for proposing an amendment to Rules 803(6) and 902 was to provide a procedure similar to section 3505 for domestic records in criminal cases and domestic and foreign records in civil cases. Thus, the cases considering confrontation challenges to the procedure set forth in section 3505 are obviously relevant to the confrontation questions supposedly arising from the proposed amendments.

The leading case rejecting a confrontation challenge under Section 3505 is *United States v. Miller,* 830 F.2d 1073 (9th Cir. 1987). The *Miller* court noted that the basic protection provided by the confrontation clause is that the government-proffered hearsay must be reliable. *Miller,* which dealt with foreign banking records, emphasized the reliability of such records. It saw no motive for the recordkeepers to change or distort the records--and if such a motive had been found, the records would have been excluded under the trustworthiness clause of Rule 803(6) anyway. As to the reliability of the certification, the court found that the records custodians had asserted under oath that the requirements of the business records exception had been met. The court declared: "Examination of the recordkeepers by counsel for Miller could not reasonably be expected to establish anything more or less than that. If the records were in fact inaccurate, it was within Miller's power to depose the recordkeepers and challenge the records."

Other courts have similarly emphasized that the fact that a records custodian or other qualified witness makes a sworn declaration is sufficient reason to believe that the certification

process satisfies the right to confrontation. See, e.g., *United States v. Garcia-Abrego,* 141 F.3d 142 (5th Cir. 1998) (certification guarantees trustworthiness); *United States v. Gleave,* 786 F.Supp. 258 (W.D.N.Y. 1992) ("The attestation by the records custodian pursuant to section 3505(c)(2) that he will be subject to criminal liability for a false certification affords the records a sufficient degree of reliability."); *United States v. Bertoli,* 854 F.Supp. 975 (D.N.J. 1994) (reliability was established by the fact of attestation under oath); *United States v. Ross,* 33 F.3d 1507 (11th Cir. 1994) (so long as the business records themselves satisfy the requirements of Rule 803(6), the confrontation clause is not violated by the process of certification rather than in-court testimony).

It could be argued that the confrontation question under the proposed amendment is somewhat different from that of section 3505 because it is more likely that the custodian of a domestic business record is available to testify at trial. This assumes, however, that the confrontation clause *requires* a showing that a hearsay declarant is unavailable. This is not ordinarily the case, however. The government has a duty to produce hearsay declarants only where their production at trial would be useful. *White v. Illinois,* 502 U.S. 346 (1992). If cross-examination will do little or no good, then the burden is shifted to the defendant to produce the witness. And, as seen above in cases like *Miller*, the courts have emphasized the fact that where the records custodian certifies the records, there is little to be gained by imposing a production requirement--it is up to the defendant to try to depose or produce the declarant in these circumstances. See, e.g., *United States v. Chan,* 680 F.Supp. 521 (S.D.N.Y. 1988) (no right to confront records custodians with respect to foreign hotel records since "the custodians would simply give the same testimony offered here by written declaration. In fact defendant has not availed himself of the opportunity offered by the court to go to Hong Kong to depose such witnesses."). Thus, the cases rejecting confrontation challenges to section 3505 provide a strong indication that the proposed amendments to Rules 803(6) and 902 pass constitutional muster.

Rule 803(10)

Rule 803(10) permits the absence of a public record to be proven by an affidavit filed by the public official who checked the records. Thus, the affidavit establishes the foundation requirement in lieu of in-court testimony from the custodian. Confrontation challenges to this procedure, which is quite similar to the certification process in proposed Rule 902(11), have been uniformly rejected.

Three cases are representative of this uniform line of authority. In *United States v. Hutchinson,* 22 F.3d 846 (9th Cir. 1993), the court held that the government was not required to prove the unavailability of a public official who filed an affidavit that a search had been conducted and a certain tax return was not recorded in IRS records. The court reasoned that admission of evidence to prove absence of a public record "involved no risk of faulty human recollection and little likelihood of misrepresentation of significant data." Note that the affidavit withstood

constitutional challenge even though it was the only proof of the absence of a public record. The case for reliability is much stronger under the proposed amendments to Rules 803(6) and 902, because the business records themselves are produced, and subject to scrutiny and challenge.

In *United States v. Rith,* 164 F.3d 1323 (10th Cir. 1999), the court flatly rejected a confrontation clause challenge to the certification procedures of Rule 803(10). The certificate was made by Marshall, an ATF agent, who checked records and determined that Rith failed to register a shotgun. There was no showing that the agent was unavailable for trial. The court rejected the confrontation clause argument in the following passage:

> A literal reading of the Confrontation Clause would seem to preclude all hearsay from being introduced as evidence against a criminal defendant. Nevertheless, the Supreme Court has declined to impose such a reading. In *White v. Illinois,* the Court stated that "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." 502 U.S. 346 (1992). The *White* Court proceeded to hold that it was unnecessary to prove unavailability of declarants of spontaneous declarations and statements made in the course of receiving medical care. Because the ATF certificate was not the product of a [prior] judicial proceeding, the government's decision to introduce the ATF certificate into evidence without putting Mr. Marshall on the stand is not assailable for failure to make him available or prove him unavailable. See also *Earnest v. Dorsey*, 87 F.3d 1123, 1130 n.5 (10th Cir.1996) (citing *White* for its limitation of availability requirement).
>
> Additionally, there is no evidence in the record that the defendant did not have the opportunity employ his Sixth Amendment right of Compulsory Process to subpoena Mr. Marshall. In deciding that there is little benefit in imposing an unavailability rule for out-of-court statements not made in the course of a prior judicial proceeding, the Court stated that "many declarants will be subpoenaed by the prosecution or defense, regardless of any Confrontation Clause requirement, while the Compulsory Process Clause and evidentiary rules permitting a defendant to treat witnesses as hostile will aid defendants in obtaining a declarant's live testimony." *White*, 502 U.S. at 355; see also *United States v. Inadi*, 475 U.S. 387 (1986) (holding that unavailability of co-conspirator need not be proved when "the defendant himself can call and cross-examine such declarants").
>
> Some circuits, including the Tenth Circuit, have followed the Court's cue and held that there is no violation of the Confrontation Clause when the defendant neglected to exercise rights that would have enabled the him to confront the witnesses against him. See, e.g., *United States v. Jackson*, 88 F.3d 845, 847 n.2 (10th Cir. 1996) (noting that the excited utterance admitted into evidence did not violate the defendant's Sixth Amendment right of confrontation in part because the defendant could have called the declarant as a witness and cross-examined him); *Reardon v. Manson*, 806 F.2d 39, 42 (2d Cir. 1986) ("It

has become settled that, at least in those borderline cases where the likely utility of producing the witness is remote, the Sixth Amendment's guarantee of an opportunity for effective cross-examination is satisfied where the defendant himself had the opportunity to call the declarant as a witness."). * * *

Because the admission of the ATF certificate does not implicate the Sixth Amendment's limited requirement of availability, and because the defendant could have called Mr. Marshall as a witness, Rith's Sixth Amendment right of confrontation was not denied by the failure of the government to call Mr. Marshall as a witness.

Finally, in *United States v. Metzger*, 778 F.2d 1195 (6th Cir. 1985), the Court rejected a confrontation challenge to Rule 803(10) by relying on the pre-*Inadi* case of *Dutton v. Evans,* 400 U.S. 74 (1970). In *Dutton*, the Court held that the government has no duty to produce a hearsay declarant where cross-examination of that declarant would be of "remote utility" to the defendant. The court in *Metzger* found that the utility of cross-examining the public official who checked the records would indeed be remote. He was unlikely to have made any errors; he had made a certification under oath; and he was unlikely to say anything different at trial.

All of these cases provide strong authority for rejecting any confrontation clause challenge to the proposed amendments to Rules 803(6) and 902. The very premise of the amendments is that cross-examination of the foundation witness would be of remote utility, in light of the generalized testimony that they would give were they produced, and in light of the fact that they have made a sworn declaration. Under these circumstances, the burden shifts to the opponent to produce the witness--and the notice requirement of the proposed amendment provides sufficient opportunity for such a production.

State cases

Proof of domestic and foreign business records by certification is permitted in several states, including Texas, Indiana and Maryland. These states have uniformly rejected confrontation challenges to rules permitting proof of business records through certification. One representative case from each of these states should suffice to make the point.

In *Chapman v. State,* 331 Md. 448, 628 A.2d 676 (1993), the court found no error in admitting an affidavit of a bank official to establish that a check had been dishonored. The court relied on *Miller, supra,* which upheld section 3505 against a constitutional attack. The *Chapman* court stated that the certification procedure was a "well-grounded" procedural "short-cut" that did not undermine "the reliability and trustworthiness of data contained in account records created and maintained in the ordinary course of the bank's business." The court also relied on the many cases, discussed above, that had rejected confrontation clause challenges to the certification procedures employed to prove the absence of a public record. The *Chapman* Court engaged in an

extensive discussion of *Inadi* and *White* and concluded that the government was not required to produce the custodian who certified the records. The court found it unnecessary to present "ministerial witnesses to carry to court a bank's business records." Production of such witnesses were not required because of the "limited utility that cross-examination of a records custodian would provide the criminal defendant." The court concluded that the "live custodian could say little more than the affidavit" and therefore production was "unlikely to clarify the record or jog the declarant's memory beyond the recorded information in the affidavit."

In *L.H. v. State*, 682 N.E.2d 795 (Ind. App. 1997), the court upheld Indiana Rule of Evidence 902 (9), permitting proof of a domestic business record through certification. This rule was the model for the proposed amendment to Federal Rule of Evidence 902. The case involved admission of a school report indicating that the juvenile had failed to attend school--this was the justification for recommitment to a juvenile detention facility. The records (of a private school) were accompanied by an affidavit of the records custodian. The court quickly rejected the confrontation challenge in the following passage:

> As indicated in Swinford's affidavit, the reports were made in the ordinary course of the school's business and there was a duty to record them. Further, we find no indication of bias or prejudice within the school report. A cross-examination of Swinford would not have added appreciably to the reliability of the facts related, namely that L.H. had numerous unexcused absences.

Finally, in *Denton v. State*, 1998 WL 476459 (Tex.App. 1998), the Court rejected a confrontation challenge to the Texas version of Evidence Rule 902(11). The government offered bank records under this rule. The court observed that Denton could cite "no authority" for his confrontation argument. The court disposed of the argument as follows:

> The effect of the Rule 902 affidavits was merely to make a prima facie showing that the bank records were what they purported to be. * * * Moreover, it was not Rule 902 that made the bank records admissible. Instead, the records were admitted pursuant to the Rule 803(6) business records exception. As Denton concedes, use of the business records exception to the hearsay rule did not violate his confrontation right.

Summary

Proof of business records through certification does not violate the confrontation clause where the records themselves satisfy the admissibility requirement of Rule 803(6). The certification requirements sufficiently guarantee the reliability of the certification process itself. And the government is not required to produce the certifying declarant, because cross-examination would be of only remote utility, and the accused has the ability to produce the

declarant if he wishes to do so.

Roger Pauley has raised the question whether the Committee Note to Rule 902 should be amended to refer to the above case law concerning the confrontation clause. On reflection, this does not seem necessary. It is implicit in the rulemaking process that the Advisory Committee will not seek to promulgate unconstitutional rules, i.e., that any constitutional question will be screened and screened again before the rule is promulgated. It seems defensive to seek to justify the constitutional basis of the rule by citing cases. Also, the law on confrontation is subject to development, rendering the Committee Note susceptible to becoming outmoded. The extensive constitutional exegesis in the original Advisory Committee Note on the hearsay rules is a case in point. That part of the Advisory Committee Note is completely outdated by intervening case law.

However, if the Committee decides that it is best to include a citation or two on the confrontation question, it would certainly be easy to do so. A paragraph could be added at the end of the Note, as follows:

> The Committee has considered whether permitting a business record to be qualified by a declaration is consistent with an accused's right to confrontation. The case law indicates that the right to confrontation is satisfied if the custodian or other qualified person makes a sworn declaration, and the records themselves satisfy the requirements of Rule 803(6). *See, e.g., United States v. Garcia-Abrego,* 141 F.3d 142 (5th Cir. 1998) (holding that admission of a business record through certification under 18 U.S.C. 3505 does not violate the accused's right to confrontation); *L.H. v. State,* 682 N.E.2d 795 (Ind. App. 1997) (rejecting confrontation clause challenge to business record admitted under Evidence Rule virtually identical to Rule 902(11)).

2. Specifying in Rule 902 that the record must be admissible under Rule 803(6)

Professor Dale Nance (98-EV-014) proposes the deletion of the phrase "which would be admissible under Rule 803(6)", as found in both 902(11) and 902(12). He argues that if admissibility under Rule 803(6) is itself a requirement for self-authentication under Rule 902, then part of the authentication requirement is that a qualified witness must testify, since that is what Rule 803(6) requires. This asserted consequence defeats the very purpose of the entire amendment. It is true that Rule 803(6) as it would be amended would not require proof of a business record through a live witness. But that is because the Rule would refer to proof by methods authorized in Rule 902. Thus, 902 would refer to admissibility under Rule 803(6), while Rule 803(6) would refer to admissibility under Rule 902--a never ending circle of inadmissibility. Moreover, a business record might be admissible for a non-hearsay purpose, in which case admissibility under Rule 803(6) would be irrelevant. That is to say, Rule 902 should be permitted to operate as an authentication rule outside its effect on the hearsay exception.

Reporter's Comment:

Professor Nance's suggested deletion of the language "that would be admissible under Rule 803(6)" was previously considered and rejected at the October meeting. However, the point he makes seems of sufficient merit to perhaps warrant reconsideration.

The language "admissible under Rule 803(6)" seems superfluous, because a record offered for its truth as a business record must meet the requirements of Rule 803(6) to be admissible anyway. That is true whether the foundation is established by a witness at trial or by certification. Including language referring to the hearsay exception in Rule 902 does not affect the underlying hearsay exception admissibility requirement one way or another. Nor does the language referring to Rule 803(6) affect or strengthen the authentication requirements in Rule 902(11) and (12) in any way. This is because the authentication requirements specifically stated in the Rule track the admissibility requirements of Rule 803(6). Referring to Rule 803(6) therefore seems to add nothing helpful to the proposed amendment to Rule 902. And the possibility that it might be construed to lead to a neverending circle of inadmissibility is a cause for concern.

Finally, hearsay exceptions and authentication requirements have traditionally been separated, as seen with public records, which have a hearsay exception (Rule 803(8)) that is separate from rules governing authentication of public records (Rules 902 (1)-(4)). There seems to be no good reason to depart from that tradition in Rules 902(11) and 902(12).

Proposal to delete reference to Rule 803(6)

If the proposal to delete the reference to Rule 803(6) were adopted, the working draft of the proposed amendment to Rule 902 would look like this:

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity ~~that would be admissible under Rule 803(6), and~~ that 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 **the declaration**.

(12) *Certified foreign records of regularly conducted activity.* In a civil case, the original or a duplicate of a foreign record of regularly conducted activity ~~that would be admissible under Rule 803(6), and~~ that 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 **the declaration.**

It is for the Committee to decide whether the proposed change would add clarity and uniformity to the proposal, without impairing the authentication requirements that the Rule imposes.

3. Record made by the regularly conducted activity

The Philadelphia Bar Association (98-EV-118) objects to the language in the proposed amendment requiring the declarant to certify that the record "was made by the regularly conducted activity as a regular practice." The Association states that "a record is not 'made' by an activity."

Reporter's Comment:

It is true that it is somewhat awkward to refer to an activity as making a record. But it is not all that awkward given the framework of Rule 803(6), which the authentication provisions are designed to track. Rule 803(6) focuses on the activity, not on the organization conducting the activity. It is also notable that 18 U.S.C. section 3505 is cast in terms of an activity making a record. That provision requires a certification, among other things, that "the business activity made such a record as a regular practice".

Still, if the proposal could be modified to provide some less awkward language, and yet retain the requirements of certification that track the admissibility requirements of Rule 803(6), the benefits might outweigh the costs of any minor textual disuniformity between Rule 902 and section 3505.

Solution:

The Philadelphia Bar Association suggests the following change to alleviate the asserted awkwardness in referring to records as made by an activity. The Association also asserts that the rephrasing more closely "follows the underlying Rule 803(6)"--though this is not obvious, since it appears that both the Working Draft and the Philadelphia Bar Association proposal track the factors set forth in Rule 803(6). The Association's proposal is more stylistic than anything.

For ease of reference for the Committee, the proposal set forth below includes the previous proposal discussed as well, i.e., deleting the reference to Rule 803(6) in the text of the Rule.

Proposal to modify reference to records made by an activity (including deletion of reference to admissibility under Rule 803(6):

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity ~~that would be admissible under Rule 803(6), and~~ that 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~~ **in accordance with the regular practice of the regularly conducted activity**.

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 **the declaration**.

(12) *Certified foreign records of regularly conducted activity.* In a civil case, the original or a duplicate of a foreign record of regularly conducted activity ~~that would be admissible under Rule 803(6), and~~ that 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~~ **in accordance with the regular practice of the regularly conducted activity**.

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 **the declaration.**

4. Describing the certification requirement with reference to other law

The Philadelphia Bar Association contends that the proposed amendment to Rule 902(11) should give more guidance on the *type* of certification that would satisfy the Rule. The Association points out that Rule 902(4), governing certification of copies of public records, requires that the certification must comply with other provisions in the Rule governing certification of public records, or with the provisions of "any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority." The Association asserts that there is no reason to omit reference to certification procedures found in other laws in Rule 902(11), when they are referred to in Rule 902(4).

Reporter's Comment:

The fact that Rule 902(4) refers to other laws governing certification in its text provides some support for including similar language in Rule 902(11). It is true that the Committee Note in the working draft of the proposed amendment refers to 28 USC 1746, thus providing a helpful referent for proper certification procedures. Yet it is also true that Rule 902(4) refers in its *text* to any act of congress or Supreme Court rulemaking that provides for proper certification. It would seem at first glance to be appropriate to have parallel language in Rules 902(4) and 902(11), since both Rules deal with certifying records. Perhaps the failure to include a parallel reference in Rule 902(11) might lead to a negative inference that would certainly be unintended.

On the other hand, it could be argued that the reference to statutes and rules in Rule 902(4) is more justifiable than in Rule 902(11). There are a number of certification provisions that might govern public officials, that do not apply to private persons. Therefore, it may be considered more necessary to alert courts and litigants to the wide variety of certification procedures that might exist with respect to public officials. Ultimately it is for the Committee to decide whether the matter is important enough to justify a change in the text of the proposal, or whether the reference in the Committee Note to 28 USC 1746 provides sufficient guidance.

Note that any reference to certification procedures found in other statutes and rules should be included in Rule 902(11) *only*. Rule 902(12) governs foreign certifications and already sets forth the requirement that the certification must be made in such a way as to subject a false statement to criminal sanction under the laws of the foreign country. Indeed, any reference to certification pursuant to Act of Congress or Supreme Court rule in 902(12) would be most problematic, since these sources of authority probably could not be applied to a person making a certification in a foreign country.

Finally, if a reference to certification procedures is made in the text of Rule 902(11), does it make any sense to retain the reference to section 1746 in the Committee Note? The answer is probably yes, since the reference might help the practitioner find the major provision governing the proper procedures for making a sworn declaration.

Note, however, that if the reference to 28 USC section 1746 is retained in the Committee Note, it must be amended to refer to Rule 902(11) only, since section 1746 cannot apply to certifications made in a foreign country for records offered under Rule 902(12). This modification of the Committee Note should be made *even if* no change is made to the text of the Rule.

Solution:

If the Philadelphia Bar Association's suggestion is seen to have merit, then the following change might be made to the text of Rule 902(11). This change would refer to authority governing certification procedures, by including language tracking that found in Rule 902(4). For ease of reference for the Committee, the proposal includes the previous changes proposed (i.e. deleting reference to admissibility under Rule 803(6), and modifying the language concerning a record made by an activity).

The proposal set forth below also includes a proposed change to the Committee Note of the working draft. That proposed change, while related to the change in the text, **should be made even if the change to the text is not adopted.**

Proposal to refer to laws governing certification procedures (including previously proposed changes, and proposed modification of the Committee Note):

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity ~~that would be admissible under Rule 803(6), and~~ that is accompanied **by a written declaration of the custodian thereof or another qualified person certifying, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, 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~~ **in accordance with the regular practice of the regularly conducted activity**.

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 **the declaration**.

(12) *Certified foreign records of regularly conducted activity.* In a civil case, the original or a duplicate of a foreign record of regularly conducted activity ~~that would be admissible under Rule 803(6), and~~ that 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~~ **in accordance with the regular practice of the regularly conducted activity**.

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 **the declaration.**

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted

activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. §1746 would satisfy the declaration requirement of ~~this amendment~~ **Rule 902(11)**, as would any comparable certification under oath.

The notice requirements in Rules 902(11) and (12) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

Reporter's Comment:

The placement of the reference to Acts of Congress and Supreme Court rulemaking is certainly subject to discussion. Placed where it is in this proposal, it makes the opening clause longer and more balky. But it also makes it more parallel to Rule 902(4), which refers to proper certification procedures in the same sentence that deals with the underlying records. Moreover, it would be difficult to define all the possible statutes and rules that might be invoked with respect to the certification, if the language was broken out into a freestanding sentence.

As an example of the problem of making the reference to certification rules a freestanding sentence: the Philadelphia Bar Association suggests placing the following freestanding sentence at the very end of Rule 902(11): "The declaration accompanying a domestic record of regularly conducted activity shall comply with any act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority governing the certification of records under oath." But this proposal is also very cumbersome. And it contains its own problems. By defining the Acts of Congress and Supreme Court rules as those governing the certification of records "under oath," the proposal could be seen by some to overlook section 28 USC 1746 itself, since the caption of that statute is entitled "Unsworn declarations under penalty of perjury." Perhaps referring to the laws governing "certifications or declarations" may be adequate, but arguably that gets the rule back into the certification/declaration distinction without a difference that caused concern within the Standing Committee.

On balance it appears that putting a general reference to acts of congress and other rules into the body of the Rule, rather than as a freestanding sentence, makes some sense and provides a closer parallel to Rule 902(4). This assumes that the Committee decides in the first place that it is appropriate to refer to other laws governing certifications in the text of Rule 902(11).

5. Clarifying the notice requirement

The Philadelphia Bar Association argues that the notification requirement in the proposed amendment is vague. The Association observes that a party is not specifically required to turn over the declaration in advance--only the underlying record itself. Moreover, the Association asserts that the timing of the notice should be set forth with more particularity. In the Association's view, the most efficient rule for pretrial notice would be to require it sufficiently in advance of trial to give the adversary an opportunity to depose the person who made the declaration. A discovery opportunity will, in the Association's view, help to guarantee that the declaration is reliable, and will prevent the trial court from having to resolve certification disputes "for the first time at trial."

Reporter's Comment:

As to specifying that the declaration must be turned over in advance along with the record, this would seem implicit in the notice requirement. If the proponent has to turn over the record, and the notice must be given in time for the opponent to challenge the declaration, it stands to reason that proponent has to turn over the declaration as well. But it is true that the text does not specifically require the declaration to be produced in advance. There appears to be no harm in making the production requirement more specific.

As to providing notice sufficiently in advance of trial that the adverse party has an opportunity to depose the person making the declaration, that is also arguably implicit in the proposal. The proposal currently provides that "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 the declaration.*" Arguably, the adverse party would not have a fair opportunity to challenge the declaration if it did not have enough time to depose the person who made the declaration.

There might also be a concern that including a rigid "time to depose" requirement in the rule could give rise to adversarial gamesmanship, the deterrence of which is one of the reasons that the amendment was proposed. An adversary might argue that they had no time to depose even if they had no intent of deposing the person who made the declaration, and even if the declaration can be challenged without such a deposition. Moreover, requiring notice in time to depose may be burdensome in cases where the declaration was prepared in a foreign country.

Arguably, the current language of the working draft — requiring the proponent to provide notice enough in advance to give the adversary a "fair opportunity to challenge the declaration" — is flexible enough to require notice with enough time to depose where such time is warranted, and yet to preclude an adverse party from complaining about the lack of discovery

when that complaint seems to be nothing more than adversarial posturing.

Solution:

If the Committee believes it is appropriate to amplify the notice provision by requiring production of the declaration, and by specifying that the adverse party should have enough time to conduct discovery, then the notice provision of the rule could be amended as follows.

The change presumably would be made to the notice provisions of both Rule 902(11) and 902(12)--unless the Committee thinks it appropriate to distinguish the notice provisions in light of the fact that the party who makes a declaration under Rule 902(12) is likely to be in a foreign country, thus complicating the requirement of giving notice in time for a deposition.

Proposed change to the notice provision (change from working draft):

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 **and the declaration** available for inspection sufficiently in advance of ~~its~~ **the** offer in evidence to provide an adverse party with a fair opportunity to challenge the declaration **by the taking of appropriate discovery.**

Reporter's Comment:

1. The two proposed changes are not interdependent. The Committee could agree to one change but not the other. The change specifying that the declaration must be produced in advance is obviously less controversial.

2. The change from "its offer in evidence" to "the offer in evidence" is made necessary by referring to both the record and the declaration.

3. If the Committee decides that it is worthwhile to specify that notice must be given in time to conduct meaningful discovery, it must also decide whether the special considerations attendant to foreign declarations would necessitate different notice provisions in Rules 902(11) and 902(12). The possibility of confusion arising from two different notice provisions cuts in favor of retaining the flexible language concerning notice that is currently found in the working draft of both subparts.

6. Pre-trial Objection Requirement?

18 U.S.C. 3505 provides that:

> "A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver."

There is no comparable provision in the proposed amendment to Rule 902. Should there be?

First, regardless of the benefits of tracking section 3505, the Committee should reject the requirement of that statute that the motion shall be "determined by the court before trial." This provision has caused problems for the courts. Several judges have complained that it denies them the flexibility of deferring a ruling until the trial. The only real question, therefore, is whether the requirement of *objection before trial* should be included in Rule 902.

Again, on this point section 3505 imposes a rigid practice that should arguably be avoided. There could be many good faith reasons for deferring an objection until trial--and of course, if the objecting party appears to be sandbagging, the court can certainly take that into account. The desire for a uniform approach to certifying business records does not mean that the rule has to repeat all the mistakes that Congress may have made.

Most importantly, there is no similar provision in any other Federal Rule of Evidence--no requirement anywhere else that an objection must be made to evidence before trial or it is waived. Why would it be so important to require such an objection under Rule 902?

Finally, it should be noted that while the confrontation clause arguments are weak, it simply adds fuel to the fire to hold that a criminal defendant waives his right to challenge a certified business record by failing to object to it before trial.

If the Committee decides, however, that a completely uniform approach is necessary, then a pretrial objection requirement can be added to the rule, at the end of the notice provision. The notice provision could read as follows (with the additions previously discussed):

> 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 and the declaration available for inspection sufficiently in advance of ~~its~~ the offer in evidence to provide an adverse party with a fair opportunity to challenge the declaration by the taking of appropriate discovery. **A motion opposing admission in evidence of such record shall be made by an adverse party before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record, but the court for cause shown may grant relief from the waiver**

Appendix

18 U.S.C. 3505

3505. Foreign records of regularly conducted activity

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that--

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

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

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term--

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.