ADVISORY COMMITTEE
ON
EVIDENCE RULES

Washington, D.C.
October 25, 1999

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
Washington, D.C.
October 25, 1999

I. Opening Remarks of the Chair

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

II. Consideration of Possible Advisory Committee Report on Case Law Divergence From Evidence Rules and Advisory Committee Notes

The Committee will discuss whether to embark on a project that would lead to the Committee's published comments highlighting Evidence Rules and Advisory Committee Notes that are inconsistent with current case law. A memorandum prepared by the Reporter, indicating some of the Evidence Rules that might be the subject of such a project, is included in the agenda book.

III. Privileges

The Subcommittee on privileges will provide an oral report on the results of the Subcommittee meeting scheduled for the day before the full Committee meeting.

IV. Consideration of Other Evidence Rules

The Committee will discuss whether there are any Evidence Rules that might be in need of amendment. The following materials are included to assist Committee members in this preliminary inquiry: 1) Memos previously prepared by the Reporter on whether action should be taken on certain Evidence Rules (after consideration of each of these memos, the Committee decided not to proceed with a proposed amendment at that time); 2)

Minutes of the October, 1996 meeting, at which Committee members were invited to propose Rules that might be amended (the Committee's resolution of each of these proposals is set forth in the Minutes); and 3) an article by Professor Imwinkelreid discussing whether it is advisable to amend Article VI of the Evidence Rules..

V. Recent Developments

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

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

C. Legislation. Report on pending legislation that may affect the Evidence Rules.

VI. New Business

VII. Next Meeting

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September 21, 1999
Doc. No. 1651

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 12-13, 1999

New York, N.Y.

The Advisory Committee on the Federal Rules of Evidence met on April 12th and 13th at Fordham University in New York City.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. Milton I. Shadur, Acting Chair for the first day of the meeting
Hon. David C. Norton
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Laird Kirkpatrick, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, 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. Richard Kyle, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on
Rules of Practice and Procedure
Professor Leo Whinery, Reporter, Uniform Rules of Evidence
Drafting Committee
Roger Pauley, Esq., Justice Department

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

John K. Rabiej, Esq., Chief, Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center

Opening Business

Judge Shadur chaired the first day of the meeting. Judge Fern Smith was available by way of telephone conference call on the first day, and was present to chair the second day of the meeting. Judge Shadur opened the meeting by asking for approval of the minutes of the October, 1997 meeting. These minutes were unanimously approved.

The Committee then considered the proposed amendments to the Evidence Rules that had been released for public comment. The proposed amendments covered Evidence Rules 103, 404(a), 701, 702, 703, 803(6) and 902. The Committee evaluated the public comments received on the proposals, considered changes to the proposed amendments and Committee Notes, and approved the proposals, as modified, for recommendation to the Standing Committee that they be approved and referred to the Judicial Conference. What follows is a breakdown of the discussions, and the action taken, with respect to each of the proposals.

Rule 702

The proposal to amend Rule 702 requires that expert testimony have a sufficient basis, that the expert employ reliable principles and methods, and that those principles and methods are reliably employed to the facts of the case. The intent of the proposal is to recognize and refine the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* and its progeny.

Judge Shadur opened the discussion on Rule 702 by noting that in deciding how to amend the Rule, the Committee was not technically bound by the Supreme Court's intepretation of the existing Rule 702 in *Daubert* and in the recent case of *Kumho Tire v. Carmichael.* However, all members of the Committee were in agreement that the approach taken by the Supreme Court--an approach that is followed in the proposal issued for public comment--provided an excellent and definitive means of regulating unreliable expert testimony. There was unanimous agreement that if the Rule is to be amended, it should stick as closely as possible to the Supreme Court's teachings in *Daubert* and *Kumho.*

The Committee then considered some of the major criticisms and suggestions that arose in the public comment period. The topics addressed are listed by number:

1. Proliferation of motions challenging expert testimony

Some public commentators were concerned that the proposed amendment would lead to a flood of motions challenging expert testimony. A discussion ensued in which some members said they had encountered no increase in challenges to experts since *Daubert*, while other members noted some (but not major) increase. Committee members noted that the public comment had expressed particular concern about the possibility that motions to exclude would increase due to the proposed amendment's extension of the gatekeeper function to non-scientific expert testimony. Since the Supreme Court had resolved that question in *Kumho* consistently with the proposed amendment, Committee members considered most of the concern over a proliferation of motions to be mooted by the *Kumho* decision.

While the concerns expressed in the public comment period did not, in the Committee's view, warrant a rejection or limitation of the language in the text of the proposed amendment, the Committee unanimously agreed to add language to the Committee Note indicating that the amendment is not intended to provide an excuse for an automatic challenge to the testimony of every proffered expert. This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

2. Infringing the Right to Jury Trial

Some public commentators asserted that the proposed amendment would deny plaintiffs a right to jury trial, because it would allow the trial judge to exclude expert testimony by deciding credibility questions that should be left to the jury. The Committee found these general criticisms to be unjustified. To the extent the criticism was based on trial judges acting as gatekeepers, this is simply the result of the proposed amendment's codification of *Daubert* and *Kumho*. Even if Rule 702 were not amended, plaintiffs would have to deal with the trial judge's gatekeeping function in excluding the testimony of any expert if that testimony is unreliable. Moreover, the right to jury trial does not mean that litigants are permitted to bring any evidence, no matter how dubious or prejudicial, before a jury. 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, privileged, etc.. 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-- does not violate the right to jury trial.

For all these reasons, the Committee unanimously agreed that any concerns over the loss of the right to jury trial did not warrant a change in the text of the proposed amendment to Evidence Rule 702. The Committee agreed, however, to add to the Committee Note a quotation

from the Court in *Daubert*, in which the Court indicates that "[v]igorous 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." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

3. Extending the Gatekeeper Function to Non-scientific Expert Testimony

Some public commentators objected to the proposed amendment's explicit extension of the *Daubert* gatekeeping function to the testimony of non-scientific experts. These comments were rendered before the Supreme Court's decision in *Kumho*, however. The Court in *Kumho*, citing favorably the Committee Note to the proposed amendment released for public comment, held that the *Daubert* gatekeeping function must be applied to all expert testimony. The *Kumho* Court emphasized the same flexible standards for assessing reliability that are set forth in the proposed amendment and Committee Note. The Committee therefore decided that there was no need to modify either the text or the note of the proposed amendment to address any concerns about extending the gatekeeper function to non-scientific expert testimony.

4. Competing Methodologies in the Same Field

Some public commentators have expressed the concern that the proposed amendment to Rule 702 fails to recognize that there might be two or more competing reliable methodologies in the same field. The Committee considered these criticisms and concluded unanimously that the broad language of the proposed amendment, which refers to "reliable principles and methods", is broad enough testimony based on competing methodologies in the same field, where both are reliable. In order to assuage any concerns on the matter, the Committee agreed to add language to the Committee Note providing that the amendment "is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

5. Experience-based Experts

A few public commentators took the position that the proposed amendment would exclude the testimony of any expert relying on experience, rather than scientific or technical knowledge. The Committee considered these comments and found them to be without merit. Rule 702 specifically states that experts may be qualified by experience. The proposed amendment, in requiring that experts must employ reliable principles and methods, in no way implies that experience cannot qualify under its terms. The Committee therefore unanimously rejected a suggestion that the term "experience" be included together with the terms "principles

and methods" in the text of the proposed amendment. Such a change might give too much weight to experience as a basis for expert testimony.

The Committee nonetheless agreed to amend the Committee Note to emphasize that the testimony of experience-based experts can qualify under the Rule. The revision provides, among other things, that in certain fields, "experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

6. Requiring the Testimony to be Sufficiently Based on Reliable Facts or Data

Several organizations expressed concern that the reference in Subpart (1) of the proposed amendment to an expert's reliance on "reliable facts or data" would create several problems. One possibility is that the trial judge could exclude the expert's testimony on the ground that the judge did not believe the underlying data; the concern is that this type of credibility determination could usurp the jury's role. Another possibility expressed in the public comment is that the reference to "reliable facts or data" could be construed to prohibit an expert from relying on hypothetical facts or data. Finally, and most importantly, the commentators noted a possibly problematic overlap between imposing a limitation on reliable facts or data in Rule 702, and imposing a similar limitation on otherwise inadmissible facts or data under Rule 703.

The Committee considered all of these criticisms and collectively found that some or all had merit. The Committee noted that the problems derived from the focus on "reliable" facts or data in Subpart (1). The intent of Subpart (1) is to assure that the expert has relied on a sufficient *quantity* of information; calling for a qualitative assessment (by requiring the information to rise to some independent level of reliability) risks a conflict with Rule 703. Nor is a qualitative assessment of the underlying data necessary in Subpart (1). Subparts (2) and (3) already require the expert to use reliable principles and methods and to apply those principles and methods reliably, so there is virtually no chance that deletion of the term "reliable" from Subpart (1) would result in the admission of unreliable expert testimony.

The Committee therefore unanimously agreed to revise Subpart (1) of the proposed amendment to Rule 702, to delete the word "reliable", and to restylize the language of Subpart (1) to provide that an expert's opinion must be based on "sufficient facts or data". The proposed Committee Note was modified where necessary to take account of this minor change. A subsequent motion was made to delete Subpart (1) entirely from the proposed amendment. This motion failed by a vote of eight to two.

7. Focus on an Expert's Reasoning

One public comment suggested that the proposed amendment should be revised to focus on an expert's "reasoning" rather than the use of "principles and methods". The Committee considered this comment and unanimously concluded that the suggested change was one of style rather than substance, that any stylistic change was not for the better, and therefore that the proposal should not be amended to focus on "reasoning."

8. Retaining the Existing Rule:

The Committee considered and discussed several public comments suggesting that Rule 702 should not be amended at all. One member of the Committee expressed some sympathy with this position. But the remaining Committee members were of the view that the amendment should be forwarded to the Standing Committee, for a number of reasons. First, even after the *Kumho* decision, there are a number of *Daubert* questions on which the courts disagree, including the appropriate standard of proof and the rigor with which expert testimony should be scrutinized. Second, Congress has in the past shown an interest in "codifying" *Daubert*, and the Committee was concerned that these previous legislative proposals created many more problems than they solved. The Committee resolved that it was necessary to respond to these Congressional initiatives with the kind of flexible and carefully drafted amendment that the Committee has proposed.

9. Generalized Expert Testimony:

One public comment expressed the concern that the proposed amendment would preclude the testimony of experts who would testify only to instruct the jury on general principles--what one Committee member referred to as expert "tutorials." The cause of the concern was Subpart (3) of the proposed amendment, which states as a condition of admissibility that "the witness has applied the principles and methods reliably to the facts of the case." With respect to expert "tutorials", the argument could possibly be made that the expert has not attempted to apply any principles or methods to the facts of the case.

The Committee engaged in an extensive discussion and analysis of whether the proposed amendment should be revised to more specifically permit the testimony of experts who testify to general principles only. One possibility considered was to revise the proposal to provide that the witness must apply the principles and methods reliably to "the issues in the case." But this proposal was found by a majority of Committee members to call for a distinction without a difference.

Ultimately, the Committee agreed, by a vote of seven to three, that the existing text of the proposal was clear enough to indicate that an expert tutorial would be admissible, so long as

the expert's testimony was reliable and fit the facts of the case. The Committee then voted unanimously to revise the Committee Note to emphasize that reliable expert testimony can be admitted even where the expert makes no attempt to apply any methodology to the specific facts of the case. Among other things, the revision states that the amendment "does not alter the venerable practice of using expert testimony to educate the factfinder on general principles." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

10. Public Comment Suggestions to Revise Committee Note

The Committee considered two sets of public comments that had suggested certain revisions to the Committee Note to the proposed amendment to Evidence Rule 702.

One comment suggested that the Committee Note be amended to state that Rule 104(b), rather than Rule 104(a), provides the standard of proof for determining the reliability of expert opinion under Rule 702. The Committee considered this comment and unanimously determined that the suggestion was inconsistent with a number of important precedents: 1) the Supreme Court in *Daubert* expressly stated that the trial judge's gatekeeper function is found within Rule 104(a), and this position was reiterated implicitly in *Joiner v. General Electric* and *Kumho*; 2) the recent amendment adding Evidence Rule 804(b)(6) specifically states in the Committee Note that admissibility questions thereunder are to be decided under Rule 104(a)--the Committee found no distinction between issues decided by the judge under Rule 804(b)(6) and those decided by the judge under Rule 702; and 3) for admissibility determinations by the judge, Rule 104(a) sets the basic rule, to which Rule 104(b) is the exception that is applicable in certain very limited situations. The Committee unanimously determined that none of the reasons for employing the exceptional Rule 104(b) standard applied to the trial judge's determination of the reliability of an expert's opinion.

A second set of comments expressed concern with the Committee Note that was released for public comment, insofar as the Note suggests certain factors that a trial court could consider in determining whether an expert's testimony is reliable. The concern was that the listed factors might be read as being dispositive of the reliability question. The Committee agreed to add language to the Committee Note providing that "no single factor is necessarily dispositive of the reliability of a particular expert's testimony."This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

11. Style Subcommittee

The Evidence Rules Committee considered a change suggested by the Style Subcommittee of the Standing Committee. That change substituted the word "if" for the words

"provided that" at the beginning of the proposed amendment to Rule 702. The Committee unanimously agreed to adopt the suggestion.

12. Kumho

The Committee unanimously resolved to add language to the Committee Note to take account of the Supreme Court's decision in *Kumho*. The sense of the Committee was that the analysis in *Kumho* is completely consistent with and supportive of, the approach taken by the proposed amendment and Committee Note; therefore it would be appropriate to cite and quote *Kumho* throughout the Committee Note. All of this language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

12. Recommendation

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 702, as modified following publication, be approved and forwarded to the Judicial Conference. That motion passed by a unanimous vote.

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

Rule 701

The Committee considered the proposed amendment to Evidence Rule 701. As released for public comment, the proposal would preclude testimony under Rule 701 if it were based on "scientific, technical, or other specialized knowledge." The goal of the amendment is to prevent testimony from being admitted under Rule 701 when in fact it is expert testimony and treated as such by the proponent.

An extensive discussion ensued on whether it was appropriate to establish a bright line between expert and lay testimony. Justice Department representatives argued that the proposal would create uncertainty, and would result in many more witnesses being subject to the disclosure provisions applicable to experts. They argued further that any expansion of discovery rules should not come by way of a rule of evidence. Other members argued, in contrast, that the proposal would not change existing law in any substantial way. A proponent who purports to present lay witness testimony that is based on extensive experience will have to establish a foundation in any case--the experiential foundation that would qualify the witness under Rule 701 would be the same as the foundation necessary to establish the witness as an expert under

Rule 702. Justice Department representatives argued in response that the real problem was one of finding it necessary to disclose such witnesses in advance of trial.

Ultimately, the Committee agreed that both the text and the Note to Rule 701 had to be revised to accommodate DOJ concerns about pretrial disclosure of witnesses such as eyewitnesses testifying on the basis of extensive, particularized experience. The Committee agreed that there was no intent to prevent such witnesses from testifying under Rule 701. On the other hand, the Committee was strongly of the view that a proponent should not be permitted to end-run the requirements of Rule 702 simply by calling testimony "lay witness testimony" when in fact the proponent emphasizes the witness' specialized knowledge and expertise.

After extensive discussion on possible compromise language, and taking account of the suggestions of the Justice Department, the Committee ultimately agreed to one change in the text of the proposal that was issued for public comment. That change modifies the exclusion of testimony under Rule 701 to testimony "not based on scientific, technical or other specialized knowledge **within the scope of Rule 702**." The inference is, therefore, that some specialized knowledge may provide a permissible basis of lay witness testimony--just not the specialized knowledge that is traditionally within the scope of expert witness testimony. Corresponding changes were made to the Committee Note, and the Note was also amended to delete a paragraph that had implied that all testimony based on specialized knowledge must be considered expert testimony. Finally, a section was added to the Committee Note indicating that there was no intent to prevent lay witnesses from traditionally accepted subjects such as the value of property and the fact that a certain substance was a narcotic. This new section of the Committee Note also elaborates on the distinction between lay testimony, which "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."

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 701, as modified following publication to address the Justice Department's concerns over the scope of the Rule, be approved and forwarded to the Judicial Conference. Nine Committee members voted in favor of the motion. The Justice Department representative abstained.

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

Rule 703

The proposed amendment to Evidence Rule 703 would impose limitations on the

disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion.The Committee considered some of the major criticisms and suggestions that arose in the public comment period concerning the proposed amendment to Evidence Rule 703. The topics addressed are listed by number:

1. A Change to the Rule is Unnecessary

The intent of the proposed amendment is to prevent an opponent from bringing unreliable hearsay or other inadmissible evidence before the jury in the guise of information relied upon by an expert. A few public comments argued that the Rule need not be amended, on the ground that courts have been guarding against the abuses that the amendment seeks to prevent. But based on an extensive review of the case law, as well as other public comments and the experiences of the Committee members, the Committee unanimously agreed that there remains a substantial risk that parties will use the existing Rule 703 as a backdoor means of evading exclusionary rules. Consequently, the Committee determined that the Rule should be amended to guard against that risk.

2. Rebuttal, and Response to an Anticipated Attack on the Expert's Basis

Some public comments suggested that the Committee Note should be amended to clarify that a proponent may be able to bring out inadmissible used by the expert on rebuttal, if the opponent attacks the basis of an expert's opinion on cross-examination. Along the same lines, these public comments suggested that the Note address whether an expert's inadmissible basis could be brought out on direct in an effort to "remove the sting" of an anticipated attack on the expert's basis. The Committee concluded that the possibilities of disclosing inadmissible information relied upon by an expert— either for rebuttal or in anticipation of an attack on the expert's basis— are encompassed within the balancing test set forth in the proposed amendment. There was therefore no need to amend the text of the Rule to account for these possibilities. The Committee did agree, however, to amend the Committee Note to clarify that the balancing test should be applied to questions of rebuttal and anticipated attack. The added language provides that "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." It further provides that "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 that the trial court "should take this consideration into account in applying the balancing test provided by this amendment."

3. Requiring Proponents to Qualify Evidence Relied on by an Expert

One public commentator suggested that the proposed amendment would result in wasted expense, because it would force a proponent to qualify evidence as admissible even if it was only to be used as part of the basis of an expert's testimony. The Committee found this suggestion to be without merit. If information relied on by an expert is in fact admissible, there is no legitimate reason why a proponent would want or need to admit it solely to explain the basis of an expert's testimony and not for substantive purposes. Nor is there a legitimate reason to forego the process of qualifying evidence that is in fact admissible.

4. Information "Not in Evidence"

At its October, 1998 meeting , the Evidence Rules Committee tentatively concluded that the proposed amendment should refer to information "not in evidence" rather than information that is "otherwise inadmissible." The thought was that the reference to information "not in evidence" would provide more clarity. However, on reconsideration, the Committee unanimously determined that the phrase "not in evidence" would be problematic. It would subject even admissible information used by an expert to the strict balancing test simply because the information was not yet put in evidence at the time of the expert's testimony. This could lead to disruption in the order of proof because a proponent could be forced to qualify evidence out of the ordinary sequence, in order to avoid the strict balancing test of the proposed amendment.

After extensive discussion, the Committee resolved to return to the "otherwise inadmissible" language that had been included in the version of the proposed amendment that was issued for public comment. The Committee also resolved to address the concern of some public comments that it might be confusing to refer to the "probative value" of "otherwise inadmissible" evidence. The Committee unanimously agreed to add language to the text of the Rule to indicate that the probative value to be assessed is the degree to which the otherwise inadmissible information assists the jury in understanding the expert's opinion. The Committee Note was also revised to accord with the change in the text. This language is included in the proposed amendment and Committee Note attached as an appendix to these minutes.

5. Explicating Balancing Factors in the Committee Note

The Committee considered the suggestion of some public commentators that the Committee Note to the proposed amendment to Rule 703 should be revised to add a list of factors that a trial court should consider in determining whether otherwise inadmissible information relied on by an expert should be disclosed. Committee members generally expressed a reluctance to include such a checklist. Members were confident that trial judges were

experienced in balancing probative value and prejudicial effect in a variety of situations. There was also a concern that by including some factors, courts and litigants might draw a negative inference concerning other factors that are not expressly included on the list. The Committee therefore unanimously agreed that the suggested addition should not be adopted.

6. Recommendation

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 703, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 703, and the proposed Committee Note to Rule 703, is attached to these minutes.

Rule 103

The proposal to amend Rule 103 that was issued for public comment would provide that a party need not renew an objection or offer of proof where the trial court has made a definitive advance ruling admitting or excluding evidence. It further codifies and extends the rule of *Luce v. United States*. *Luce* held that a criminal defendant who objects to an advance ruling admitting impeachment evidence must take the stand to preserve any claim of error for appeal.

The Chair began the discussion on Rule 103 by stating that she did not believe it was the Committee's role to expand the application of *Luce*--that was an important policy issue that should be left to the courts. Several Committee members echoed this sentiment, and stated that the proposed Rule should leave the applicability of *Luce* to case law. The way this could be done would be to delete the second sentence of the proposed amendment (the sentence codifying and extending *Luce*), and to state in the Committee Note that there was no intent to address any of the questions raised in *Luce*.

The Justice Department representatives objected to this solution, arguing that deleting the second sentence of the proposal would implicitly overrule *Luce*, and that this implication could not be corrected by a Committee Note. They argued that most of the expressed concern over the second sentence was in its application to civil proceedings. The Justice Department representatives suggested that the text of the proposal could be changed to limit the second sentence, concerning *Luce*, to criminal cases. Some members responded that this solution would

implicitly overrule some of the court decisions that had in fact applied *Luce* in a civil setting. The Justice Department representatives responded that the Committee Note could state that there was no intent to deal with *Luce* in a civil setting. It was unclear to many Committee members, however, why a Committee Note would be considered sufficient to clarify any ambiguity about the effect of the Rule on *Luce* in civil cases when, according to the Justice Department, a Committee Note would not be sufficient to clarify any ambiguity about the effect of the Rule on *Luce* in every case.

Other Committee members rejected the contention that dropping the sentence on *Luce* could be construed as an implicit overruling of that decision. The first sentence of the proposed amendment states that there is no need to renew an objection or offer of proof when the advance ruling is definitive. But *Luce* has nothing to do with renewing an objection--rather, it requires a party to testify in order to preserve a claim of error with respect to the admission of impeachment evidence. Testifying and renewing an objection are separate concepts.

Other Committee members, addressing the Justice Department's proposal to limit the *Luce* language to criminal cases, noted that such a limitation had been rejected by the Standing Committee when a previous version of an amendment to Rule 103 was proposed for release for public comment.

A motion was made to delete the second sentence of the proposed amendment to Rule 103 that was issued for public comment; to amend the Committee Note to indicate that there is no intent to disturb *Luce;* and to add language to the Committee Note describing why the question of renewal of objection or offer of proof is different from the question confronted by the Court in *Luce.* This motion passed by a vote of 7 to 3. A second motion was made to retain the second sentence but limit it to criminal cases, and to amend the Committee Note accordingly. This motion failed by a vote of 7 to 3.

After these votes, Committee members expressed concern that Justice Department objections to the deletion of the second sentence of the proposal might result in the rejection of the proposed amendment in its entirety. The sense of the Committee was that it would be most unfortunate if the first sentence of the proposal were to be rejected due to expressed objections over the deletion of the second sentence. Therefore, in a separate vote, the Committee unanimously agreed that it would prefer to have an amendment with the *Luce* language, limited to civil cases, rather than to have no amendment at all.

Magistrate Judge's Rulings:

28 U.S.C section 636(b)(1) and Fed.R.Civ. P. 72(a) require that a party who would object to the nondispositive determination of a magistrate judge on a matter adjudicated without consent of the parties must file an objection with the district court within ten days of the ruling, in order to preserve a claim of error on appeal. A public commentator expressed concern that the

proposed amendment to Evidence Rule 103(a) could be construed as in conflict with the statute and the Civil Rule, because the proposed amendment states that a party need not renew an objection or offer of proof as to pretrial definitive rulings.

The Committee, after discussion, determined that there was no inconsistency between the proposed amendment and the statute and Civil Rule. The proposed amendment provides that an objection or offer of proof need not be *renewed* at trial when the pretrial ruling is definitive. The statute and Civil Rule do not require a renewal of an objection; rather, they require the party to essentially *appeal* the Magistrate Judge's ruling to the district court, in order to preserve the right to appeal further to the court of appeals. The Committee therefore found it unnecessary to amend the text of the proposal to refer to 28 U.S.C section 636(b)(1) and Fed.R.Civ. P. 72(a).

The Committee did agree, however, that it would be useful to add language to the Committee Note that would mention the statute and Civil Rule, and to state that there is no intention to abrogate those provisions. The Committee unanimously agreed to add the following language to the Committee Note:

> 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 a 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."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Subsequent Foundation

The Committee reviewed a public comment suggesting that the Committee Note to the proposed amendment to Rule 103 be revised to address the problem arising when evidence is admitted subject to connection or foundation, and the proponent never ends up satisfying that foundation requirement. In such circumstances, the objecting party should not be led to believe

that an initial objection at the time of the advance ruling would be sufficient to preserve a claim of error predicated on the proponent's failure to establish a foundation. The Committee agreed that it would be useful to amend the Committee Note to provide guidance to practitioners on this question. The Committee voted unanimously to add language to the Committee Note providing that "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."

Style Subcommittee

The Style Subcommittee of the Standing Committee suggested a minor change to the proposed amendment to Evidence Rule 103 as it was released for public comment. The suggestion was to move the clause "at or before trial" to a different place in the first sentence of the proposal. The Committee unanimously agreed to this change.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 103, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a vote of seven to three.

A copy of the proposed amendment to Rule 103, and the proposed Committee Note to Rule 103, is attached to these minutes.

Rule 404(a)

The proposed amendment to Evidence Rule 404(a) that was issued for public comment would provide that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" trait of character of the accused. At its October, 1998 meeting, the Committee tentatively agreed to change the word "pertinent" to the word "same", thus limiting the door-opening effect to the very trait of character as to which the accused attacked the victim. The Committee Note was also tentatively revised to accord with this textual change, and to clarify that the Rule does not apply if the accused proffers evidence of the victim's character for some purpose other than proving the victim's propensity to act in a certain way. These tentative changes were approved by the Committee at the April meeting, as appropriate and helpful limitations and clarifications.

The Committee also discussed a suggestion that all the references in Rule 404 to a "victim" should be changed to refer to an "alleged victim." Use of the term "alleged" would provide consistency with Rule 412, and would reflect the reality that at the time the character evidence is proffered, the victim's status is alleged, not proven. The Committee agreed to make this change to the text of the proposed amendment, and to make corresponding changes to the Committee Note.

The Committee then discussed the underlying merits of the proposed rule change. Some members expressed concern that the proposal imposes an unjustified penalty on an accused who decides to attack the victim's character; but most members were of the view that the proposal is necessary to prevent a one-sided presentation of character evidence.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 404(a), as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a vote of nine to one.

A copy of the proposed amendment to Rule 404(a), and the proposed Committee Note to Rule 404(a), is attached to these minutes.

Rule 803(6)

The proposed amendment to Evidence Rule 803(6) would provide a means of qualifying business records without the necessity of calling a witness to testify at trial. The public comment on the proposal was almost uniformly favorable. The Committee considered one public comment arguing that the proposal could violate a criminal defendant's right to confrontation. But after extensive research into the case law, the Committee found that there is no viable confrontation question where the record itself fits the requirements of a business record and is qualified by a sworn declaration of the custodian or other qualified witness. The Committee unanimously found that there was no need to amend either the text or the Committee Note of the proposal that was released for public comment.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 803(6), as issued for public comment, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 803(6), and the proposed Committee Note to Rule 803(6), is attached to these minutes.

Rule 902

The proposed amendment to Rule 902 would provide a means of authenticating certain business records, other than through the live testimony of a foundation witness. The proposal is intended to work in tandem with the amendment to Evidence Rule 803(6). The intent of the amendment is to provide similar treatment for domestic records, and foreign records in civil cases, as is provided for foreign records in criminal cases by 18 U.S.C. section 3505.

Right to Confrontation:

A Justice Department representative suggested that the Committee Note to the proposed amendment to Evidence Rule 902 include a statement that the admission of business records through certification of a qualified witness does not violate a criminal defendant's right to confrontation. Most Committee members thought it unwise, however, to opine about constitutional issues in a Committee Note. The suggestion was therefore rejected.

Tracking Section 3505

18 U.S.C. 3505 provides that foreign business records can be admitted in criminal cases by way of certification of a qualified witness. The proposed amendment to Rule 902 seeks to apply the principles of section 3505 to all domestic business records, and to foreign business records in civil cases. The proposed amendment is not a carbon copy of section 3505, however. For example, section 3505 contains a provision that an objection to the record must be entered before trial, or it is deemed waived. It also provides that the court's ruling on a motion to exclude the record must be made before trial. There are no similar procedural provisions in the proposed amendment to Evidence Rule 902.

A Justice Department representative argued that because the language section 3505 differed from that of the proposed amendment, the proposed Rule 902(12) should be expanded to criminal cases. This would in effect provide the government two means of qualifying foreign business records in criminal cases--section 3505 and Rule 902(12). Committee members generally opposed this suggestion, expressing concern that it would result in much confusion. Nor did the Committee find any reason to replicate section 3505 word for word in the Evidence Rules. Section 3505 contains intricate procedural provisions, the type of which are not generally found in the Evidence Rules. The suggestion from the Justice Department representative failed for want of a motion.

Records Admissible Under Rule 803(6)

One public comment suggested that the reference in the proposed amendment to records admissible under Rule 803(6) would create a problematic circularity. The argument was that a record is only admissible under Rule 803(6) if a qualified witness authenticates the record at trial, or if the record is certified in accordance with Rule 902. But since the proposed amendment to Rule 902 refers back to admissibility under Rule 803(6), the public commentator envisioned an endless cycle of inadmissibility. The Committee concluded that this concern could be remedied by revising the text of the proposal slightly to refer to a "record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person . . . " Committee members expressed the opinion that it was important to refer to Rule 803(6) in the proposed amendment to Rule 902--such a reference was necessary to provide a connection between the two rules. The Committee voted unanimously to modify the language of the text of Rules 902(11) and (12) to refer to records "that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person".

Record Made by a Regularly Conducted Activity

One public comment suggests that the reference in the proposed amendment to records "made by the regularly conducted activity as a regular practice" is awkward, because, it is asserted, an activity cannot make a record. The Committee considered this criticism and determined that the chosen language was appropriate--it tracked the terms of Rule 803(6) and 18 U.S,C. 3505, both of which refer to records made by an activity.

Explication of Certification Standards

A public comment suggested that the text of the proposed amendment be amended to refer to rules and statutes governing the methods of proper certification. The Committee noted that Rule 902(4), governing authentication of public records, contains language providing for certification "in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority". The Committee unanimously agreed that it would be appropriate and helpful to add identical language to Rule 902(11). Similar language could not be added to Rule 902(12), however, since that provision governs foreign business records, and certification of those records could not be expected to follow a manner complying with domestic law. The Committee also agreed, in accordance with a tentative decision reached at the October meeting, to amend the Committee Note to provide a reference to 28 U.S.C. §1746, the most important statutory provision governing affirmations under oath. The language added to

the text and Committee Note can be found in the appendix to these minutes.

Notice Provision

The Committee determined, in response to a suggestion in a public comment, that it would be useful to specify that the proponent must make both the underlying record and the signed declaration available in advance of trial. The Committee also affirmed a tentative decision reached at the October meeting--that the text of the Rule specify that the opponent should have sufficient time to challenge the declaration of the custodian or other qualified witness. These changes were agreed to by unanimous vote.

Some public commentators suggested that the notice provisions should be amended to provide more procedural detail. But the Committee unanimously concluded that such an approach would be inconsistent with the notice provisions found in other Evidence Rules, which are mostly cast in general terms.

Style Subcommittee

The Style Subcommitee of the Standing Committee made a number of suggestions for restylizing the proposed amendment to Rule 902. Some of the suggestions were mooted because they were made with respect to proposed revisions that were not adopted. The Evidence Rules Committee unanimously agreed to all of the other suggestions except one--the suggestion for restylizing the phrase "in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority" was not adopted because the existing phrase is drawn verbatim from other Evidence Rules, and the Committee believed it appropriate to use consistent terminology throughout the Evidence Rules.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 902, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 902, and the proposed Committee Note to Rule 902, is attached to these minutes.

Privileges

At the October meeting, the Chair appointed a Subcommittee to conduct a preliminary investigation into whether it would be advisable for the Evidence Rules Committee to begin a project that might propose a codification of the law of privileges. The Subcommittee reported at the meeting, and unanimously recommended that the Committee should begin a long-term project to attempt to draft proposed rules that would codify the federal law of privileges. The Subcommittee noted that there are many questions on which the courts are divided, both as to the extent of well-accepted privileges and the existence of newer privileges. The Subcommittee also noted that Congress has expressed an interest in codifying privileges on a case-by-case basis, and asserted that if Congress was determined to tinker with privilege law, it would be better to conduct a more wide-ranging review through the rulemaking process. Finally, the Subcommittee noted that the lack of a codified privilege law created a major gap in the Evidence Rules--a gap that should be closed at some point.

The Committee unanimously agreed that an investigation of the privileges would be a useful project even if the Committee never reached the stage of formally proposing codified rules. In light of this general agreement, the Chair appointed a subcommittee to begin an investigation into codification of the privileges. It was suggested that the Subcommittee begin by reviewing the proposed codification of the original Advisory Committee on Evidence Rules. The Subcommittee consists of Laird Kirkpatrick, David Maring, and the Reporter. Ken Broun will act as a consultant to the Subcommittee. The Committee was in general agreement that this would be a long-term project.

Technology

Judge Turner, who is the Evidence Rules Committee's representative on the Technology Subcommittee of the Standing Committee, reported on developments in the Standing Committee's technology project. The current focus is on promulgation of rules that will permit electronic filing with consent of the parties. The Technology Subcommittee has held a meeting with a number of judges and lawyers involved in pilot electronic filing projects, and has fashioned a proposed amendment to the Civil Rules that would permit electronic filing with consent of the parties. No changes to the Evidence Rules are contemplated, at least in the immediate future, though the Evidence Rules Committee will continue to monitor technological developments in the presentation of evidence..

Uniform Rules

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

New Business

The Chair noted that this April meeting has completed a cycle of the Committee--the end of a three-year-long project to propose a package of amendments to the Evidence Rules, most importantly the rules governing expert testimony. The Committee, after discussion, agreed that barring unforeseen developments (such as Congressional activity), there is no need to propose any amendments to the Evidence Rules in the near future.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for October 25th and 26th in Washington, D.C.

The meeting was adjourned at 11:45 a.m., Tuesday, April 13th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

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 cmte 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 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **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 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **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**

Proposal	Source, Date, and Doc #	Status
[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**
[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 — Subcmte appointed to study the issue **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied 10/98 — Cmte. reconsidered and appointed a subcmte to further study the issue 4/99 — Considered pending further study **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 — Cmte 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 12/98 — Effective **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. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **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. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **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. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 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 Cmtes 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**
[EV 706] — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 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 Cmte 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**

Proposal	Source, Date, and Doc #	Status
[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**
[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 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved **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**

Proposal	Source, Date, and Doc #	Status
[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. 12/97 — 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**
[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. 12/97 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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. 12/97 — Effective **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**
[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**

Proposal	Source, Date, and Doc #	Status
[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 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved **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**
[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 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Cmte Approved 9/99 — Judicial Conference Approved **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**

Proposal	Source, Date, and Doc #	Status
[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**
[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; cmte declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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**
[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**

Proposal	Source, Date, and Doc #	Status
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**

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: **May 1, 1999**

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

I. Introduction

The Advisory Committee on Evidence Rules met on April 12th and 13th, 1999, in New York City. At the meeting, the Committee approved seven proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them and forward them to the Judicial Conference. The discussion of these proposed amendments is summarized in Part II of this Report. An appendix to this Report includes the text, Committee Note, GAP report, and summary of public comment for each proposed amendment.

The Evidence Rules Committee also agreed to proceed with a long-term project to draft a possible set of privilege rules, without deciding at this point whether any amendments to the Evidence Rules will actually be proposed. The discussion of this matter is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the April meeting, which are attached to this Report.

II. Action Items -- Recommendations to Forward Proposed Amendments to the Judicial Conference

At its January, 1998 meeting, the Standing Committee approved the publication of proposed amendments to Evidence Rules 103, 404(a), 803(6) and 902. At its June, 1998 meeting, the Standing Committee approved the publication of proposed amendments to Evidence Rules 701, 702 and 703. The public comment period for all of these rules was the same--August 1, 1998 to March 1, 1999.

The Advisory Committee on Evidence Rules conducted two public hearings on the proposed amendments, at which it heard the testimony of 18 witnesses. In addition, the Committee received written comments from 174 persons or organizations, commenting on all or some of the proposed amendments.

The Committee has considered all of these comments in detail, and has responded to many of them through revision of the text or Committee Notes of some of the proposals released for public comment. The Committee has also considered and incorporated almost all of the suggestions from the Style Subcommittee of the Standing Committee. After careful review, the Evidence Rules Committee recommends that all of the proposed amendments, as revised where necessary after publication, be approved and forwarded to the Judicial Conference.

A complete discussion of the Committee's consideration of the public comments respecting each proposed amendment can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendments.

A. Action Item — Rule 103. Rulings on Evidence.

Courts are currently in dispute over whether it is necessary for a party to renew an objection or offer of proof at trial, after the trial court has made an advance ruling on the admissibility of proffered evidence. Some courts hold that a renewed objection or offer of proof is always required in order to preserve a claim of error on appeal. Some cases can be found holding that a renewed objection or offer of proof is never required. Some courts hold that a renewal is not required if the advance ruling is definitive. The Evidence Rules Committee has proposed an amendment to Rule 103 that would resolve this conflict in the courts, and provide litigants with helpful guidance as to when it is necessary to renew an objection or offer of proof in order to preserve a claim of error for appeal. Under the proposed amendment, if the advance ruling is definitive, a party need not renew an objection or offer of proof at trial; otherwise renewal is required. Requiring renewal when the advance ruling is definitive leads to wasteful practice and costly litigation, and provides a trap for the unwary. Requiring renewal where the

ruling is not definitive properly gives the trial judge the opportunity to revisit the admissibility question in the context of the trial.

Public comment on the proposed amendment's resolution of the renewal question was almost uniformly favorable. Some comments suggested that certain details might be treated in the Committee Note. For example, it was suggested that the Committee Note might specify that developments occurring after the advance ruling could not be the subject of an appeal unless their relevance was brought to the trial court's attention by way of motion to strike or other suitable motion. It was also suggested that the Committee Note refer to other laws that require an appeal to the district court from nondispositive rulings of Magistrate Judges. These suggestions were incorporated into the Committee Note.

The proposed amendment to Evidence Rule 103 that was issued for public comment contained a sentence that purported to codify and extend the Supreme Court's decision in *Luce v. United States*. Under *Luce* a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. Lower courts have extended the *Luce* rule to comparable situations, holding, for example, that if the trial court rules in advance that certain evidence will be admissible if a party pursues a certain claim or defense, then the party must actually pursue that claim or defense at trial in order to preserve a claim of error on appeal. The proposal issued for public comment recognized that any codification of *Luce* would necessarily have to extend to comparable situations.

The public comment on the proposed codification and extension of *Luce* was generally negative. Substantial concerns were expressed about the problematic and largely undefinable impact of *Luce* in civil cases. The Evidence Rules Committee considered these comments and, after substantial discussion and reflection, determined that the comments had merit. The Committee therefore deleted the sentence from the published draft that codified and extended *Luce*. The Committee considered the possibility that deletion of the sentence could create an inference that the proposed amendment purported to overrule *Luce*. The Committee determined that such a construction would be unreasonable, because the proposed amendment concerns *renewal* of objections or offers of proof, but *Luce* concerns fulfillment of a condition precedent to the trial court's ruling. *Luce* does not require renewal of an objection or offer of proof; it requires the occurrence of a trial event that was a condition precedent to the admissibility of evidence. In order to quell any concerns about the effect of the proposed amendment on *Luce*, however, the Committee Note was revised to indicate that the proposed amendment is not intended to affect the rule set forth in *Luce*.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 103, as modified following publication, be approved and forwarded to the Judicial Conference.

B. Action Item — Rule 404(a). Character Evidence.

The proposed amendment to Evidence Rule 404(a) is designed to provide a more balanced presentation of character evidence when an accused decides to attack the alleged victim's character. Under current law, an accused who attacks the alleged victim's character does not open the door to an attack on his own character. The current rule therefore permits the defendant to attack an alleged victim's character without giving the jury the opportunity to consider equally relevant evidence about the accused's own propensity to act in a certain manner. The Evidence Rules Committee proposed the amendment in response to a provision in the Omnibus Crime Bill that would have amended Evidence Rule 404(a) directly. The Congressional proposal would have permitted the government far more leeway in attacking the accused's character in response to an attack on the alleged victim's character.

The proposed amendment as issued for public comment provided that an attack on the alleged victim's character opened the door to evidence of any of the accused's "pertinent" character traits. Public comment on this proposal suggested that the language should be narrowed to permit only an attack on the "same" character trait that the accused raised as to the victim. The Committee agreed that this modification was necessary to prevent a potentially overbroad use of character evidence. The public comment on the proposal, as so modified, was substantially positive.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a), as modified following publication, be approved and forwarded to the Judicial Conference.

C. Action Item — Rule 701. Opinion Testimony by Lay Witnesses.

The proposed amendment to Evidence Rule 701 seeks to prevent parties from proffering an expert as a lay witness in an attempt to evade the gatekeeper and reliability requirements of Rule 702. As issued for public comment, the proposed amendment provided that testimony cannot be admitted under Rule 701 if it is based on "scientific, technical or other specialized knowledge." The language of the draft issued for public comment intentionally tracked the language defining expert testimony in Rule 702.

The public comment on the proposal was largely positive. Some members of the public went on record as opposing the proposal, but in fact their comments were directed at the proposed amendment to Evidence Rule 702. The major source of objection directly specifically

to the proposed amendment to Rule 701 has come from the Department of Justice. DOJ argued that it is appropriate to have overlap between Rules 701 and 702, so that experts could be permitted to testify as lay witnesses. DOJ also expressed concern that exclusion under Rule 701 of all testimony based on "specialized knowledge" would result in many more witnesses having to qualify as experts--leading to deleterious consequences because the government would have to identify many of those witnesses in advance of trial under the Civil and Criminal Rules governing disclosure.

At its April meeting, the Evidence Rules Committee carefully considered the objections of the Justice Department, and decided to revise the proposed amendment to address the concern that all testimony based on any kind of specialized knowledge would have to be treated as expert testimony. The proposed amendment, as revised, provides that testimony cannot qualify under Rule 701 if it is based on "scientific, technical or other specialized knowledge *within the scope of Rule 702*." The Committee Note was also revised to emphasize that Rule 701 does not prohibit lay witness testimony on matters of common knowledge that traditionally have been the subject of lay opinions. The Committee believes that the proposed amendment, as revised, will help to protect against evasion of the Rule 702 reliability requirements, without requiring parties to qualify as experts those witnesses who traditionally and properly have been considered as providing lay witness testimony.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701, as modified following publication, be approved and forwarded to the Judicial Conference.

D. Action Item — Rule 702. Testimony by Experts.

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* It attempts to address the conflict in the courts about the meaning of *Daubert* and also attempts to provide guidance for courts and litigants as to the factors to consider in determining whether an expert's testimony is reliable. The proposal is also a response to bills proposed in Congress that purported to "codify" *Daubert*, but that, in the Committee's view, raised more problems than they solved. The proposed amendment to Evidence Rule 702 specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony, as affirmed by the Supreme Court in *Kumho Tire Co. v. Carmichael*, requires a showing of reliable methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case. The Committee has prepared an extensive Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible.

The public comment on the proposed amendment was mixed. Those in favor of the proposal believed that it was important to codify the *Daubert* principles by using general language such as that chosen in the proposed amendment. They noted that many courts, even after *Daubert,* had done little screening of dubious expert testimony. Those opposed to the proposed amendment argued that it would 1) permit trial judges to usurp the role of the jury; 2) lead to a proliferation of challenges to expert testimony; 3) allow judges to reject one of two competing methodologies in the same field of expertise; and 4) result in the wholesale rejection of experience-based expert testimony.

The Evidence Rules Committee considered all of these comments in detail. It determined that most of the concerns were not directed toward the proposal itself, but rather toward the case law that the proposal codifies, most importantly *Daubert* and *Kumho*. In order to allay concerns about the potential misuse of the amended Rule, however, the Committee revised the Committee Note to clarify that the amendment was not intended to usurp the role of the jury, nor to provide an excuse to challenge every expert, nor to prohibit experience-based expert testimony. The Note was also revised to emphasize that the Rule is broad enough to permit testimony from two or more competing methodologies in the same field of expertise. Finally, in response to public comment, the text of the proposal was revised slightly to avoid a potential conflict with Rule 703, which governs the reliability of inadmissible information used as the basis of an expert's opinion.

The Supreme Court granted certiorari in *Kumho* before the Standing Committee authorized the proposed amendment to Rule 702 to be released for public comment. *Kumho* was decided shortly after the public comment period ended. At its April meeting, the Evidence Rules Committee carefully considered the impact of *Kumho* on the proposed amendment. The Committee unanimously found that the Court's analysis in *Kumho* was completely consistent with, and supportive of, the approach taken by the proposed amendment. The Court in *Kumho* held that the gatekeeper function applies to all expert testimony; that the specific *Daubert* factors might apply to non-scientific expert testimony; and that the Rule 702 reliability standard must be applied flexibly, depending on the field of expertise. The proposed amendment precisely tracks *Kumho* in all these respects. The Court in *Kumho* emphasized the same overriding standard as that set forth in the Committee Note to the proposed amendment, i.e., that an expert must employ the same degree of intellectual rigor in testifying as he would be expected to employ in his professional life. The Committee also noted that the *Kumho* Court favorably cited the Committee Note to the proposed amendment to Evidence Rule 702 as issued for public comment.

For all these reasons, the Committee decided that the Supreme Court's decision in *Kumho* provided more rather than less reason for proceeding with the proposed amendment. The Committee Note was revised to include a number of references to *Kumho*. The Committee considered whether, in light of *Kumho's* resolution of the applicability of *Daubert* to non-scientific experts, it made sense to amend the Rule. The Committee unanimously agreed that the amendment would perform a great service even after the Court's resolution in *Kumho*. Even after *Kumho*, there are many unresolved questions about the meaning of *Daubert*, such as 1) the

standard of proof to be employed by the trial judge in determining reliability; 2) whether the trial court must look at how the expert's methods are applied; and 3) the relationship between the expert's methods and the conclusions drawn by the expert. Moreover, even without any obvious conflicts on the specifics, the courts have divided more generally over how to approach a *Daubert* question. Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods, and application. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation. The Evidence Rules Committee believes that adoption of the proposed rule change, and the Committee Note, will 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 legitimate cause for concern that Congress will act to amend Rule 702. Prior codification efforts were shelved partly because of assurances that the Rules Committee was already considering a change to Rule 702. If the Committee fails to act, these congressional efforts may be renewed.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702, as modified following publication, be approved and forwarded to the Judicial Conference.

E. Action Item -- Rule 703. Bases of Opinion Testimony by Experts.

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

The public comment on the proposed amendment was largely positive. Most comments

agreed that under current practice, Rule 703 is all too often used as a device for evading exclusionary rules of evidence, and that the balancing test set forth in the proposal is necessary to prevent this abuse. Negative comments expressed concern that the proposal did not specify how the balancing test would apply in rebuttal, and did not mention whether a proponent might be able to introduce inadmissible information on direct examination in order to remove the sting of an anticipated attack on the expert's basis. In response to these comments, the Committee Note was revised to emphasize that the balancing test set forth in the amendment is flexible enough to accommodate each of these situations.

Other public comments suggested that the amendment clarify why inadmissible information relied upon by the expert might have probative value that would be weighed under the amendment's balancing test. In response to these comments, the Committee revised the text of the amendment to provide that the trial judge must assess the inadmissible information's "probative value in assisting the jury to evaluate the expert's opinion". Finally, the Committee adopted the suggestions of the Style Subcommittee of the Standing Committee, and made stylistic improvements to the proposal as it was released for public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703, as modified following publication, be approved and forwarded to the Judicial Conference.

F. Action Item — Rule 803(6). Records of Regularly Conducted Activity.

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The intent of the proposed amendment to Evidence Rule 803(6) is to provide for uniform treatment of business records, and to save the parties the expense and inconvenience of producing live witnesses for what is often perfunctory testimony. The approach taken by the proposed amendment, permitting a foundation for business records to be made through certification, is in accord with a trend in the states. The proposed amendment to Rule 803(6) is integrally related to the proposed amendment to Evidence Rule 902, discussed below.

The public comment on the proposed amendment to Evidence Rule 803(6) was almost uniformly positive. The Committee made no changes to the text or Note of the proposal that was issued for public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 803(6), as issued for publication, be approved and forwarded to the Judicial Conference.

G. Action Item — Rule 902. Self-authentication.

The Evidence Rules Committee recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package--the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The proposed amendment to Evidence Rule 902 sets forth the procedural requirements for preparing a declaration of a custodian or other qualified witness that will establish a sufficient foundation for the admissibility of business records. Public comment on the proposed amendment was almost uniformly positive. Some comments suggested minor changes in the language of the text, to provide more consistency in the terms "certification" and "declaration", and to refer to independent statutes and rules governing the procedures for a proper certification. The Evidence Rules Committee has revised the proposal that was issued for public comment in response to these suggestions. The Committee also incorporated suggested changes from the Style Subcommittee of the Standing Committee.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 902, as modified following publication, be approved and forwarded to the Judicial Conference.

III. Information Item

A. Privileges

A subcommittee has been appointed to begin a long-term project to attempt to draft a possible proposal to codify the privileges. The Evidence Rules Committee has determined that there are many questions on which the courts are divided, both as to the extent of well-accepted privileges and the existence of newer privileges. The Committee, noting that Congress has expressed an interest in codifying privileges on a case-by-case basis, has determined that an overriding look at the privileges in the context of the rulemaking process is a far better way of proceeding than is a patchwork legislative treatment. Moreover, the Committee believes that an investigation of the privileges would be a useful project even if the Committee never reaches the stage of formally proposing codified rules.

It should be stressed that no decision has been made to propose any new amendments to the Evidence Rules. Indeed, the Committee does not contemplate proposing any new amendments in the foreseeable future.

IV. Minutes of the April, 1999 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 1999 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Amendments, Committee Notes, GAP Reports, and Summaries of Public Comment
Draft Minutes (without attachments)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 1999
Newton, Massachusetts

Draft Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at the Boston College Law School in Newton, Massachusetts on Monday and Tuesday, June 14-15, 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.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Morey L. Sear was unable to attend. The Department of Justice was represented at the meeting by Deputy Attorney General Eric H. Holder, Jr. and Associate Attorney General Raymond C. Fisher, both of whom attended the Monday portion of the meeting. Neal K. Katyal, Advisor to the Deputy Attorney General, also participated on behalf of the Department. Judge Robert E. Keeton, former chairman of the committee, and Francis H. Fox, former member of the Advisory Committee on Civil Rules, also attended the meeting.

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
Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter

Advisory Committee on Civil Rules —
    Judge Paul V. Niemeyer, Chair
    Judge David F. Levi
    Professor Edward H. Cooper, Reporter
    Professor Richard A. Marcus, Special 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. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; Patricia S. Channon, senior attorney from the Bankruptcy Judges Division of the Administrative Office; and Joe S. Cecil and Carol L. Krafka of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica reported that he and Judge Davis had appeared before the Judicial Conference in March 1999 to present the committee's proposed amendments to the criminal rules. He stated that most of the rules had been approved as part of the Conference's consent calendar. But the comprehensive new Rule 32.2, governing criminal forfeiture, had been placed on the Conference's discussion calendar. He added that the members of the Conference had been presented with a letter opposing the rule from the National Association of Criminal Defense Lawyers and a written response from Judge Davis.

Judge Scirica said that he described for the Conference the lengthy and meticulous process that the Advisory Committee on Criminal Rules followed in drafting the new rule, in soliciting comments and input, and in making appropriate revisions in light of the comments received from the public and the Standing Committee. He noted that several members of the Conference stated expressly that they had been very impressed by the careful nature of the work of the committees.

Judge Scirica reported that Judge Davis addressed the Conference on the merits of the proposed criminal forfeiture rule and was asked several penetrating questions. Some members, he said, expressed concern over the rule's explicit reference to the practice in some circuits of allowing courts to issue money judgments in lieu of the forfeiture of specific property connected to an offense. In the end, however, the Conference approved the new rule without change.

Judge Scirica also reported that the Federal Judicial Center was in the process of conducting a study for the Standing Committee to document the procedures used by individual district and circuit courts to obtain financial information from parties for purposes of judge recusal. He noted that Judge Bullock had agreed to serve as the committee's liaison to the Center in connection with the study.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 7-8, 1999.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 20 bills had been introduced in the 106th Congress that would have an impact on the federal rules or the rulemaking process. He proceeded to describe four of the most significant bills.

He said that H.R. 771 would undo the 1993 amendments to FED. R. CIV. P. 30(b) and require, in essence, that depositions be taken down by a stenographer. He noted that the 1993 amendments had been designed expressly to save litigation costs by providing the parties with discretion to select the recording means that best suited their individual needs.

He reported that H.R. 755, the "Year 2000 Readiness and Responsibility Act," which had just passed the House of Representatives, would, among other things, federalize all "Y2K" class actions. He said that Judge Stapleton, chairman of the Judicial Conference's Federal-State Jurisdiction Committee, had written to the Congress expressing opposition to the class action provision of the bill on federalism grounds. He added, though, that Judge Stapleton had included in his letter a caveat that the judiciary's opposition to the Y2K legislation should not be construed as opposition to the extension of minimal diversity to every mass tort.

Mr. Rabiej reported that S. 353, the "Class Action Fairness Act of 1999," contained a provision that would undo the 1993 amendments to FED. R. CIV. P. 11, thereby making the imposition of sanctions mandatory for violations of the rule. He noted that several witnesses had testified against a return to the wasteful satellite litigation generated by the pre-1993 rule. He added that the Judicial Conference would continue to oppose repeal of the 1993 amendments, which focus on deterrence, rather than compensation, and provide courts with appropriate discretion to impose sanctions on a case-by-case basis.

Finally, Mr. Rabiej reported that comprehensive bankruptcy legislation had just passed the House of Representatives. H.R. 833, the "Bankruptcy Reform Act of 1999," he noted, contained several objectionable rules-related provisions. The Director of the Administrative Office had written to the Congress seeking deletion or modification of these provisions. But, he noted, except for adding a provision dealing with rules in bankruptcy appeals, the House passed the legislation without correcting the objectionable rules-related provisions.

Administrative Actions

Mr. Rabiej reported that the volume of staff work needed to support the rules committees had increased enormously in the last few years. This, he said, was due in large measure to: (1) increased legislative activity; and (2) the initiation of special projects and studies on such topics as mass torts, class actions, attorney conduct, discovery, and technology. He noted that the increased workload of preparing, printing, and distributing materials and of staffing committee and subcommittee meetings had placed considerable stress on the staff. He added, though, that technological improvements had provided some relief and that agenda books could now be sent to the members by electronic mail.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a brief update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) He referred in particular to the ongoing project to survey the means used by courts to identify financial information about parties in order to avoid potential conflicts of interest for judges.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 13, 1999. (Agenda Item 5)

He reported that the advisory committee had no action items to present for approval or publication. Nevertheless, the committee was continuing to consider and approve necessary amendments to the appellate rules, and it would seek authority to publish a package of proposed changes at the January 2000 meeting of the Standing Committee.

Judge Garwood pointed out that the advisory committee had considered the proposed draft amendment to FED. R. CIV. P. 5(b) that would authorize service by electronic means. He noted that the committee had some reservations regarding certain specific provisions of the proposal, but it endorsed the approach taken by the Advisory Committee on Civil Rules. The advisory committee, moreover, believed that it was essential to provide the pilot electronic case files courts with legal authority to permit service by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 7, 1999. (Agenda Item 7)

Judge Duplantier reported that the advisory committee had decided not to proceed with the "litigation package" of proposed amendments that it had published for comment in August 1998. But, he said, parts of the package had been returned to the advisory committee's litigation subcommittee for further study, including proposals addressing the use of affidavits at trial and the scheduling of witnesses for hearings.

Judge Duplantier stated that the advisory committee was seeking final approval from the Standing Committee for amendments to five rules and authority to publish amendments to six rules. The advisory committee would also propose amendments to two other rules regarding electronic service, if the Standing Committee decided to publish the proposed amendment to FED. R. CIV. P. 5(b).

Action Items

FED. R. BANKR. P. 1017

Professor Resnick stated that the proposed amendment to Rule 1017(e) would permit the court to grant a request by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under 11 U.S.C. § 707(b), even if the court actually rules on the request for an extension after the 60-day time limit specified in the rule for filing the request has expired. He added that the rule, as presently written, has been interpreted to require the court to issue its ruling before the end of the 60-day period.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6) was designed by the advisory committee as a cost-cutting measure and would take account of inflation. The current rule requires the clerk of court to send a notice of hearing to all creditors on any application for compensation or reimbursement of expenses that exceeds $500. The proposed amendment would raise the threshold amount — which has not been adjusted since 1987 — to $1,000. The clerk, however, would still have to send notices of applications of $1,000 or less, but only to the trustee, United States trustee, and creditors' committee.

FED. R. BANKR. P. 4003

Professor Resnick noted that the proposed amendment to Rule 4003(b) was similar to that proposed in Rule 1017. It would permit the court to grant a timely-filed request for an extension of time to object to a list of claimed exemptions, whether or not the court actually rules on the request for an extension within the 30-day period specified in the rule.

FED. R. BANKR. P. 4004

Professor Resnick stated that Rule 4004(c)(1) requires the court to issue a discharge by a certain time unless one or more specified events have occurred. The proposed amendment would add an additional exception to the rule. It would provide that a discharge not be granted if a motion is pending for an extension of time to file a motion to dismiss the case for substantial abuse under 11 U.S.C. § 707(b).

FED. R. BANKR. P. 5003

Professor Resnick reported that new subdivision 5003(e) was designed to facilitate the routing of notices to federal and state governmental units. He noted that debtors, especially consumer debtors, frequently provide incomplete or incorrect addresses for governmental creditors. As a result, the appropriate governmental unit may receive a notice too late for it to act in a bankruptcy proceeding.

Professor Resnick stated that the advisory committee had been working with the Department of Justice to devise a reasonable way to improve and expedite the processing of notices to government creditors. As a result, the proposed new Rule 5003(e) would require each clerk's office to maintain, and annually update, a register of federal and state governmental agencies. The clerk would not be required to include in the register more than one mailing address for each agency.

He noted that the amendment would specify that the mailing address set forth in the register is conclusively presumed to be a correct address. The debtor's failure to use that address, however, would not invalidate a notice if the agency in fact received it. In essence, then, using the address in the register would provide a "safe harbor" for debtors and would encourage use of the register.

Professor Resnick noted that a representative of state governments had urged the advisory committee to go further and require debtors use the register address. The committee, however, rejected that approach because it would be too harsh for consumer debtors. He pointed out, in addition, that the comprehensive bankruptcy legislation that had recently passed the House of Representatives contained a stronger notice requirement. It would require debtors to use the register address and require the clerks of court to update the registry quarterly, rather than annually. Judge Duplantier stated that if the legislation were to become law, the Judicial Conference would be advised promptly that the pending rule amendment would be mooted.

The committee approved the amendments to Rules 1017, 2002, 4003, 4004, and 5003 without objection.

Rules for Publication

FED. R. BANKR. P. 1007

Professor Resnick said that Rule 1007 instructs debtors as to what they must include in the list of creditors and schedules. The proposed new subdivision 1007(e) would add a requirement that if the debtor knows that a person on the list or schedules is an infant or incompetent person, the debtor must also include on the list or schedules the name, address, and legal relationship of any person on whom service should be made. The amendment would enable the person or organization that mails the notices in the case to send them to the appropriate guardian or other representative of an infant or incompetent person.

FED. R. BANKR. P. 2002

Professor Resnick stated that Rule 7001 currently requires a party to file an adversary proceeding in order to obtain an injunction. Effective December 1, 1999, however, the rule will be amended to specify that an adversary proceeding need not be filed if an injunction is provided for in a plan (i.e., an injunction enjoining conduct other than that enjoined by operation of the Bankruptcy Code itself). He explained that it is relatively common practice today for chapter 11 plans to include injunction provisions.

Professor Resnick reported that the Department of Justice originally had opposed the amendment to Rule 7001, expressing concern that affected parties would not normally become aware of an injunction in a plan unless they are served with process as part of an adversary proceeding. He noted that some government agencies had also complained that injunctions — some of which might be against the public interest — could be buried in lengthy, complex plans. He added, though, that the Department later withdrew its objection to the Rule 7001 amendment on the understanding that the advisory committee would work with it to devise appropriate solutions to the notice problem.

Professor Resnick explained that the proposed new Rule 2002(c)(3) — and companion amendments to Rules 3016, 3017, and 3020 — were designed to ensure that parties who are entitled to notice of a hearing on confirmation of a plan are provided with clear notice of any injunction included in a plan enjoining conduct not otherwise enjoined by operation of the Bankruptcy Code. The notice, for example, would have to be set forth in conspicuous language, such as bold, italic, or highlighted text.

Professor Resnick pointed out that the proposed amendments to Rule 2002(g) deal with a different problem. He explained that the clerk's office typically receives information on the addresses of creditors from three sources: (1) lists provided by the debtor; (2) proofs of claim; and (3) separate requests from creditors designating an address. He said that the proposed amendments would establish priorities or rankings to determine which address governs.

He said that the proposed new paragraph 2002(g)(3) was part of the package dealing with notice to infants and incompetent persons. (See Rule 1007 above.) It would provide that if the debtor lists the name of a guardian or legal representative in the notice, all notices would have to mailed to that guardian or representative.

FED. R. BANKR. P. 3016

Professor Resnick pointed out that the proposed new subdivision 3016(c) was a companion to the amendment to Rule 2002(c)(3) above — designed to assure that entities whose conduct would be enjoined under a plan are given adequate notice of the proposed injunction. The amendment would require that the plan and the disclosure statement describe all acts to be enjoined in specific and conspicuous language and identify all entities that would be subject to the injunction. Thus, Rules 2002(c)(3) and 3016 together would require specific and conspicuous language regarding the injunction to be included in the notice, the plan, and the disclosure statement.

FED. R. BANKR. P. 3017

Professor Resnick stated that the proposed new subdivision 3017(f) is also part of the injunction package. He noted that some chapter 11 plans contain injunctions against entities that are not parties in the case. The proposed amendment would require the court to consider providing appropriate notice to non-parties who are to be enjoined under a plan.

FED. R. BANKR. P. 3020

Professor Resnick pointed out that the proposed amendments to Rule 3020(c) are also part of the injunction package. They would require that the order of confirmation describe in reasonable detail all acts to be enjoined, be specific in its terms regarding the injunction, and identify all entities subject to the injunction. He added that notice of entry of the order of confirmation would have to be provided to all entities subject to an injunction provided for in a plan.

Professor Resnick stated that the Department of Justice was pleased with the package of amendments dealing with injunctions, and it had worked closely with the advisory committee in preparing them.

FED. R. BANKR. P. 9020

Professor Resnick reported that the advisory committee would delete the current, complex provision on contempt in Rule 9020 and replace it with a single sentence that would simply state that Rule 9014 applies to a motion for an order of contempt. Rule 9020, thus, would provide that a party seeking a contempt order proceed by way of a contested matter, rather than an adversary proceeding.

Professor Resnick explained that the current rule had been drafted soon after the bankruptcy courts had been restructured under the 1984 bankruptcy reform legislation. The 1984 legislation, in effect, deleted the explicit statutory contempt power granted to bankruptcy judges by legislation in 1978. He noted that, as a result of the 1984 legislation, it was unclear whether bankruptcy judges retained contempt power. Accordingly, the advisory committee drafted a rule, which took effect in 1987, specifying that a bankruptcy judge may issue an order of contempt, but the order may only take effect after 10 days. During the 10-day period, the party named in the contempt order may seek de novo review by a district judge.

Professor Resnick explained that a number of court of appeals decisions have been issued since Rule 9020 took effect in 1987, holding that bankruptcy judges do in fact have contempt power — either under 11 U.S.C. § 105 or as a matter of inherent judicial power. Thus, it was the opinion of the advisory committee that Rule 9020 is too restrictive and is no longer needed. He added that the committee note makes it clear that the advisory committee does not take a position on whether bankruptcy judges have contempt power or not. Issues relating to the contempt power of bankruptcy judges are substantive. The rule simply provides the appropriate procedure, i.e., through the filing of a contested matter under Rule 9014.

The committee approved the amendments to Rules 1007, 2002, 3016, 3017, 3020, and 9020 for publication without objection.

Resolution of Appreciation for Professor Resnick

Judges Scirica and Duplantier reported that Professor Resnick had just announced his intention to relinquish the post of reporter to the Advisory Committee on Bankruptcy Rules after 12 years of distinguished service. He asserted that it would be difficult to imagine anyone doing a better job than Professor Resnick and added that his personal experience in working with him had been immensely gratifying.

The committee unanimously approved the following resolution honoring Professor Resnick:

> Whereas, Alan N. Resnick, Benjamin Weintraub Distinguished Professor of Bankruptcy Law at Hofstra University, has served as Reporter to the Advisory Committee on Bankruptcy Rules for more than eleven years, beginning in late 1987, the Committee on Rules of Practice and Procedure wishes to recognize Professor Resnick for extraordinary service of the highest quality, marked in particular by
>
> - the complete revision of the Federal Rules of Bankruptcy Procedure to accommodate the creation by Congress of a national system of United States trustees to supervise the administration of bankruptcy estates and with statutory authority to raise and be heard on any issue in a case:

- the complete revision of the Official Bankruptcy Forms in conjunction with the revision of the rules;

- the drafting and rapid distribution to the courts following further amendments to the Bankruptcy Code of suggested interim rules for local adoption to provide procedural guidance during the period required to prescribe permanent national rules implementing the statutory changes;

- the drafting of rules to facilitate the use of technology in the giving of notice to parties in bankruptcy cases and initiating the drafting of rules to permit electronic filing of documents in all types of proceedings in federal courts;

- the providing of wise counsel on bankruptcy matters to the committee's working groups on mass torts and on attorney conduct; and

- the concise and lucid presentation to the committee of proposed amendments to the Federal Rules of Bankruptcy Procedure approved by the advisory committee.

And whereas Professor Resnick has requested that he be permitted to relinquish the post of Reporter, a request that the committee has reluctantly granted,

Be it RESOLVED that the committee hereby expresses its gratitude to Professor Resnick for his exemplary drafting of rules and related explanatory materials, for his patient answers to questions from committee members, and for his unfailing collegiality.

Professor Resnick expressed his appreciation for the resolution and the kind words of the chairman. He added that it had been his distinct honor to have served under four remarkable chairs — Judges Lloyd D. George, Edward Leavy, Paul Mannes, and Adrian G. Duplantier — and was grateful to the advisory committee for the intellectual stimulation and respect that they had provided to him over the past 12 years.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 1999. (Agenda Item 6)

Action Items

Judge Niemeyer reported that the advisory committee was seeking approval of three separate packages of amendments to the civil rules, dealing respectively with: (1) service on federal officers and employees sued in their individual capacity; (2) admiralty rules; and (3) discovery rules.

1. Service Package

FED. R. CIV. P. 4 AND 12

Judge Niemeyer reported that the proposed amendments to Rules 4 and 12 had been initiated at the suggestion of the Department of Justice and adopted by the advisory committee without opposition. He added that the thrust of the amendments was to entitle federal officers and employees who are sued in their individual capacity to the same rights that they would have if sued in an official capacity.

Professor Cooper explained that federal officers and employees are sued in their individual capacity for actions that have some connection to their functions as officers or employees of the United States. He noted that it is common for the United States, through the Department of Justice, to assume the burden of defending them and to move to have the government substituted as the defendant. He said that there was some uncertainty in the case law whether the United States must be served with process, as well as the individual defendant, when an officer or employee is sued for acts in connection with employment.

The amendments to Rule 4 would require service on the United States when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of duties on behalf of the United States. Rule 12 would be amended to provide the same 60-day answer period in an individual-capacity action that the United States enjoys when an officer is sued in an official capacity.

Professor Cooper said that little public comment had been generated by the proposed amendments. The comments received were favorable to the amendments, and several suggested certain drafting improvements, As a result, the advisory committee made improvements in language after publication. For example, as revised, the amendments now use the term "officer or employee" consistently. Language was also added to make sure that no one reads the rule to mean that when the same individual is sued both in an individual capacity and an official capacity, both the individual and the United States must be served twice — once under subparagraph (a) and once under subparagraph (b).

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

2. Admiralty Package

Judge Niemeyer reported that the proposed changes in the admiralty rules had been developed over a long period of time with the assistance of a special subcommittee chaired by Mark O. Kasanin, Esquire. He noted that the subcommittee had coordinated its work very closely with the Department of Justice and the Rules Committee of the Maritime Law Association.

Professor Cooper reported that the proposed changes in the Supplemental Rules for Certain Admiralty and Maritime Claims were designed to meet two goals. First, they reflected the increasing importance of civil forfeiture proceedings, which generally use admiralty procedure. The amendments adjust the admiralty rules, for the first time, to make certain necessary procedural distinctions between traditional maritime proceedings and civil forfeiture proceedings. Second, the changes would take account of the 1993 reorganization of FED. R. CIV. P. 4. In addition, the rules have been reorganized and restyled for purposes of clarity.

Professor Cooper stated that it was not necessary to describe the proposed amendments in substantial detail because the advisory committee had presented them to the Standing Committee in January 1998, when it sought authority to publish them for public comment. He noted that there had been little comment or testimony on the proposals and that minor drafting changes had been made by the advisory committee in light of the public comments.

SUPPLEMENTAL ADMIRALTY RULE B

Professor Cooper reported that the advisory committee had made a post-publication adjustment in the language of Rule B(1)(d) — and a companion amendment to Rule (C)(3)(b) — to substitute the passive voice for the active. As published, the amendment had provided that the clerk of court must deliver a summons or other process to the marshal for service if the property in question is a vessel or tangible property aboard a vessel. One of the public comments asserted that delivery of the papers to the clerk for forwarding to the person making service would occasion delay in cases when time is usually of the essence. It was pointed out, for example, that it was the practice in the Eastern District of New York for the clerk to deliver the process to the attorney for the plaintiff, who in turn arranges delivery to the person who will make service. Accordingly, the advisory committee changed the rule to provide broadly that process "must be delivered" to the person making service, without designating who is to effect the delivery. Professor Cooper added that the Maritime Law Association and the Department of Justice agreed with the change, which was made at three places in the amended rules.

Professor Cooper pointed out that FED. R. CIV. P. 4 had been reorganized in 1993. As part of the reorganization, former Rule 4(e) — which is incorporated in the current Admiralty Rule B(1) — has been replaced by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought. The advisory committee, however, decided not to

incorporate Rule 4(n)(2) in the revised Admiralty Rule B because maritime attachment and garnishment are available whenever the defendant is not found within the district, including some circumstances in which personal jurisdiction can also be asserted.

Professor Cooper noted that Rule (B)(1)(e) expressly incorporates FED. R. CIV. P. 64 to make sure that elimination of the reference to state quasi-in-rem jurisdiction in former Rule 4(e) is not read as defeating the continued use of state security devices. Thus, subparagraph (e) reminds attorneys that it is consistent with the admiralty rules to invoke FED. R. CIV. P. 64, which allows the use of security provisions in the manner provided by state law. Professor Cooper said that a concluding sentence would be added to the committee note to Rule E(8) providing that: "if a state law allows a special, limited, or restrictive appearance as an incident to the remedy adopted from state law, the state practice applies through Rule 64 'in the manner provided by' state law."

SUPPLEMENTAL ADMIRALTY RULE C

Professor Cooper explained that the amendments to Rule C were designed in large measure to take into account meaningful distinctions between traditional admiralty and maritime proceedings and civil forfeiture proceedings. In paragraph (2)(c), for example, the complaint in an admiralty or maritime proceeding must state that the property is located within the district or will be within the district while the action is pending. On the other hand, paragraph (2)(d) reflects the variety of civil forfeiture statutes that now allow a court to exercise authority over property outside the district.

Professor Cooper noted that subdivision (6) explicitly provides for different procedures for forfeiture proceedings and admiralty seizure proceedings. In a maritime proceeding, for example, fewer people are entitled to appear and only 10 days are provided to file a verified statement of right or interest. In civil forfeiture proceedings, a person who asserts an interest or right against the property has 20 days to file a statement.

SUPPLEMENTAL ADMIRALTY RULE E

Professor Cooper stated that Rule E(3) provides that maritime attachment and garnishment may be served only within the district. But in forfeiture cases, in rem process may be served outside the district if so authorized by statute. He noted that subdivision E(10) is new and makes clear the authority of the court to preserve and prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

FED. R. CIV. P. 14

Professor Cooper pointed out that the only changes in Rule 14 were to replace the term "the claimant" with "a person who asserts a right under Supplemental Rule C(6)(b)(i)."

The committee approved the amendments to Supplemental Admiralty Rules B, C, and E and FED. R. CIV. P. 14 without objection.

3. Discovery Package

Judge Niemeyer reported that the advisory committee had studied discovery in a comprehensive manner over the past three years. The focus of its efforts was not to curb discovery "abuse" per se, but rather to examine broadly the whole architecture of discovery and to ask whether it can be made more efficient and less expensive — while still preserving the fundamental principle of providing full disclosure of relevant information to the litigants. Yet, he added, full disclosure — especially in the age of information technology — may not require the production of each and every document, regardless of the cost of producing it and the likelihood of its actual use in a case. What needs to be produced, he said, is "all the information that matters."

Judge Niemeyer pointed out that the package of proposed amendments to the civil rules was modest and well balanced. It was designed to make discovery cost less and work better. He said that the advisory committee and its discovery subcommittee would continue to study whether additional changes in the rules should be proposed in the future. He noted, for example, that he believed personally that the committee could explore a number of possibilities for establishing a very inexpensive, streamlined process that would result in prompt resolution of uncomplicated cases.

Judge Niemeyer stated that the impetus for considering changes in the discovery rules had come from several sources. He noted, for example, that the American College of Trial Lawyers and other bar groups had urged that the scope of discovery be narrowed. But, he said, the biggest impetus for change had come from the impact of the Civil Justice Reform Act of 1990 on the district courts. The Act urged each court to experiment locally with various procedural devices in an effort to reduce litigation costs and delay. The 1993 amendments to the Federal Rules of Civil Procedure, enacted in part to facilitate the local experiments sanctioned by the Act, allowed courts to "opt out" of certain provisions of the national rules — most notably the provisions on mandatory disclosure. He added that the combined effect of the Act and the 1993 rules amendments was a "balkanization" of federal pretrial procedure and the proliferation of local rules and procedures.

Judge Niemeyer reported that the advisory committee was firmly committed to returning to a uniform set of national procedural rules. He noted that the bar had been nearly unanimous in urging the committee to limit "opt outs" and local variations. He added, however, that opposition to the rules amendments would likely come from district judges, who are used to their own, carefully developed — and often very effective — local procedures.

Judge Niemeyer described the lengthy and careful process that the advisory committee had followed in developing the proposed amendments to the discovery rules. He noted that the committee had asked the RAND Corporation to take a fresh look at the enormous data base that it had developed under the Civil Justice Reform Act and to examine particularly the cost of discovery, the satisfaction of attorneys with discovery, and the extent to which discovery is actually used in federal civil cases. In addition, at the committee's request, the Federal Judicial Center polled a scientific cross-section of lawyers and received more than 1,200 responses regarding discovery practice and opinions.

He reported that the advisory committee had received numerous papers from academics on discovery topics. It had conducted two conferences involving judges, lawyers, and law professors, and several of the papers presented at its Boston conference were published in the Boston College Law Review. In addition, the committee sought out and heard the views of practitioners from practically every sector of the legal profession, federal and state judges, law professors, and former rules committee chairs and reporters. He added that he had never witnessed any legislative action or committee action that had involved as much participation, research, input, and support.

Judge Niemeyer reported that the research and input, among other things, had revealed that —

- Discovery accounts for about half of all litigation costs.
- Discovery is actually used in a relatively small percentage of federal civil cases. In 40% of the cases, for example, there is no discovery at all, and in another 25% of the cases, there is only minimal discovery.
- Discovery, however, is used extensively in an important minority of cases. It may cause serious problems in those cases and account for as much as 90% of the litigation costs.
- Both plaintiffs' lawyers and defense lawyers agree by very large margins that discovery costs in general are too high (although they tend to emphasize different factors as the principal reasons for the high costs).
- The bar overwhelmingly supports national uniformity in the rules.
- The bar also overwhelming supports early judicial involvement in discovery, early discovery cut-off dates, and firm trial dates.

Judge Niemeyer stated that the advisory committee had conducted its efforts through a discovery subcommittee chaired by Judge Levi, with the assistance of Professor Marcus as special reporter. He reported that the advisory committee had asked the subcommittee to

consider all reasonable proposals for improvement in the discovery process. The subcommittee, he said, had developed and presented the advisory committee with more than 40 possible recommendations for change. The advisory committee, over the course of several meetings, then debated each of the recommendations. It decided to proceed only with those proposals that commanded the support of a strong majority of the committee members. No measure was approved by a close vote.

Judge Niemeyer stated that the advisory committee then published the package of proposed amendments, conducted three public hearings, heard from more than 70 witnesses, and received more than 300 written comments. The committee concluded that the comments, while very informative and helpful, generally addressed the same policy issues and concerns that had been considered thoroughly before publication. Accordingly, the changes made by the committee following publication consisted of language and organizational improvements, rather than substantive changes. The committee, however, amended proposed Rule 30(f)(1) in light of the public comments to delete the requirement that the deponent consent to extending a deposition beyond one day.

Judge Niemeyer reported that three issues in the package had caused the greatest debate during the public comment period and the committee's deliberations: (1) mandatory initial disclosures under Rule 26(a)(1); (2) the scope of discovery under Rule 26(b)(1); and (3) cost bearing under Rule 26(b)(2).

1. Mandatory Initial Disclosures. Judge Niemeyer pointed out that the 1993 rule amendments, which had introduced mandatory initial disclosures, were very controversial. They had generated three dissents on the Supreme Court and came close to being rejected by the Congress. He noted that lawyers had complained strenuously that the revised Rule 26(a)(1) invades the attorney-client relationship by requiring the production of hostile documents and turning over to opposing parties documents that have not been asked for.

Nevertheless, he said, mandatory disclosure has worked well in the districts that have adopted it, and it has been used substantially even in many of the districts that have officially opted out of the national disclosure rule. The empirical data show general satisfaction with disclosure, but they are not conclusive on whether it reduces costs.

Judge Niemeyer explained that the advisory committee was committed to the principle of a single, uniform national rule, without local "opt outs." It therefore had three options: (a) to reject mandatory disclosure altogether; (b) to extend the existing mandatory disclosure regime to all districts; or (c) to mandate disclosure, but in a modified, less controversial form. He stated that the advisory committee decided upon the third course — requiring parties to disclose only that information that the disclosing party may use to support its own claims or defenses.

Judge Niemeyer pointed out that most of the criticisms that the advisory committee had received about disclosure were that it would not work in certain kinds of cases. In response, the

rule was amended to exclude certain categories of cases from the disclosure requirement. It also allows the attorneys to opt out of disclosure in individual cases. And the rule provides district judges with considerable discretion to dispense with disclosure in individual cases.

2. Scope of Discovery. Judge Niemeyer noted that the committee's proposed amendment to Rule 26(b)(1) would not narrow the scope of discovery. Rather, it would divide discovery into two distinct phases: (1) attorney-managed discovery, generally conducted without court involvement and embracing matters relevant to the claim or defense of any party; and (2) court-managed discovery, embracing — with court approval — any matter relevant to the subject matter involved in the action.

He said that opponents of the change had argued that the proposed amendment would cause substantial litigation regarding the scope of discovery. He agreed that some litigation would in fact occur initially, but the law would soon become clear.

3. Cost bearing. Judge Niemeyer stated that much of the opposition to the proposed amendment to Rule 26(b)(2) had been expressed in terms that it would favor rich litigants at the expense of poor ones. He explained that the present rules give a judge implicit authority to allow a party to obtain discovery that may be burdensome or duplicative, on the condition that the requesting party pay for it. The amended rule, he said, would make that authority explicit, and it would tell judges clearly that they have the tools they need to manage and regulate discovery.

FED. R. CIV. P. 5

Judge Niemeyer explained that the advisory committee had originally proposed — when it sought authority from the Standing Committee to publish the proposed discovery amendments — that Rule 5(d) be amended to provide that discovery and disclosure materials "need not" be filed with the court until they are used in a proceeding. The Standing Committee, however, voted to change "need not" to "must not." Judge Niemeyer said that the rule had attracted very little public comment, and the advisory committee on reflection agreed with the Standing Committee that "must not" is preferable language to "need not."

One of the members argued that discovery material not filed with the court should nevertheless be considered part of the court record. He recommended adding a sentence to that effect in the committee note in order to protect the press and the public. He explained, for example, that these materials, having the status of court records, would be privileged. Therefore, one who published them would be protected in the event of a defamation action. Another member agreed and added that if the materials were court records, they would also be available for public examination. He said that it was important to clarify the status of unfiled discovery materials, and the status should be specified in the rule itself, rather than the committee note.

Judge Niemeyer responded that the advisory committee had not studied this issue. Rather, its principal purpose in amending Rule 5 was to alleviate the storage burdens and costs

imposed on clerks' offices. Judge Levi added that the advisory committee also considered the amendment necessary to bring the national rule on filing into conformity with most of the present local rules and practices on the subject.

Professor Marcus pointed out that he had conducted considerable research on whether unfiled materials are "court records" and had concluded that it is a very complicated matter that cannot be addressed properly by simply adding a sentence to the committee note. Several other participants agreed with his analysis.

Professor Hazard recommended that the advisory committee undertake a study of whether discovery and disclosure materials are, or should be, part of the court record. **Mr. Lafitte moved to have the advisory committee study the issue and report back at the January 2000 meeting of the Standing Committee. The committee approved the motion by consensus without a formal vote.**

The committee approved the amendment to Rule 5 without objection.

FED. R. CIV. P. 26(a)

Judge Levi said that the Rules Enabling Act contemplates a set of national, uniform procedural rules to accompany national substantive law. He noted that the Judicial Conference, in its 1997 final report to Congress on the Civil Justice Reform Act, had asked the rules committees specifically to consider whether the advantages of national uniformity outweigh the advantages of allowing courts to develop their own local alternative procedures in such areas as initial disclosure and the development of discovery plans.

Judge Levi reported that well over half the district courts have some form of disclosure in place. Research conducted for the committee by the Federal Judicial Center, moreover, disclosed that some sort of disclosure had occurred in three-fifths of the federal cases surveyed. The Center study also showed that most of the 1,200 attorneys interviewed who had used disclosure liked it and said that it helps to reduce disputes, enhance settlements, and expedite cases. Judge Levi said that the Center study had confirmed that cases where disclosure occurs are concluded more quickly than cases without disclosure, and the RAND study came close to saying that attorney hours are reduced when there is disclosure. He added that the Federal Judicial Center had also found that a majority of the lawyers believe that the lack of procedural uniformity among districts causes problems for attorneys.

Judge Levi reported that the discovery subcommittee had been working on discovery for three years, had conducted several conferences with the bar, and had consulted with six major bar organizations. It had heard from both plaintiffs' attorneys and defense attorneys that national procedural uniformity was very important to them. Members of the bar, he said, report that it is difficult to keep up with changes in local rules, and the practical effect of the local rules is to create a preference for local counsel. Judge Levi added that although many of the rules are

posted on the Internet, they are not easy to find. Electronic postings, moreover, do not include standing orders and local interpretations of the local rules.

Judge Levi emphasized that national uniformity was a major matter. He noted that it had been a common theme voiced by the lawyers at the subcommittee's Boston College conference. In fact, he said, it was a fundamental premise of the federal rules and the Rules Enabling Act. Discovery and disclosure, he emphasized, are an important part of the pretrial process and should not be handled by different sets of rules determined by geography. Discovery and disclosure can affect notice pleading, motions to dismiss, and motions for summary judgment, and they may in certain instances affect the outcome of cases.

Judge Levi said that the subcommittee, in seeking national uniformity, had three options before it. The first was to retain the present disclosure requirements of Rule 26(a)(1), but to eliminate the authority of courts to opt out of the requirements. The second option was to eliminate disclosure entirely from the national rule, effectively preventing any court from using it. He noted that this approach would be very controversial because many courts now require disclosure and have achieved substantial benefits from it. The third choice — which the subcommittee adopted — was to retain disclosure as a national requirement, but to remove the "heartburn" from it by removing the present requirement that attorneys disclose information harmful to their clients without a formal discovery request.

Under the subcommittee's proposal, which the advisory committee eventually approved, parties would only have to disclose matters that support their own claims. Complex, or "high end," cases will be effectively removed from the rule by action of counsel, and eight categories of "low end" cases are explicitly exempted from the rule. The lawyers, moreover, may mutually opt out of the present disclosure requirements, and the court has discretion to dispense with disclosure in any case.

Judge Levi said that the proposal was moderate and based on fundamental fairness. He noted that it was similar to FED. R. CRIM. P. 16 in criminal cases, under which the government turns over documents that it intends to use at trial. Moreover, he said, it was similar to FED. R. CIV. P. 26(a)(3), which deals with documents and witnesses that parties intend to use at trial. He added that the bar, with some notable exceptions, supports the proposal. He noted that the Litigation Section of the American Bar Association, which had been adamantly opposed to Rule 26(a)(1) in 1993, supported the present proposal. In addition, endorsements had been received from the American College of Trial Lawyers and the Federal Magistrate Judges Association.

Judge Levi reported that many letters had been received from judges during the public comment period opposing any national rule that would impose mandatory disclosure in their districts or prescribe a form of disclosure different from that currently provided in their own local rules. The judges in the Eastern District of Virginia, in particular, expressed concern that the amendments would slow down the "rocket docket" used in that court. In response, the advisory committee added a sentence to Rule 26(f) after publication authorizing a court by local rule to

shorten the prescribed period between the Rule 26(f) attorney conference and the court's Rule 16(b) scheduling conference or order.

Judge Levi noted that 10 different federal judges had worked in the advisory committee on the discovery package over the past three years, and all 10 agree that the proposed Rule 26(a)(1) would both achieve national uniformity and benefit civil litigation. He emphasized that the rule provides judges with considerable discretion, but within the context of an overall national rule.

Mr. Schreiber argued against weakening the present mandatory disclosure requirements. He said that hostile information is the key to all discovery and that parties should be required to disclose pertinent information hostile to their clients' interests. He added that the language of the proposed amendment — requiring disclosure of matters "that the disclosing party may use to support its claims" — was meaningless. He said that a party could simply argue at the initial stages of the case that it simply has not yet made up its mind as to whether it will use any particular material in the case.

Mr. Schreiber moved to substitute the word "will" for the word "may." Thus, the amendment would require a party to disclose matters that it "will use to support its claims." Judge Tashima recommended an amendment to the motion to substitute the words "supports its claims or defenses." Judge Tashima said that the term "supports it claims or defenses" will lead to less gamesmanship among attorneys than "may use to support its claims or defenses" **Mr. Schreiber accepted the amendment to his motion.**

Judge Levi responded that the advisory committee had considered both formulations at considerable length. He noted that the agenda binder included a memorandum in which Professors Cooper and Marcus — who had different personal preferences regarding the appropriate terminology — describe the respective advantages and disadvantages of "may use to support" vis a vis "supporting." At Judge Levi's request, each of them presented his respective views orally to the committee.

Judge Levi stated that the advisory committee ultimately concluded that "may use to support" would be easier for lawyers to apply. It also has the advantage of generally tracking the language of Rule 26(a)(3), dealing with pretrial disclosures. In any event, he said, the court has authority to impose appropriate sanctions to prevent gamesmanship on the part of attorneys

The members discussed the merits of the two alternatives, how they compared to similar language in other parts of the Federal Rules of Civil Procedure (including Rule 11), and how lawyers and judges might apply them in practical situations.

The committee rejected Mr. Schreiber's motion by a vote of 8 to 3

Judge Tashima moved to amend Rule 26(a)(1) to allow a court by local rule either: (1) to opt out completely from its mandatory disclosure requirement; or (2) to narrow the categories of disclosure materials.

Some of the members expressed opposition to the motion on the grounds that it would undercut the goal of national uniformity. One member added that if the local bar does not need or want disclosure, the parties will mutually stipulate out of it.

The committee rejected Judge Tashima's motion by a vote of 11 to 1.

Judge Tashima moved to delete from the fifth paragraph of the committee note the sentence reading, "Clients can be bewildered by the conflicting obligations they face when sued in different districts." Professor Cooper agreed that the sentence was not essential. **The committee decided without objection to eliminate the sentence.**

Judge Wilson moved to repeal the 1993 amendments entirely and return to the pre-1993 procedures. He said that the single most important procedural requirement is to encourage judges to resolve disputes decisively and quickly. He added that if a judge is readily accessible to decide disputes, the disputes will arise less frequently and cases will be resolved promptly. He said that judges should also establish early cut-off dates for discovery and set early and firm trial dates.

Judge Levi responded that the 1993 rules authorized mandatory disclosure, and its repeal would deprive courts of the benefits derived from disclosure, as demonstrated by attorney surveys and other empirical data. He said that the present Rule 26(a)(1) proposal was very modest and was necessary to provide the district courts with continuing authority to require disclosure.

Associate Attorney General Fisher stated that the Department of Justice very much favors a uniform set of national procedural rules, although different parts of the Department may have different views as to specific parts of the proposed rules amendments. He said that the central concept of judge-managed discovery will work if the judges actually make it work by being readily accessible to resolve discovery problems.

Mr. Fisher added that Department attorneys, based on their experience, had identified several other categories of cases that should be exempted from the initial disclosure requirements of Rule 26(a)(1). As examples, he listed forfeiture cases, mandamus cases, FOIA cases, constitutional challenges to statutes, *Bivens* cases, and social security cases. He noted that the advisory committee was not inclined to expand the list at this point, but had promised to consider these suggestions promptly. One of the members responded that the list of exemptions was too long already and that it is generally not sound policy to encourage different procedural rules for different categories of cases. Mr. Fisher responded that the Department supported Rule 26(a)(1), as amended.

The committee rejected Judge Wilson's motion by a vote of 8 to 4.

The committee then approved the proposed amendments to Rule 26(a) by a vote of 11 to 1.

FED. R. CIV. P. 26(b)(1)

Judge Levi stated that the proposed amendment to Rule 26(b)(1) will not change the scope of discovery. He said that it will not keep litigants from obtaining appropriate discovery in any case. Parties will still be entitled — on request and without court approval — to a very broad range of information, *i.e.,* "any matter . . . relevant to the claim or defense of any party." The change occasioned by the amendment is to assign a portion of the discovery to the courts to manage, as judges for cause may make available "any matter relevant to the subject matter involved in an action."

Judge Levi said that the language of the amended rule is clearer than that of the present rule, which provides insufficient guidelines for limiting overbroad discovery. The district judges and magistrate judges who had reviewed the amendment believe that it will work well. In fact, he said, not a single judge had written or testified against the amendment. He noted that the proposal was supported by the American College of Trial Lawyers, the Litigation Section of the American Bar Association, and the Federal Magistrate Judges Association.

Judge Levi pointed out that the Department of Justice under the Carter Administration had urged the advisory committee to narrow the scope of discovery by removing the "subject matter" criterion. He read from a letter from Attorney General Griffin Bell to Judge Roszel Thomsen, chairman of the Standing Committee, in which the Attorney General reported that he "was particularly pleased with the . . . proposed change in Rule 26 which would narrow the scope of discovery to the 'issues raised.' It has been my experience as a judge, practicing lawyer and now as Attorney General that the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity, and high cost of civil litigation in the federal courts."

Judge Levi said, however, that the Department of Justice had submitted a memorandum to the committee opposing the proposed amendment, stating that it would have a deleterious effect on the Department's litigation and on civil cases generally.

Mr. Fisher pointed out that the Department of Justice sues on behalf of the public interest, and its career litigators have sincere objections to the proposed amendment, as do the American Trial Lawyers Association and civil rights and environmental organizations. In short, he said, Department lawyers are satisfied with the existing standards and believe that they work very well. The burden, presently, is placed on the defendant to come forward to limit discovery when it is seen as inappropriate or excessive. For the most part, judges do not intervene in the discovery process, and, as a consequence, a broad range of discovery is routinely provided today.

The Department believes, however, that the amended rule will shift the burden to plaintiffs and require them to seek judicial intervention to obtain information that they now receive regularly. He added that government attorneys fear that most judges simply will not have the time or inclination to become involved in discovery matters. They fear, moreover, that judges, individually and collectively, will construe the revised language of Rule 26(b)(1) narrowly and deny discovery on the merits. The net result, thus, will be a narrowing of the scope of discovery.

Mr. Fisher said that the amendment will cause particular problems in civil rights and environmental cases, and the public interests of the United States will not be served. He noted that defendants in these cases often resist producing essential records and information. He said that the Department lawyers, and plaintiffs' lawyers generally, believe that they will face even greater resistance under the amended rule.

Mr. Fisher concluded that the problems that the advisory committee attempted to address through the proposed amendment are important and difficult ones. He expressed the Department's appreciation for the committee's careful and thoughtful work. But, he added, the amendment simply was not needed. He suggested that the principal argument advanced in support of the change is that judges do not take appropriate steps under the current rule to limit the excessive discovery that occurs in some cases. But, he said, the current rule clearly gives judges sufficient authority to take an active role and limit inappropriate discovery requests.

He noted that the Department of Justice believed that there would be a good deal of costly litigation over the meaning of the amendment, at least for a while. There may well be inconsistent interpretations of the new rule, and, as a result, the scope of discovery will effectively be narrowed for some plaintiffs. In short, he said, the proposed amendment attempts to deal with a small group of troublesome cases, but will result in serious negative consequences. He suggested that, rather than recreating the whole landscape of Rule 26(b), the advisory committee should consider removing those troublesome cases from the general operation of the rule and regulating them with special rules.

Judge Niemeyer thanked Mr. Fisher and said that his points were very well taken. But, he said, the advisory committee had considered the same points at great length both before and during the public comment period. He noted that some members of the advisory committee agreed generally with Mr. Fisher's arguments, but a strong majority of the committee supported the proposed amendment. He noted that the advisory committee included in its report to the Standing Committee an April 14, 1999 "dissenting opinion" prepared by Professor Thomas D. Rowe, Jr., a member of the advisory committee.

Judge Levi added that the current law makes almost everything relevant to the claims or defenses in civil rights and environmental cases. The amendment, he said, would not limit the broad array of information that plaintiffs presently receive through discovery. They will, for example, still be entitled under the amended rule to information about the treatment of other employees, a pattern of discrimination, or a continuing violation, as well as information

extending beyond the statute of limitations. These types of information are all considered relevant to the claims and defenses under current law.

Judge Levi noted that the advisory committee disagreed that the proposed amendment would lead to costly motion practice. He emphasized that discovery disputes are usually decided on an expedited basis. In many courts they are resolved without the filing of written motions, and often by telephone. He added that discovery works well in most cases and will continue to work well under the proposed amendment. But there is a group of cases where it is very contentious and very expensive. He said that the courts need to take an active role in managing these cases, and the amended rule gives judges clear authority and direction to manage them.

Judge Niemeyer said that the discovery rules are designed generally for lawyers and litigants who do not abuse the process. They assume compliance and good faith for the most part. The existing rules, as well as the proposed amendments, expect judges to supervise discovery in those cases where there are problems. Thus, if a defendant "stonewalls" on discovery production in a case, plaintiffs' counsel or the Department of Justice, will have to litigate on the scope of discovery in any event — either under the present rule or the amended rule.

One of the members strongly opposed the proposed amendment to Rule 26(b)(1), calling it — along with the proposed cost-bearing amendment to Rule 26(b)(2) — the most radical change in the civil rules in 60 years. He said that every employment law group and civil rights organization was opposed to the change, because it would limit discovery and strongly tilt the playing field against them. Another member, however, responded that he could not think of a single piece of information obtainable under the current rule that would not be discovered under the new rule. Other members added that they supported the amendment because it would cause lawyers to focus their discovery efforts more effectively and require them to be more specific and responsible in what they request.

Mr. Schreiber questioned why the advisory committee had used the term "for good cause shown," instead of "on motion" or "for reasonable cause." He moved to delete "for good cause shown" and substitute the words "on motion." Thus, judges would have complete discretion to order broader discovery, without being bound to the "good cause" standard.

Judge Levi replied that the committee note states specifically that the good-cause standard is meant to be flexible. One of the members added that the rule had to prescribe a standard beyond that of mere discretion. Another member reminded the committee that "good cause" had been the standard required for the production of discovery documents before 1970.

Mr. Schreiber later withdrew his motion.

The committee approved the amendment to Rule 26(b)(1) by a vote of 10 to 2.

FED. R. CIV. P. 26(b)(2)

Judge Niemeyer noted that the proposed amendment to Rule 26(b)(2), governing cost bearing, had been published as an amendment to Rule 34. The advisory committee relocated it in Rule 26 after publication, but without any change in content. He said that its placement in Rule 26 would emphasize that it applies to all categories of discovery. He added that the proposed amendment would not change the law as it exists, but would make an existing judicial tool explicit. It would give district judges and magistrate judges clear authority to require a party seeking information not otherwise discoverable under Rule 26(b)(2)(i), (ii), or (iii) to pay part or all of the reasonable expenses incurred in its production.

Mr. Fisher stated that the Department of Justice was concerned that the proposed amendment might be applied by the courts to require requesting parties to pay for "court-managed" discovery, vis a vis "attorney-managed" discovery. He recommended inclusion of a clear statement that discovery of "any matter relevant to the subject matter involved in the action" would be provided without charge to the requesting party, in the same manner as discovery of "any matter . . . relevant to the claim or defense of any party." In other words, the cost-bearing provision explicitly would be applicable to both.

Judge Niemeyer responded that the proposed amendment did in fact apply equally to both and said that he would be pleased to work on improving the language. Mr. Fisher suggested including in the committee note to Rule 26(b)(1) language from page 74 of the agenda book declaring that the scope-expansion and cost-bearing provisions are not intended to operate in tandem and that ordinarily a request to expand the scope of discovery will not justify a cost-bearing order. Judge Niemeyer agreed to draft appropriate language to that effect, and his language was later incorporated in the revised committee note.

Judge Scirica stated that several public comments had suggested that the amendment would have the effect of distinguishing between plaintiffs who have resources and those who do not. Judge Niemeyer replied that the amendment would not change the current results. Plaintiffs will continue to receive, without charge, every document that relates to their claim or defense or that relates to the subject matter of the action. Cost-bearing will only be applied to discovery requests that are burdensome, duplicative, or unreasonable. Judge Levi added that a judge, in considering cost bearing, is required explicitly to take account of the parties' resources under Rule 26(b)(2). Accordingly, parties with limited resources may actually be treated better than well-healed parties under the amended rule. Moreover, a party who can afford to pay for marginal discovery, and is willing to pay for it, may not in fact receive it because the judge has discretion to deny the request entirely.

One of the members said that the amendment would cause havoc, especially in employment discrimination cases. He predicted that defendants would bring a motion for cost-bearing in every case in an effort to save money for their clients. One of the members responded that the prediction assumed that judges would act foolishly. He said that routinely-made motions will be routinely denied.

Judge Levi added that the cost-bearing amendment, by definition, deals only with material that is marginal to the case and is burdensome, duplicative, or unreasonable. Some members questioned why that type of material should be produced at all. Others responded that the amendment provides judges with a useful management tool and would permit a judge to determine how much a lawyer wants particular material and whether the lawyer is willing to pay for it. Others suggested that the amendment would allow judges to order discovery on condition that the requesting party pay only part of the cost of producing it. They said that it was not clear whether judges may apportion costs under the current rule.

One member asked why local rule authority had been removed from the provision of Rule 26(b)(2) dealing with the number of depositions and interrogatories and the length of depositions, but retained with regard to the number of requests for admissions. Professor Cooper responded that there were several local rules on the subject, and the advisory committee was reluctant to eliminate local rule authority to limit requests for admission without further study of local practices.

Another member pointed out that the committee note to Rule 26 referred to standing orders, as well as local rules, in some places, but not in others. He suggested that the note be reviewed in this respect for consistency of terminology.

The committee approved the proposed amendment to Rule 26(b)(2) by a vote of 11 to 1.

FED. R. CIV. P. 26(d) and (f)

Judge Niemeyer reported that the proposed amendments to Rule 26(f) would require the parties to confer at least 21 days, rather than 14 days, before the court's Rule 16 scheduling conference or scheduling order. He noted that the advisory committee had made a change in the amendments after publication to accommodate the expedited pretrial procedures used in the Eastern District of Virginia. The change would allow a court by local rule to require that the conference be held less than 21 days before the scheduling conference or order.

Judge Niemeyer pointed out that the amendments would no longer require the attorneys to meet face-to-face, but would allow a court by local rule or order to require that the attorneys attend the conference in person. Several members questioned the wisdom of allowing courts to issue local rules on this subject, especially since the authority of courts to opt out of national requirements was being eliminated in other parts of Rule 26. One added that the requirement for face-to-face meetings should be made in individual cases, rather than by local rule.

Judges Niemeyer and Levi agreed that local rules should be discouraged generally, but they noted that the advisory committee believed that differences in geography and local culture made it appropriate to allow courts to have local variations in this specific instance. They added that several commentators had informed the committee that face-to-face meetings between the

attorneys, as required by the 1993 amendments to Rule 26(f), had been instrumental in expediting cases and reducing costs.

One of the members stated that a court should not be allowed by local rule to require out-of-town counsel to appear in person. Professor Cooper replied that the committee note addressed the issue and provided that, "a local rule might wisely mandate face-to-face meetings only when the parties or lawyers are in sufficient proximity to one another."

Judge Kravitch moved to eliminate from the proposed amendments the authority of a court to require face-to-face meetings of counsel by local rule and replace it with language that would authorize a court to require that meetings be held face-to-face, but only by a judge's case-specific order. Her motion was approved by a vote of 8 to 2.

The committee approved the amendments to Rules 26(d) and (f) by a vote of 12 to 0.

FED. R. CIV. P. 30

Judge Niemeyer reported that the proposed amendment to Rule 30(d)(2) would establish a presumptive limit on depositions of one day of seven hours. But a longer period could be authorized by court order or stipulation of the parties. The amendment, he said, was designed to respond to an area cited by commentators — particularly plaintiffs' lawyers — as one of recurring abuse and excess cost. He noted that research by the Federal Judicial Center had demonstrated that depositions are often the single most expensive item of discovery.

Judge Niemeyer stated that the rule provides a norm to guide the bench and bar in measuring depositions. He said that the advisory committee had heard many comments at the public hearings that the new rule would be effective. He added that the most common response from lawyers was that they have little trouble in reaching accommodations with opposing counsel on making arrangements for depositions. The amendment, he said, tells lawyers what the norm is for a deposition, and they will plan their depositions accordingly. One member added that he had been strongly opposed to the amendment when it had been published, but the consistent testimony from lawyers at the hearings had convinced him that the rule would work well in practice.

Judge Tashima moved to exclude expert witnesses from the operation of the rule. He noted that many expert witness depositions simply cannot be completed within seven hours. He added that the Department of Justice supported his position in this regard, but the Department would go further and also exclude Rule 30(b)(6) witnesses and named parties.

One of the members spoke against the proposed amendment in general, saying that it simply was not necessary. He said that it is easier to demonstrate to a judge that abuse has occurred in a deposition than to convince the judge that additional time is needed for a deposition. Judge Niemeyer replied that many members of the advisory committee had been of

the same view, but were convinced by the hearings that the amendment to the rule would be beneficial.

Professor Marcus said that the advisory committee had included additional language in the committee note to guide lawyers and judges as to when it would be desirable to extend the time for the deposition. Mr. Katyal added that the Department of Justice appreciated the additional language in the committee note, but still believed that there was no need to apply the presumptive time limit to depositions of expert witnesses. He said that government attorneys feared that relying on the consent of a party or the court's management to waive the 7-hour limit would not be sufficient.

The committee rejected Judge Tashima's motion by a vote of 7 to 3.

One member said that it was essential that the deponent be required to read pertinent documents in advance in order to avoid wasting time and generating requests for extensions of time. He noted that language to that effect had been included in the committee note, but he would prefer to have a clear requirement included in the rule. He also suggested that the note provide additional direction to the bar regarding time limits for depositions in multiple-party cases. Judge Niemeyer responded that the discovery subcommittee would continue to study these matters, but it is simply not possible to address all potential problems in the rule or the note.

Judge Niemeyer reported that the advisory committee had amended Rule 30(f)(1), without publication, to eliminate the need to file a deposition with the court. The change merely conforms the rule to the published amendment to Rule 5(d), which provides that depositions not be filed with the court.

The committee approved the proposed amendments to Rule 30 by a vote of 10 to 1.

FED. R. CIV. P. 34

Judge Niemeyer reported that the advisory committee had added to Rule 34 a cross-reference to Rule 26(b)(2)(i), (ii), and (iii). He noted that, as published, the cost-bearing provision had been included as part of Rule 34(b), but the committee relocated it to Rule 26(b)(2) after publication. Because cost-bearing concerns often arise in connection with discovery under Rule 34, a reference was needed in Rule 34 to call attention to the availability of cost-bearing in connection with motions to compel Rule 34 discovery and Rule 26(c) protective orders in connection with document discovery.

Some members of the committee questioned the need for the cross-reference in Rule 34. Other members pointed out, however, that although the reference is not essential, it serves as a helpful flag to lawyers.

The committee approved the proposed amendment to Rule 34 without objection.

FED. R. CIV. P. 37

Judge Niemeyer reported that the proposed amendment to Rule 37(c)(1) closes a gap in the current rule and provides that the sanction of exclusion, forbidding the use of materials not properly disclosed, applies to a failure to supplement a formal discovery response.

The committee approved the proposed amendment to Rule 37 without objection.

The committee approved the package of amendments to the discovery rules by a vote of 10 to 0.

Rules for Publication

Electronic Service

FED. R. CIV. P. 5, 6, and 77 and FED. R. BANKR. P. 9006 and 9022

Judge Niemeyer reported that the Advisory Committee on Civil Rules had been asked to take the lead in drafting uniform amendments to the federal rules to authorize service by electronic means. The advisory committee, he said, had worked closely with the Standing Committee's Technology Subcommittee (which includes representatives from each of the advisory committees), and it had generally followed the advice of that subcommittee. He noted that the proposed amendments before the Standing Committee had been circulated to the other advisory committees for comment. Although many of the suggestions from the other committees had been incorporated in the draft, the advisory committees were not in complete agreement on all parts of the draft.

Professor Cooper pointed out that all the participants agreed that the time for electronic service had arrived, but they also agreed that it was premature to consider making its use mandatory — either by national rule or by local rule. Accordingly, the proposed amendments authorize electronic service with the consent of the party being served. He added that they authorize electronic service only for documents under Rules 5(a) and 77(d), and not for the service of initiating documents and process in a case, such as under FED. R. CIV. P. 4

Professor Cooper said that, as amended, Rule 5(b) specifies that service is complete upon "transmission." He noted that the Advisory Committee on Civil Rules had requested specific comment from the other advisory committees on this point. In response, the Advisory Committee on Appellate Rules asked what should happen if service is transmitted electronically, but the electronic system notifies the sender that the message has not in fact been delivered. As a result, language was added to the committee note specifying that: "As with other modes of service, . . . actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete upon transmission."

Professor Cooper pointed out that new subparagraph 5(b)(2)(D) provides that, if authorized by local rule, a party may make service through the court's transmission facilities. He explained that this provision contemplates eventual enhancements in the courts' electronic systems to allow a party to file a paper with the court and have it served simultaneously on all the required parties. Professor Cooper also pointed out that this is the only reference to local rule authority in the proposed amendments. In addition, a minor amendment would be made to FED. R. CIV. P. 77(d) to conform to the changes proposed in Rule 5(b).

Judge Niemeyer reported that electronic service raises the question of whether the party being served should be allowed additional time to respond, in the same way that FED. R. CIV. P. 6(e) currently provides an additional three days to respond when a party is served by mail. He said that differing views had been expressed on this subject. Accordingly, the Advisory Committee on Civil Rules had prepared a draft rule plus three alternatives for presentation to the Standing Committee. The draft rule would allow an extra three days for all service other than personal service. Alternative 1 would make no change in Rule 6(e), therefore providing no additional time when service is made electronically. Alternative 2 would eliminate Rule 6(e) and the three-day provision entirely. Alternative 3 would amend Rule 6(e) to allow an additional three days if service is made by mail "or by a means permitted only with the consent of the party served." Professor Resnick said that this formulation, which covers electronic service, could conveniently be incorporated by the Federal Rules of Bankruptcy Procedure.

Judge Niemeyer reported that 6 members of the Advisory Committee on Civil Rules had voted against allowing additional time for service by electronic means — or for any other types of proposed consensual service, such as commercial carrier. Professor Cooper added that the reasoning for this approach is that the rule specifically requires consent, and people will only consent to a type of service in which they have confidence. Accordingly, there is no need to provide them with additional time. He added that the Advisory Committee on Appellate Rules had expressed concern that if additional time were given, it would deter people from using electronic service.

Judge Niemeyer said that 4 members of the advisory committee had voted to allow three days additional time. He noted that those who favored allowing additional time urged that consent will be more likely to be given if it brings with it the reward of additional time. He added that the committee would describe the alternatives and solicit comment from the public on the advisability of applying the three-day rule to electronic service.

Judge Scirica emphasized the importance of publishing a uniform set of amendments if feasible. Professor Cooper agreed, but pointed out some practical differences between civil and appellate practice. Judge Garwood added that the Federal Rules of Appellate Procedure — unlike the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure — presently authorize service by commercial carrier, and that no consent is required from the party being served by commercial carrier. He noted that FED. R. APP. P. 25 and 26 give the party being served an extra three days unless the paper in question is delivered on the date of service specified in the paper.

Judge Garwood said that the time periods should generally be the same in all the federal rules. He would, however, distinguish the issue of the authority to use commercial carriers from the issue of whether an additional three days is provided for a response.

Professor Resnick said that the bankruptcy rules did not have to be amended to authorize electronic service in adversary proceedings because FED. R. CIV. P. 5 is applicable to those proceedings. He added that the Advisory Committee on Bankruptcy Rules believed that an additional three days should be allowed for electronic service, and for all other types of service except personal delivery. Therefore, it had prepared companion amendments to FED. R. BANKR. P. 9006, to extend the three-day "mail rule" to all service under FED. R. CIV. P. 5(b)(2)(C) and (D), and to FED. R. BANKR. P. 9022, to conform to the proposed amendment to FED. R. CIV. P. 77(d). He urged that the proposed amendments to the bankruptcy rules be published together with the proposed amendments to the civil rules.

The committee voted without objection to authorize publication of the proposed amendments to FED. R. CIV. P. 5(b) and 77(d) and to FED. R. BANKR. P. 9006 and 9022. As part of the package, an alternate amendment to FED. R. CIV. P. 6(e) would also be published for comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1999. (Agenda Item 8)

He reported that the advisory committee had no action items to present. He noted that the committee was deeply involved in the project to restyle the body of criminal rules. The Style Subcommittee of the Standing Committee had prepared a draft of the entire criminal rules, and the advisory committee was close to completing its revision of the first 22 rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1999. (Agenda Item 9)

Judge Smith reported that the advisory committee was seeking approval of amendments to seven rules. She noted that she had provided the Standing Committee with a detailed explanation of the proposed amendments at the January 1999 meeting. The advisory committee, she said, had conducted two hearings on the amendments and had received 173 written comments from the public.

FED. R. EVID. 103

Judge Smith said that the proposed amendment to Rule 103 would resolve a dispute in the case law over whether it is necessary for a party to renew an objection or an offer proof at trial after the court has made an advance ruling on the admissibility of the proffered evidence. She noted that the amendment had been considered by the Standing Committee on several occasions and that improvements in its language had been made. She added that the current proposal had received very favorable support during the public comment period.

Judge Smith pointed out that the proposed amendment, as published, had contained an additional sentence codifying and extending to all cases the principles of *Luce v. United States,* 469 U.S. 38 (1984). In that case, the Supreme Court held that a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. The public comments on the addition, she said, had been negative, and several commentators had expressed concern over the potential and unpredictable consequences of applying *Luce* to civil cases.

Judge Smith said that the advisory committee had decided to eliminate the additional sentence in light of the public comments. But, she added, some members were concerned that elimination of the sentence might be interpreted as an implicit attempt to overrule *Luce.* Ultimately, the advisory committee decided to eliminate the sentence but to include explicit language in the committee note stating that nothing in the amendment is intended to affect the rule set forth in *Luce.*

The committee approved the proposed amendment to Rule 103 without objection.

FED. R. EVID. 404

Judge Smith reported that Rule 404(a)(1) would be amended to provide that when an accused attacks the character of an alleged victim, the accused's character also becomes subject to attack for the "same trait." She pointed out that the amendment, as published, had been broader in scope, allowing the accused to be attacked by evidence of a "pertinent trait of character." She added that the advisory committee had narrowed the amendment in light of negative public comments and comments from some members of the Standing Committee.

The committee approved the proposed amendment to Rule 404 without objection.

FED. R. EVID. 701

Mr. Holder reported that the litigating divisions of the Department of Justice, the United States attorneys, and other components of the Department had thoroughly reviewed the proposed amendment to FED. R. EVID. 701 and had concluded that it would have a serious and deleterious impact on the Department's civil and criminal litigation. He said that he was grateful that the

advisory committee had carefully considered his letter of January 5, 1999, to Judge Smith and had made changes in the amended rule and the accompanying committee note to accommodate the Department's concerns. But, he said, the revised amendments regrettably did not alleviate the core concerns of the Department's lawyers.

Mr. Holder explained that no bright line is presently drawn in Rule 701 between lay testimony and expert testimony. Witnesses are often put on the stand by counsel to testify as to facts, but their testimony inevitably includes opinions based on their occupation or personal experience.

He noted, for example, that the Department of Justice puts witnesses on the stand who testify as to drug transactions, food adulteration, or environmental cleanups. Many of these witnesses would not be considered "experts," in the common or legal use of the term, but their testimony is often based on specialized knowledge. The testimony cannot meaningfully be presented to the court or jury without the witnesses giving their opinions, which are based on specialized knowledge arising from their occupation or life experience.

Mr. Holder said that forcing these people to be considered "experts" under Rule 702 would lead to a number of unfortunate results. Under FED. R. CRIM. P. 16, for example, they would have to file a written summary of their testimony. In civil cases, FED. R. CIV. P. 26(a)(2) may require them to file expert reports. Also by brightening the line between lay and expert testimony, the amendment, he said, would subject the evidentiary rulings of trial judges to greater appellate review. This result would run counter to the thrust of the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), and *Kumho Tire Co. V. Carmichael,* 119 S. Ct. 1167 (1999), which confirmed the discretion of trial courts to weigh the reliability of testimony.

Finally, Mr. Holder said that the net effect of the amendment to Rule 701 would be to require the Department under FED. R. CRIM. P. 16 to disclose in advance of trial the identity of fact witnesses whom it intends to call if part of their testimony entails giving their opinion as to matters they have observed. Such disclosure might in a few cases pose a danger to the life or safety of prospective witnesses.

In conclusion, Mr. Holder urged the committee to reject the rule entirely. Alternatively, he recommended that it be deferred for further consideration by the civil and criminal advisory committees.

Judge Smith said that the Department, basically, objects to brightening the line between Rule 701 lay testimony and Rule 702 expert testimony. But, she said, although the line cannot be brightened completely, it can be clarified. There will always be some doubt, and judges will continue to have to exercise judicial discretion. She added that in light of the Supreme Court's decisions in *Daubert* and *Kumho,* it was necessary to provide judges and lawyers with some guidelines in this area.

Judge Smith said that there was a widespread belief among the bar that the lack of guidelines has led to increasing attempts by attorneys to evade the reliability requirements of Rule 702 by proffering experts in the guise of law witnesses under Rule 701. She added that the proposed amendment to Rule 701 was not intended in any way to change the status of lay opinion or opinion that is based on people's everyday life experiences. Rather, the advisory committee wanted to clarify for the bench and bar how the judicial gatekeeping function should operate. She explained that, as helpful as the *Kumho* decision had been, there still needed to be guidelines set forth in the rules to aid the bench and bar.

Judge Smith pointed out that Mr. Holder's letter of June 9 to the Standing Committee, in discussing FED. R. CIV. P. 26(b)(1), had expressed "grave substantive concerns, shared by the Department, about the Advisory Committee's proposal to modify the most essential element of the federal civil system — the complementary hallmarks of the Federal Rules of Civil Procedure: notice pleading and full discovery of relevant information." She said that full disclosure of information requires that a party give notice to the other party of any specialized knowledge on the part of a witness it intends to call. Only in this way can the court's gatekeeping function be handled properly, with appropriate input from both sides. She said that the basic needs of fairness outweigh the inconvenience of having to disclose more witnesses in some kinds of cases.

Judge Smith reported that the advisory committee had made changes in Rule 701 to ameliorate the concerns of the Department of Justice. She said that the words "within the scope of Rule 702" had been added to the rule after publication to show that witnesses need not be qualified as experts unless they are clearly found to be expert witnesses under Rule 702. She said that the committee had also added several examples to the committee note of the types of lay opinion witnesses who do not need to be qualified as experts. Professor Capra explained that the committee had incorporated the examples from the pertinent case law to help clarify the application of Rules 701 and 702 in light of the concerns of the Department and to assist attorneys in determining in advance how to avoid potential violations of FED. R. CRIM. P. 16.

Mr. Katyal said that the Department's principal concern with the amendment was not that its lawyers would be unable to introduce necessary testimony in court, but that testimony currently admitted under Rule 701 would now be classified as Rule 702 expert testimony. This would require compliance with FED. R. CRIM. P. 16, including pretrial disclosure of the names of witnesses. He noted that the Attorney General has had a long-standing policy on this matter and had written to the chief justice in the past firmly opposing proposed amendments to Rule 16 that would have required pretrial disclosure of government witnesses.

Mr. Katyal said that the United States attorneys and the Criminal Division of the Department of Justice believe strongly that the proposed amendment will threaten the safety of government witnesses and add to litigation costs. He added that *Kumho* did not require the proposed amendment, and that the bright line fashioned by the proposed amendment would actually undercut *Kumho*.

Several judges responded that, based on their experience, the potential problems pointed out by the Department of Justice were overstated. One judge, for example, said that the Department's views must always be taken very seriously, but the suggested danger to witnesses cited by the Department was simply not realistic. He added that the proposed amendment was both modest and reasonable. Professor Capra noted that FED. R. CRIM. P. 16 does not require the government to disclose the identify of a witness. It only requires disclosure of statements.

Judge Scirica said that if the proposed rule were adopted, a United States attorney would in an appropriate case petition the court *ex parte* to protect any witness against whom there was a potential threat. Mr. Katyal responded that the Department had in fact discussed this suggested course of action with the United States attorneys, but they countered that the amended rule might not authorize that type of action. And, in any event, the district court might deny their request. Judge Smith added that the witnesses covered by the rule were, usually, law enforcement witnesses, rather than potentially endangered lay witnesses.

Judge Scirica asked Judges Davis and Niemeyer to comment on Mr. Holder's alternate recommendation that the proposed amendment to Rule 701 be deferred to obtain the views of the criminal and civil advisory committees. Judge Davis responded that the Advisory Committee on Criminal Rules would have no problem with the proposed amendment. He noted that his committee had consistently called for greater pretrial disclosure under FED. R. CRIM. P. 16 than the Department of Justice has been willing to provide. Judge Niemeyer commented that the Advisory Committee on Civil Rules had not considered the proposed amendment, but that he personally believed that it would be helpful in clarifying the distinction between lay witnesses and expert witnesses.

Mr. Katyal suggested that the committee note be amended to specify that the rule is not intended to require the disclosure of the identify of witnesses if the United States attorney personally avers to the court that the safety of a witness is at stake, or there are facts that tend to reveal that the safety of a witness may be at stake. Professor Capra responded that the additional language would be inappropriate because Rule 702 is an evidence rule, not a disclosure or discovery rule.

The committee approved the proposed amendment to Rule 701 by a vote of 9 to 1.

FED. R. EVID. 702

Judge Smith reported that the advisory committee had made minor changes in the rule following publication: (1) to delete the word "reliable" from Subpart 1 of the proposed amendment; (2) to amend the committee note in several places to add references to the Supreme Court's decision in *Kumho*, which was rendered after publication; (3) to revise the note to emphasize that the amendment does not limit the right to a jury trial or encourage additional challenges to the testimony of expert witnesses; and (4) to add language to the note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Rule 702.

challenges to the testimony of expert witnesses; and (4) to add language to the note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Rule 702.

The committee approved the proposed amendment to Rule 702 by a vote of 9 to 0.

FED. R. EVID. 703

Judge Smith reported that the advisory committee had made a few minor, stylistic changes following publication.

The committee approved the proposed amendment to Rule 703 by a vote of 10 to 0.

FED. R. EVID. 803 AND 902

Professor Capra pointed out that the proposed amendments to Rules 803(6) and 902(11) and (12) were part of a single package, allowing certain records of regularly conducted activity to be admitted without the need for calling a foundation witness. He pointed out that two new subdivisions would be added to Rule 902 to provide procedures for the self-authentication of foreign and domestic business records. Professor Capra said that the advisory committee had made minor stylistic changes following publication and had added a phrase to specify that the manner of authentication should comply with any Act of Congress or federal rule.

The committee approved the proposed amendments to Rules 803 and 902 without objection.

REPORT OF THE ATTORNEY CONDUCT RULES SUBCOMMITTEE

Judge Scirica reported that Professor Coquillette and the subcommittee had accomplished a great deal since the last committee meeting. He noted that the subcommittee had held a meeting in Washington in May 1999 that included members of other Judicial Conference committees and a number of people interested and knowledgeable in attorney conduct matters. He said that recent federal legislation had made government attorneys subject to state ethical regulations, and that Chief Justice Veasey and Professor Hazard had been active in working with the Department of Justice in trying to fashion an acceptable rule to govern the subject matter of Rule 4.2 of the A.B.A. Code of Conduct, *i.e.,* contact by government attorneys with represented parties.

Chief Justice Veasey reported that additional progress had been made in the negotiations on this matter among the chief justices, the Department of Justice, and the American Bar Association. He added that two competing bills were pending in the Senate. One, sponsored by Senator Hatch, would preempt state bars from regulating federal prosecutors. The other, sponsored by Senator Leahy, would single out for Judicial Conference action the issue of government attorneys contacting represented parties. He reported that the Conference of Chief

Justices had written to Senators Hatch and Leahy informing them that work was proceeding on trying to reach a compromise. He added that Professor Hazard had been very active and very helpful in the negotiations.

Professor Coquillette said that the subcommittee was planning to hold one additional meeting, in Philadelphia in September.

He reported that there are literally hundreds of local federal court rules purporting to govern attorney conduct. Some of them, he said, just adopt the conduct rules of the state in which the federal court sits. Other local rules adopt the A.B.A. Code, and some adopt the A.B.A. canons. Many courts, moreover, appear to ignore their own rules in practice.

Professor Coquillette said that there appeared to be a consensus that attorney conduct obligations should, as a general rule, be governed by the laws of the states. If there are to be any special rules for federal attorneys, they should be limited to a very small core when clear federal interests are at stake. He noted that Professor Cooper was working on a draft "dynamic conformity" rule that would make state conduct rules applicable in the federal courts, but leave open a narrow door for such matters as Rule 4.2 conduct. He said that the draft would be circulated for comment to the subcommittee and the advisory committee reporters. He added that there was a possibility that a proposed resolution of the matter might be brought before the Standing Committee at the January 2000 meeting.

LOCAL RULES PROJECT

Professor Squiers explained in brief the manner in which she had conducted the original local rules project. She explained that in her original study she had gathered the rules of every court and had placed them in five categories: (1) those that were appropriate local rules; (2) those that were so effective that they should be publicized as model rules for the other courts to consider; (3) those that should be incorporated into the national rules; (4) those that were duplicative of the federal rules; and (5) those that were inconsistent with federal law or the national rules. She added that the courts were provided with the results of this work and asked to take appropriate action. Compliance, she said, was voluntary.

Professor Squiers pointed out that the federal rules had been amended in 1995 to require that local rules be renumbered, and most courts had redrafted their rules to meet that requirement. In addition, she said, the Civil Justice Reform Act had led to the adoption of many new local rules, and that some additional local rules changes had been made to take account of the expiration of the Act.

Professor Squiers reported that she planned to follow the same general approach in the new study of local rules, and she invited the members to provide input and guidance. She pointed, for example, to suggestions that she had received that the judicial councils of the circuits

should be involved early in the project since they have the authority to oversee and abrogate local rules.

Some of the members pointed out that some of the judicial councils appeared to be very active in reviewing and acting on local rules, while other councils appeared to be largely inactive in this area. Judge Scirica said that it might be useful for the committee eventually to suggest a model process for the judicial councils to follow in reviewing local rules.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee's efforts had been directed to assisting the Advisory Committee on Criminal Rules in restyling the body of criminal rules. He noted that the style subcommittee had completed a preliminary draft of all the criminal rules, and that the advisory committee would take action on FED. R. CRIM. P. 1-22 at its June 1999 meeting.

NEXT COMMITTEE MEETING

Judge Scirica reported that the next committee meeting had been scheduled for January 6 and 7, 2000.

Respectfully submitted,

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Divergence Between Evidence Rules and Current Case Law
Date: September 15, 1999

Judge Shadur has proposed that the Committee consider whether it would be useful to prepare new Committee Notes that identify Evidence Rules and Committee Notes that diverge from current case law. The goal of such a project is to assist practitioners who might look at a certain Rule, as elucidated by the original Advisory Committee Note, and understandably conclude that the Rule and Note mean what they say--when in fact the case law has diverged from the original Rule and Note.

The first question for the Committee is whether the project should be undertaken. Should the Committee decide in the affirmative, the second question is the proper format for the Committee's work product. There are two possibilities. One possibility is to enact supplementary Advisory Committee Notes. If the Committee ultimately decides that it wishes to enact supplementary Committee Notes, it must determine whether it is permissible to enact a Committee Note without any corresponding amendment to the text of a Rule. Moreover, the enactment approach must receive the approval of the Standing Committee, since that Committee has taken the position that the Advisory Committee Notes actually become Standing Committee Notes when a rule change is enacted--hence the term "Committee Note", rather than "Advisory Committee Note" in any rule change.

Another possibility for work product is for the Committee to prepare a report that would be published (perhaps by the Federal Judicial Center) and sent to publishers of the Federal Rules of Evidence, much as was done with the Reporter's article concerning Advisory Committee Notes that are inconsistent with the text of the Rules.

The purpose of this memorandum is to set forth some of the Rules where the case law has developed in such a way as might not have been envisioned by the Rule or the Committee Note.

This memorandum is not intended to be comprehensive. Nor is it intended to suggest that the project must necessarily be undertaken--that question is for the Committee. The memorandum simply provides some background for the Committee in determining whether the project would be useful.

There are two types of divergences between case law and Rule/Committee Note that potentially could be addressed: 1) where the case law (defined as at least a fair number of reported cases) is flatly inconsistent with either the text of the Rule, the Committee Note, or both; and 2) where the case law has provided significant development on a point that is not addressed by either the text of the Rule or the Committee Note. This memorandum sets forth examples of both types of divergence.

Finally, a disclaimer: no inference should be derived that the case law discussed below is wrong or unreasonable. Indeed, most of the divergence from the text of the Rules seems very sound and well-reasoned. The memorandum simply illustrates the divergences, so that the Committee can decide whether it would be useful to undertake the project.

Examples of Case Law in Conflict with the Language of the Rule or Note:

*1. **Rule 106:*** The rule of completeness set forth in Rule 106 by its terms applies only to written or recorded statements--not to oral statements. Some courts have found that the Rule, or at least its principle, applies to require admission of portions of an oral statement when necessary to correct a misimpression. See the discussion in *United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (finding it unnecessary to decide the question, but noting the case law on the point).

Moreover, some courts have held that Rule 106 can operate as a kind of hearsay exception when the opponent opens the door by creating a misimpression by offering only part of a statement. See *United States v. Sutton,* 801 F.2d 1346 (D.C.Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously"). Such a reading is not apparent from the text or Committee Note. See *United States v. Wilkerson,* 84 F.3d 692 (4th Cir. 1996) (interpreting Rule 106 as purely a timing device, not as a rule permitting the admission of otherwise inadmissible evidence).

*2. **Rule 403:*** Of the negative factors listed that would support exclusion, only one refers to the jury directly--the danger of "misleading the jury". This would seem to indicate that other negative factors mentioned in the Rule, specifically the danger of unfair prejudice and confusion of the issues, must be taken into account in a bench trial. Yet courts have held, with good reason, to the contrary. See, e.g., *Schultz v. Butcher,* 24 F.3d 626 (4th Cir. 1994) (trial court erred in excluding evidence in a bench trial on the ground of its prejudicial effect); *Gulf States Utils. v. Ecodyne Corp.,* 635 F.2d 517 (5th Cir. 1981) (the portion of Rule 403 referring to prejudicial effect "has no logical application in bench trials").

*3. **Rule 404(a):*** The Rule states that no party is permitted in the first instance to introduce character evidence to prove action in accordance with character, except for the "accused"--i.e., only the "accused" can open the door to circumstancial use of character evidence. Thus, the Rule seems explicit in prohibiting the circumstantial use of character evidence in civil cases. And the Advisory Committee Note confirms this exclusionary principle. Yet some courts have permitted civil defendants to use character evidence circumstantially "when the central issue in a civil case is by its nature criminal." *Palmquist v. Selvik,* 111 F.3d 1332 (7th Cir. 1997); *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986) (police officers charged with excessive force are permitted to prove the decedent's character for violence).

*4. **Rule 407:*** Courts have held that subsequent remedial measures are not excluded by Rule 407 if the measure is taken by someone other than the defendant, i.e., if it is a "third party

repair." See *Dixon v. International Harvester Co.,* 754 F.2d 573 (5th Cir. 1985) (repair by tractor owner after an accident not excluded when offered against tractor manufacturer). Yet the plain language of the Rule excludes *any* measure which, if taken, would have made the injury less likely to occur.

Also, the Rule states that "impeachment" is a proper purpose for admitting subsequent remedial measures. Yet courts have generally limited the admission of subsequent remedial measures when offered for impeachment by way of contradiction. The fear is that this exception would swallow the rule. See, e.g., *Kelly v. Crown Equip. Co.,* 970 F.2d 1273 (3d Cir. 1992) (subsequent remedial measure cannot be offered for simple contradiction of expert's statement that a design was safe). Thus, "impeachment" has been limited to cases where defense witnesses have made extravagant claims of safety. See *Wood v. Morbark Indus.,* 70 F.3d 1202 (11th Cir. 1995) (post-accident design change admissible for impeachment where defense witness testified that the original design was the safest possible design). While this limitation on the impeachment exception makes sense, the fact remains that it is inconsistent with the language of the Rule.

5. Rule 601: Rule 601 essentially states that all questions that had been treated previously as matters of competency are now matters of credibility. The Advisory Committee Note, elaborating on the Rule, essentially prohibits a trial judge from excluding a witness on grounds of incompetence. Yet courts have excluded witnesses who have been found incapable of testifying in a competent fashion. See, e.g., *United States v. Gutman,* 725 F.2d 417 (7th Cir. 1984) (trial court retains the power, and sometimes the duty, to hold a hearing "to determine whether a witness should not be allowed to testify because insanity has made him incapable of testifying in a competent fashion."); *United States v. Gates,* 10 F.3d 765 (11th Cir. 1993) ("Notwithstanding Rule 601, a court has the power to rule that a witness is incapable of testifying, and in an appropriate case it has the duty to hold a hearing to determine that issue.").

6. Rule 607: The rule states categorically that a party can impeach a witness it calls. On its face, the Rule allows the government to call a witness favorable to the defendant for the sole purpose of ``impeaching" the witness with a prior inconsistent statement that would not otherwise be admissible. Thus, the Rule by its terms permits the prosecutor to subvert the hearsay rule by proffering prior inconsistent statements, not made under oath (and therefore not admissible for their truth under Rule 801(d)(1)(A)) in the guise of impeachment. Yet despite the affirmative and permissive language of the Rule, the courts have held that a prosecutor cannot call a witness solely to impeach him, because to allow this practice would be unfair and would undermine the hearsay rule. See, e.g., *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975) (conviction reversed on the ground that the government should not have been permitted to call a witness for no other purpose than to impeach him); *United States v. Hogan*, 763 F.2d 697 (5th Cir. 1985) (convictions reversed because the government ``called a witness for the primary purpose of impeaching him with otherwise inadmissible hearsay evidence").

7. Rule 613: The Rule, and the Advisory Committee Note, both clearly indicate that it is not necessary to give a witness an opportunity to examine a prior inconsistent statement before that statement is admissible for impeachment. All that is necessary is that the witness be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule from Queen Caroline's case, under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Note, many courts have reverted to the common-law rule. See, e.g., *United States v. Sutton,* 41 F.3d 1257 (8th Cir. 1994) (trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while on the witness stand); *United States v. Devine,* 934 F.2d 1325 (5th Cir. 1991).

8. Rule 704(b): Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. But some courts have held (and others have implied) that the rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from law enforcement agents. See, e.g., *United States v. Gastiaburo,* 16 F.3d 582 (4th Cir. 1994) (stating that Rule 704(b) does not apply to the testimony of a law enforcement agent); *United States v. Lipscomb,* 14 F.3d 1236 (7th Cir. 1994) (expressing sympathy with such a position, but finding it unnecessary to decide the matter). Other courts, while technically applying the Rule 704(b) limitation to all expert witnesses, have applied it in such a way as to nullify its impact--permitting, for example, an expert to opine as to the mental state of a hypothetical person whose fact situation mirrors the fact situation in issue. See, e.g., *United States v. Williams,* 980 F.2d 1463 (D.C.Cir. 1992) (permitting a law enforcement agent to testify that a hypothetical person carrying ziplock bags each containing small amounts of drugs was intending to distribute them; the hypothetical matched the facts of the case).

9. Rule 801(c) (Implied Assertions): The Advisory Committee Note states that "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is excluded from the definition of hearsay "by the language of subdivision (c)". This would mean that a statement would be hearsay only if it were offered for the truth of the express assertion in the statement--offering it for any implied assertion would escape hearsay proscription. So for example, a statement "It is raining cats and dogs" would be admissible to prove it is raining--the statement is not being offered for the express assertion that felines and canines are falling from the sky.

This rather absurd and highly constricted definition of hearsay has not been followed by the courts. The cases state that statements are hearsay if 1) they are offered for the truth of a matter implied in the statement and 2) the speaker intended to express that implication. See, e.g., *United States v. Reynolds,* 715 F.2d 99 (3rd Cir. 1983) ("we reject the government's suggestion in this case that only a statement's express assertion should be considered in deciding whether it

constitutes hearsay").

10. Rule 801 Advisory Committee Note on Confrontation: The original Advisory Committee Note includes an extensive discussion of the law of confrontation as it existed at the time. This Note is quite outdated, since the Supreme Court has substantially revised its view of the Confrontation Clause. For example, the Advisory Committee Note draws a fairly sharp distinction between the hearsay exceptions and the Confrontation Clause. But the recent jurisprudence leads to the conclusion that the Federal Rules hearsay exceptions do satisfy the Confrontation Clause. All of the major exceptions, except the residual exception, have been found by federal courts to be "firmly rooted", which means that statements falling within these exceptions automatically satisfy the Confrontation Clause. And as to the residual exception, the reliability requirements of that exception have been found contiguous with those imposed by the Confrontation Clause. See the Federal Rules of Evidence Manual, 1504-5, 1702-5, 1852-4, 1943-7. The question for the Committee is whether it is worthwhile to point out the fact that the discussion of the Confrontation Clause in the original Advisory Committee Note is outdated.

11. Rule 803(4): The Rule admits statements for purposes of treatment or diagnosis when the statements deal with the "cause or external source" of the condition. The Rule does not permit statements attributing fault. The Committee Note states that statements of fault "would not ordinarily qualify" under the exception, and distinguishes a statement "I was hit by a car" (admissible) from "I was hit by a car that ran a red light" (inadmissible). Yet in at least some classes of cases, statements attributing fault are admitted under Rule 803(4). The most common example is a statement from a child victim of sexual abuse, specifically identifying her attacker. See, e.g., *United States v. Renville,* 779 F.2d 430 (8th Cir. 1985) (child's statement attributing fault is admissible under Rule 803(4) "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding").

12. Rule 803(5): The Rule does not seem to permit a "two-party voucher" system of proving past recollection recorded, since it states that the record must be shown to have been "made or adopted by the witness." Thus, the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. The Committee Note provides that "multiple person involvement in the process of observing and recording" is permitted, but this could be construed, in light of the text, to be limited to situations where the observer adopts the recorder's account as his own. Despite the language of the Rule, the courts have permitted two-party vouching under Rule 803(5). See, e.g., *United States v. Williams,* 951 F.2d 853 (7th Cir. 1993) .

13. Rule 803(6): The Rule defines a business record as one "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted activity." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. The Advisory Committee Note clearly states that the business duty requirement is retained, but the Rule itself was changed by Congress, to delete the language that the Advisory Committee relied upon. Yet despite the Congressional change, the courts have held that all those who report information included in a business record must be under a business duty to do so--or else the hearsay problem created from the report by an outsider must be satisfied in some other way. See *Cameron v. Otto Bock Orthopedic Indus. Inc.,* 43 F.3d 14 (1st Cir. 1994) (product failure reports submitted to the manufacturer after the plaintiff's accident were inadmissible; the reports were submitted by parties who had no business duty to report accurately to the manufacturer); *Bemis v. Edwards,* 45 F.3d 1369 (9th Cir. 1995) (911 call was not admissible as a business record because the caller was not under any business duty to report, and the report did not independently satisfy any hearsay exception).

14. Rule 803(8)(B): The Rule excludes reports setting forth "matters observed by police officers and other law enforcement personnel" if such reports are offered "in criminal cases." Read literally, the Rule would exclude a forensic report prepared by the police which indicated that the defendant was innocent. Such a report would be offered by the defendant, but the exclusion covers all police reports offered in criminal cases. Yet lower courts have refused to be bound by the plain meaning of the rule, reasoning that Congress intended to regulate only police reports that unfairly inculpate a criminal defendant. See, e.g., *United States v. Smith,* 521 F.2d 957 (D.C.Cir. 1975) (despite its exclusionary language, Rule 803(8)(B) should be read in accord with Congress' intent to exclude only public reports offered against a criminal defendant, and not a report offered in his favor).

15. Rule 803(8)(B) and (C): Rule 803(8)(B) and (C) both contain language appearing to categorically exclude records prepared by law enforcement personnel, when such records are offered against a criminal defendant. Read literally, these provisions would prevent the Government from introducing simple tabulations of non-adversarial information. For example, the Rules literally exclude a routine printout from the Customs Service recording license plates of cars that crossed the border on a certain day, when offered in a criminal case. Courts have refused to apply the plain exclusionary language of these rules in an absolute fashion, however. They reason that the language could not have been intended to exclude reports that are ministerial in nature and prepared under non-adversarial circumstances. See, e.g., *United States v. Grady,* 544 F.2d 598 (2d Cir. 1976) (reports concerning firearms' serial numbers were admissible because they were records of routine factual matters prepared in nonadversarial circumstances); *United States v. Orozco,* 590 F.2d 789 (9th Cir. 1979) (customs records of border crossings are admissible under Rule 803(8) because they are ministerial and not prepared under adversarial circumstances).

16. Rule 804(b)(1): The Rule provides that prior testimony is admissible against a party if either the party, or a predecessor in interest of that party, had a similar motive and opportunity to develop the testimony at the time it was given. Some courts have defined the term "predecessor in interest" as anyone who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the instant trial. This construction of the term "predecessor in interest" renders it devoid of any independent content--it collapses the term "predecessor in interest" with the term "similar motive". This interpretation of the Rule is eminently reasonable as a policy matter, but it does seem to conflict with the principle that statutory terms should have some independent meaning. See, e.g., *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978) (prior testimony properly admitted against plaintiff, where third party had a similar motive to develop the testimony as the plaintiff would have were the declarant to testify at trial; Judge Stern, concurring, states that such an expansive definition of "predecessor in interest" effectively reads that term out of the Rule); *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276 (4th Cir. 1993) (prior testimony from a different case properly admitted against the plaintiff, where the previous plaintiff had a similar motive to develop the testimony).

17. Rule 804(b)(3): The Rule provides that if a declaration against penal interest is offered to exculpate an accused, it is not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." On its face, the rule does not require corroboration for statements offered by the Government that *inculpate* the accused. Yet many courts have required the Government to establish corroboration for inculpatory statements offered under Rule 804(b)(3). The courts essentially reason that "adversarial fairness" prohibits them from imposing an admissibility requirement on the defendant that is not imposed on the Government for the same category of statements. See, e.g., *United States v. Barone,* 114 F.3d 1284 (1st Cir. 1997) (imposing a corroboration requirement for statements offered by the prosecution under Rule 804(b)(3), while acknowledging that the Rule "does not explicitly require" corroboration for such statements); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborative evidence for inculpatory declarations against penal interest).

18. Rule 805: The Rule states that hearsay within hearsay is not excluded if each part of the combined statement "conforms with an exception to the hearsay rule." However, admissions and certain prior statements of testifying witnesses are classified by Rule 801(d) as "not hearsay." Rule 805 could technically be read to be inapplicable to situations in which one level of hearsay would be admissible under the Rule 801(d) exemptions, as opposed to an "exception" as is mentioned by the Rule. But courts have held that the technical difference between Rule 801(d) "not hearsay" and Rule 803, 804 and 807 "hearsay subject to exception" cannot control the application of Rule 805's standard for admitting multiple levels of hearsay. See, e.g., *United States v. Dotson,* 821 F.2d 1034 (5th Cir. 1987) ("For the purposes of the hearsay-within-hearsay principle expressed in Rule 805, non-hearsay statements under Rule 801(d) . . . should be considered in analyzing a multiple-hearsay statement as the equivalent of a level of the combined

statement that conforms with an exception to the hearsay rule.").

19. Rule 806: The Rule states that a hearsay declarant's credibility may be attacked "by any evidence which would be admissible" if the declarant had testified as a witness. The language raises a problem when the proponent wishes to attack the declarant by proffering specific bad acts to prove the witness' bad character for veracity. Rule 608(b) prohibits extrinsic proof of bad acts offered to show the witness' character for untruthfulness. Rule 806 could therefore be read as prohibiting bad acts impeachment of a hearsay declarant. But courts have stated that extrinsic evidence of bad acts is admissible to impeach a hearsay declarant (subject to Rule 403). The reasoning is that since the declarant is not available for cross-examination, extrinsic evidence is "the only means of presenting such evidence to the jury." *United States v. Friedman,* 854 F.2d 535 (2nd Cir. 1988). See the extensive discussion of this problem in Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant,* 56 Ohio State L.J. 495 (1995).

20. Rule 807: There are at least two ways in which the case law diverges from the text and/or note to Rule 807. First, the intent of the Rule, as evidenced by the Advisory Committee Note, is that it is to apply only to "unanticipated situations." There is no intent to allow "an unfettered exercise of judicial discretion." Yet the practice under the Rule indicates that the courts have used it fairly aggressively, sometimes to create whole new categories of hearsay exceptions (e.g., the grand jury exception and the child sexual abuse exception). See the cases set forth in the Federal Rules of Evidence Manual at pages 1951-60. A related point is that the Rule permits the admission of residual hearsay only if that hearsay is "not specifically covered" by another exception. This would seem to indicate that hearsay which "nearly misses" one of the established exceptions should not be admissible as residual hearsay--because it is specifically covered by, and yet not admissible under, another exception. In fact, most courts have construed the term "not specifically covered" by another hearsay exception to mean "not admissible under" another hearsay exception. This reading renders the phrase "not specifically covered" meaningless, since by definition a hearsay statement offered under Rule 807 is not admissible under any other hearsay exception--you don't need language in the exception to make that point. See *United States v. Fernandez,* 892 F.2d 976 (11th Cir. 1989) (grand jury statement is "not specifically covered" by another hearsay exception because it is not admissible under any such exception). Compare *United States v. Dent,* 984 F.2d 1453 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that grand jury testimony can never be admissible as residual hearsay, since such testimony is specifically covered by, though not admissible under, the hearsay exception for prior testimony).

The second divergence between the case law and the text of the residual exception involves the notice requirement. The Rule states that "a statement may not be admitted" under this exception unless the proponent gives notice "sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it". Most courts have read the

notice requirement far more flexibly than its language would seem to permit. For example, most courts have held that the notice requirement can be satisfied by providing notice at trial, so long as the adversary is given sufficient time to prepare. See, e.g., *United States v. Baker,* 985 F.2d 1248 (4th Cir. 1993). Other courts have read a good cause exception into the notice requirement, even though there is nothing in the Rule permitting such an exception. See, e.g., *United States v. Doe,* 860 F.2d 488 (4th Cir. 1993).

Examples of Case Law Development Where the Rule and Note are Silent:

1. Rule 104(a): The rule discusses the Trial Judge's role in determining admissibility questions. But the rule is silent on who bears the burden of proof on admissibility questions, and it is also silent on what standard of proof is to be employed. A significant body of case law has developed under the Rule that answers these questions. See, e.g., *Bourjaily v. United States,* 483 U.S. 171 (1987) (party seeking to admit the evidence has the burden of proving by a preponderance that the admissibility requirements are met).

2. Rule 301: The Rule is silent on whether a party favored by a presumption is entitled to a peremptory instruction if the party against whom the presumption operates fails to offer any rebuttal evidence. Courts have held, however, that such an instruction must be given upon request. See *A.C. Aukerman Co., v. R.L. Chaides Constr. Co.,* 960 F.2d 1020 (Fed.Cir. 1992) (where presumption applies, the presumed fact "*must* be inferred, absent rebuttal evidence.").

3. Rule 404(b): The notice requirement of Rule 404(b) does not state whether the prosecution has a continuing obligation to notify the defendant, should it discover Rule 404(b) evidence after an initial notification. Courts have imposed such an obligation even though the Rule is silent on the matter. See, e.g., *United States v. Barnes,* 49 F.3d 1144 (6th Cir. 1995) (reading the rule to require "a continuing obligation on the government to comply with the notice requirement . . . whenever it discovers information that meets the previous defense request").

4. Rule 410: Rule 410 is silent on whether its protections can be waived by a criminal defendant. The Supreme Court construed the rule to permit such a waiver, at least for impeachment purposes, in *United States v. Mezzanatto,* 513 U.S. 196 (1995). Subsequent cases have upheld waivers of Rule 410 protections that permitted the government to use the defendant's statements in its case-in-chief. See *United States v. Burch,* 156 F.3d 1315 (D.C.Cir. 1998).

5. Article VI: Article VI is silent about many of the common forms of impeachment, such as bias, contradiction, and mental capacity. Nor does the article deal in any systematic fashion with whether extrinsic evidence is admissible when the goal is to impeach a witness. The only rule discussing the question of extrinsic evidence is Rule 608(b), and that Rule is limited to impeachment by way of showing untruthful character. (Rule 613(b) discusses the use of extrinsic evidence of prior inconsistent statements, but its treatment is limited to the timing of the presentation; it does not set any standards for when such proof can be admitted in the first place). All of the "holes" in Article VI are well-discussed by Professor Imwinkelreid in an article

included elsewhere in this agenda book. There is, of course, a significant amount of case law dealing with impeachment matters on which Article VI is silent. See generally Saltzburg, Martin and Capra, *Federal Rules of Evidence Manual* 939-970, 1139-1148.

6. Rule 615: Rule 615 provides only for exclusion of witnesses from the courtroom. It is silent about whether a trial judge can order witnesses not to talk to each other outside the courtroom; nor does it say anything about a judge's power to order a potential witness not to obtain access to certain information that might taint their testimony. The courts have held, however, that the trial court retains its common-law power to fashion a more far-reaching sequestration order appropriate to the circumstances of the case. See the extensive discussion in *United States v. Sepulveda,* 15 F.3d 1161 (1st Cir. 1993) (Rule 615 "demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires").

7. Rule 801(d)(1)(B): The hearsay exception for prior consistent statements does not specifically provide that the statement must precede the alleged motive to falsify. However, the Supreme Court in *Tome v. United States*, 513 U.S. 150 (1995), held that a statement is not admissible under the exception unless it was made before the alleged motive to falsify arose.

Also, the hearsay exception is silent on whether prior consistent statements (including those not covered by the exception itself) can be admitted for rehabilitation purposes. The courts have held that a consistent statement could be probative and admissible for rehabilitation purposes even if it is not admissible under the hearsay exception. See, e.g., *United States v. Brennan,* 798 F.2d 581 (2nd Cir. 1986) (prior consistent statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B).").

8. Rule 803(3): The Rule is silent on whether a declarant's statement of intent can be used to prove the subsequent conduct of a non-declarant. When the victim says, "I am going to meet Frank tonight", is the statement admissible to prove that Frank and the victim actually met? Or is the statement only admissible to prove the future conduct of the declarant? The Advisory Committee Note refers only to the Rule as allowing "evidence of intention as tending to prove the act intended." The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. See *Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978). Other courts hold such statements admissible. Other courts hold them admissible if the prosecution provides corroborating evidence that the meeting took place. See *United States v. Delvecchio,* 816 F.2d 59 (2nd Cir. 1987).

9. Rule 803(18): The Rule does not mention whether the learned treatise exception covers evidence presented in demonstrative form, such as a chart or film. The courts have held that the Rule can cover such evidence even though it cannot literally be "read into evidence." See *United States v. Mangan*, 575 F.2d 32 (2nd Cir. 1978).

10. Rule 1101: Courts have found that the Federal Rules are inapplicable to a number of proceedings, even though these proceedings are not specifically mentioned as exempt in Rule 1101(d). Examples include suppression hearings, proceedings to obtain a temporary restraining order, and proceedings seeking release from psychiatric commitment. Included in this agenda book is a memorandum previously prepared by the Reporter, setting forth all the case law establishing exemptions from the Federal Rules of Evidence. As noted in the memorandum, many of the exemptions established by the courts are not specifically included in Rule 1101(d). The courts establish these exemptions because they are within the spirit of Rule 1101(d)--exempting from the Rules those proceedings that are run by the judge and are less formal than a trial. See e.g., *Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153 (3rd Cir. 1994) (Evidence Rules do not apply in juvenile transfer proceedings, even though such proceedings are not specifically exempted in Rule 1101(d)(1); a juvenile transfer proceeding "is of a preliminary nature and is consequently not comparable to a civil or criminal trial.").

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Reports Previously Prepared Concerning Possible Projects
Date: September 15, 1999

Attached to this memorandum are reports previously prepared by the Reporter, in response to inquiries from the Committee as to whether certain Evidence Rules should be amended. With respect to each of these Reports, the Committee decided not to proceed any further at the time. These reports are reproduced to assist the Committee in determining whether it wishes to pursue any proposed amendments at this time.

The attached reports are:

1) A report on Rule 1101, discussing whether amendment is required to extend, or limit, the Evidence Rules to certain types of proceedings.

2) A report concerning whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence.

3) A report on Judge Bullock's proposal to consider whether Rule 801(d)(1)(B) should be amended to provide that a prior consistent statement is admissible under the Rule whenever it is admissible to rehabilitate a witness' credibility. (Judge Bullock's law review article, referred to in the memorandum, is also attached).

4) A report on whether Civil Rule 44 should be abrogated in light of its overlap with the Evidence Rules.

5) A report considering whether Rule 706 should be amended.

6) Reports concerning the expanded use of the residual exception, and the notice requirement of the residual exception.

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Evidence Rule 1101— Proceedings In Which the Evidence Rules Do Not Apply
Date: September 15, 1998

At the April, 1998 meeting of the Evidence Rules Committee, the suggestion was made that the Committee might consider how and to what extent Evidence Rule 1101 operates to exempt certain proceedings from the Evidence Rules. This memorandum is in response to that suggestion.

Rule 1101 provides as follows:

Rule 1101. Applicability of Rules

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

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

proceedings and cases under title 11, United States Code.

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

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

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

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

(3) Miscellaneous proceedings. — Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) *Rules applicable in part.* — In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled ``An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled ``An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled ``An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas

corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled ``An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

This memorandum sets forth the proceedings to which the Evidence Rules are not applicable under the terms of Rule 1101, as well as certain proceedings not specified by the Rule as to which the Rules have been found to be inapplicable. With each proceeding listed, this memorandum discusses the stated reason, if any, for rendering the Federal Rules inapplicable, and makes a preliminary suggestion as to whether the Rules could or should be extended to that type of proceeding. The memorandum also discusses whether Rule 1101 should be amended to specifically exempt from the Evidence Rules those proceedings which the courts have found exempt even though they are not currently mentioned in the Rule. Finally, the Rule considers certain drafting anomalies that are found in Rule 1101.

It must be stressed that the ultimate question of amending Rule 1101 is dependent on sensitive statutory and policy questions that require substantial deliberation by this Committee, should it decide to proceed on these matters. In this sense, the memorandum is merely an introduction to the question of whether Rule 1101 should be amended.

I make no pretense that the memorandum is comprehensive. There are a lot of proceedings out there. This memorandum only describes those that are either mentioned in Rule 1101 itself, or that have been the subject of judicial consideration as to whether the Evidence Rules are applicable.

This memorandum has two attachments. The first is a memorandum previously distributed to this Committee, setting forth a large number of statutes that affect the admissibility of evidence. Many of these statutes operate to replace all or some of the Federal Rules in specific proceedings to which the Federal Rules are otherwise applicable. Other statutes, set forth at the end of the attachment, provide that the Federal Rules are inapplicable to certain kinds of proceedings and therefore supplement the provisions of Rule 1101(d). The second attachment is a report by the American College of Trial Lawyers, arguing that at least some of the Federal Rules of Evidence should be applicable in sentencing proceedings.

Proceedings In Which the Rules of Evidence Are Inapplicable

1. Preliminary Questions of Fact

Rule 1101(d) echoes Rule 104 in providing that the Rules of Evidence are inapplicable to preliminary determinations by the trial judge. The rationale is that many of the Rules of Evidence are justified on the basis of the inability of the jury to handle certain kinds of evidence, something that is not a concern when the trial judge alone decides questions. For example, a trial judge can consider hearsay "for what it's worth", whereas a jury might think a hearsay statement to be more reliable than it actually is. See generally *Bourjaily v. United States,* 483 U.S. 171 (1987). See also *Thompson v. Board of Education,* 71 F.R.D. 398 (W.D.Mich. 1976) (rules of evidence inapplicable in a preliminary hearing to determine whether a class should be certified).

It is apparent that Rule 1101(d) should not be amended to extend the Rules of Evidence to preliminary determinations by a trial judge. The rationale for the current procedure appears sound. Extending the Rules to preliminary determinations would result in a substantial change of practice throughout the Federal Courts, with at best an uncertain benefit of a marginal increase in the accuracy of preliminary determinations.

2. Grand Jury Proceedings

In *Costello v. United States,* 350 U.S. 359 (1965), the Supreme Court categorically rejected the proposition that the Rules of Evidence should be applicable to grand jury proceedings. The Court stated that such an extension "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." The Advisory Committee Note to Rule 1101(d) specifically relies on *Costello*, and if it were written today it could also rely on a steady string of Supreme Court cases rejecting the application of technical rules and procedural requirements to grand jury proceedings. See, e.g., *United States v. Williams,* 504 U.S. 36 (1992) (rejecting the argument that the grand jury must consider exculpatory evidence).

It might be argued that today the grand jury is not so much a body of laymen conducting an inquiry as it is an excuse for prosecutorial inquisition. See the discussion in Saltzburg and Capra, *American Criminal Procedure* 710-18 (5th ed. 1996). Yet even if that argument were true, it would probably not justify the application of the Rules of Evidence to grand jury proceedings. The strongest argument against such an extension is that it is not practicable. The operation of

the Evidence Rules is largely dependent on objections coming from the adversary. Given the ex parte nature of grand jury proceedings, no objections to inadmissible evidence could be made. Unless the goal is to turn the grand jury into a full-blown adversary proceeding -- a question that appears well beyond the jurisdiction of the Evidence Rules Committee -- the notion of extending the Rules of Evidence to such proceedings is simply not viable.

3. Proceedings for Extradition or Rendition

Proceedings for extradition or rendition are governed by statute, see 18 U.S.C. § § 3181-95. They are essentially administrative in character. As the court explained in *Martin v. Warden,* 993 F.2d 824 (11th Cir. 1993):

> Extradition is an executive, not a judicial, function. The power to extradite derives from the President's power to conduct foreign affairs. * * * An extradition proceeding is not an ordinary Article III case or controversy. It clearly is not a criminal proceeding. See Fed.R.Crim.P. 54(b)(5) ("these rules are not applicable to extradition and rendition of fugitives"); Fed.R.Evid. 1101(d)(3) ("The rules ... do not apply ... [to] proceedings for extradition or rendition...."). Rather, the judiciary serves an independent review function delegated to it by the Executive and defined by statute. See, e.g., *Jhirad v. Ferrandina,* 536 F.2d 478, 482 (2d Cir. 1976) ("Orders of extradition are sui generis."). The inquiry conducted by an "extradition magistrate" is limited. The extradition magistrate conducts a hearing simply to determine whether there is "evidence sufficient to sustain the charge [against the defendant] under the provisions of the proper treaty or convention." 18 U.S.C. § 184. If the evidence is sufficient, the extradition magistrate makes a finding of extraditability and certifies the case to the Secretary of State. Id. Extradition ultimately remains an Executive function. After the courts have completed their limited inquiry, the Secretary of State conducts an independent review of the case to determine whether to issue a warrant of surrender. The Secretary exercises broad discretion and may properly consider myriad factors affecting both the individual defendant as well as foreign relations which an extradition magistrate may not. The Secretary of State's decision is not generally reviewable by the courts.

Thus, extradition and rendition proceedings are not trials, and there seems to be no good reason to alter the practice by amending Rule 1101(d) to extend the Rules of Evidence to such proceedings. Moreover, such an extension may be seen as an unwarranted intrusion on the executive function. The costs of an amendment therefore seem to far outweigh the benefits.

It should also be noted that the subject of an extradition proceeding is not completely bereft of evidentiary protection, and therefore the need for protection through the Evidence Rules is less than it otherwise might be. As the court stated in *In re Hearst,* 1998 WL 395267 (S.D.N.Y.):

> The Federal Rules of Evidence do not apply to extradition hearings, and thus hearsay and other evidence that would be inadmissible at a trial may be considered in determining probable cause. Although hearsay is permitted, and although there are no "bright-line" tests, the materials submitted must set forth facts from which both the reliability of the source and probable cause can be inferred.

The Court in *Hearst* found insufficient reliable evidence to establish probable cause under the circumstances. The only evidence presented by the government was the decision of a foreign court, which did not describe the evidence on which it was based, and therefore there was "no basis on which the Court can make the required independent determination as to whether probable cause exists."

4. Preliminary Examinations in Criminal Cases

The Advisory Committee Note to Rule 1101(d) states that the exemption of preliminary examinations in criminal cases from the Evidence Rules was designed to give deference to the Criminal Rules. The rationale for dispensing with Evidence Rules, especially hearsay, is similar to that supporting the exemption for preliminary determinations of fact--the determination is made by a judge, who will be able to weigh the otherwise inadmissible evidence "for what it's worth."

There appears to be no reason to reject the above rationale when applied to preliminary examinations in criminal cases. I have been unable to find case law or commentary advocating an extension of the Evidence Rules to these proceedings.

5. Sentencing

The attached report from the American College of Trial Lawyers makes the case for extending at least some of the Evidence Rules to sentencing proceedings. The original justification for the exemption, as indicated in the Advisory Committee Note, is that sentencing courts needed all kinds of information in order to assess the defendant, because the entire

sentencing system was based on judicial discretion. This rationale is somewhat tempered by the fact-oriented and discretion-limiting system of sentencing guidelines that is currently in place. However, as the Trial Lawyers note, the courts have uniformly rejected the argument that the advent of sentencing guidelines has brought a concomitant change in the procedural rules of evidence to be applied at sentencing hearings. The Evidence Rules remain inapplicable.

Whatever the merits of extending the Evidence Rules to sentencing proceedings, there are also countervailing practical considerations. Such considerations are indicated by the following excerpt from the minutes of the October, 1996 Evidence Rules Committee meeting:

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

It is for the Committee to decide whether the circumstances have sufficiently changed over two years to warrant a reopening of this question. As stated above, any extension of the Federal Rules to sentencing proceedings requires more than a change in the Evidence Rules. It also requires a statutory change and an amendment to the Sentencing Guidelines.

It should be noted that the current sentencing procedures are not completely lacking in protection by evidentiary principles. As the cases discussed by the Trial Lawyers note, hearsay evidence must reach at least a minimal level of reliability in order to be considered by a sentencing judge. See, e.g., *United States v. Atkin,* 29 F.3d 267 (7th Cir. 1994) ("hearsay is a staple" in sentencing proceedings, so long as it carries minimum indicia of reliability).

6. Granting or Revoking Probation

Rule 1101(d) and the Advisory Committee Note treat "probation proceedings" and sentencing proceedings under the same rationale--the Rules of Evidence do not apply because maximum flexibility is required, and the trier must necessarily consider many sources of information to determine whether probation or revocation is warranted. But the sentencing

analogy is not a complete answer to whether the Evidence Rules should apply in the context of probation.

If the question is whether the Evidence Rules should apply to proceedings in which the decision whether or not to *grant* probation is made, then the sentencing analogy is apt. The decision whether to grant probation is part and parcel of the sentencing determination; the perameters are set by statute and Guideline, and therefore the reasons against extending the Evidence Rules to sentencing apply equally to the decision whether to grant probation.

The decision whether to *revoke* probation could arguably be distinguished from sentencing. Usually, the probation revocation question is highly factual--did the probationer do some specific thing or things that violated the terms of probation? Because the revocation determination is largely fact-bound, there is an argument that the Rules of Evidence ought to apply.

But there are also strong arguments against such an extension. First, the probation revocation decision is made by a judicial officer. As with preliminary determinations on admissibility issues, the accepted rationale is that a judicial officer can weigh all the information presented for what it is worth, and should not be bound by technical rules of evidence that are really designed for the benefit of juries. Procedural protection is found not in the rules of evidence but in the requirement that evidence meet a minimal standard of reliability. See, e.g., *United States v. Pierre,* 47 F.3d 241 (7th Cir. 1995) (court in revoking probation could rely on written reports of drug tests and affidavit by the lab director concerning how drug tests are conducted: "The district judge must use reliable evidence, but written reports of medical tests are in the main reliable."). Second, the probation revocation is sometimes dependent not only on whether a condition of probation has been violated, but also on whether steps short of incarceration could be taken to protect society and improve the chances of rehabilitation, and therefore is sometimes more discretionary and flexible, and less fact-oriented -- though this second consideration does not apply where revocation of probation is mandatory upon the finding of a violation. See 18 U.S.C. § 3565 (a) (the court "shall" revoke probation of a person who is found possessing illegal drugs).

It is for the Committee to decide whether probation revocation proceedings are so fact-oriented, and so in need of procedural reform, that the Rules of Evidence should be extended to such proceedings. While probation revocation proceedings can be distinguished from sentencing proceedings, it is an open question whether that distinction will be found sufficiently compelling during the course of the Rules process. Moreover, as stated above, the rationale for exempting preliminary judicial determinations from the Evidence Rules is equally applicable to determinations on probation revocation; this clearly cuts against amending the Rule with respect to probation revocation.

7. *Supervised Release Revocation Proceedings*

Rule 1101(d) provides that the Rules of Evidence are not applicable to "sentencing, or granting or revoking probation"; but it makes no reference to supervised release revocation proceedings. Of course, supervised release proceedings did not exist when Rule 1101 became law. But the absence of a specific reference to these proceedings has created a problem for the courts.

In the leading case of *United States v. Frazier*, 26 F.3d 110 (11th Cir. 1994), Frazier made several interesting arguments in support of the proposition that the Evidence Rules are applicable to supervised release revocation proceedings. These arguments were: 1) Supervised release proceedings are not specifically listed in Rule 1101(d); 2) Rule 1101 was amended after supervised release proceedings were instituted in 1984 (for example, to refer to "magistrate judges" rather than "magistrates"), and yet no attempt was made to amend subdivision (d) to include a reference to supervised release proceedings; 3) The Criminal Rules have been amended to refer to supervised release proceedings, while the Evidence Rules have not; and 4) Supervised release proceedings are different from parole and probation proceedings, because supervised release is statutorily required in specified circumstances, whereas parole and probation are discretionary acts of grace.

The Court in *Frazier* rejected all these arguments. It reasoned that the failure to amend Evidence Rule 1101 to refer to supervised release was not dispositive, "because we believe that Congress considered probation revocation and supervised release revocation so analogous as to be interchangeable." It also concluded that supervised release is "conceptually the same" as parole. A proceeding to revoke either parole or supervised release is by definition more flexible than a trial, and therefore neither proceeding should be constricted by the Rules of Evidence. Finally, the Court observed that as with parole revocation proceedings, the subject of a supervised release proceeding is still protected by minimal evidentiary standards of reliability.

The courts that have dealt with the question have all held, consistently with *Frazier*, that the Federal Rules of Evidence are inapplicable to supervised release revocation proceedings. See *United States v. Portalla,* 985 F.2d 621 (1st Cir. 1993); *United States v. Stephenson,* 928 F.2d 728 (6th Cir. 1991) (at a supervised release revocation proceeding, a "judge may consider hearsay if it is proven to be reliable"); *United States v. Walker,* 117 F.3d 417 (9th Cir. 1997).

It appears clear that if the Evidence Rules are not to be extended to probation revocation

proceedings, then they should not be extended to supervised release revocation proceedings. The opposite question remains, however: whether Rule 1101(d) should be amended to specifically *exempt* supervised release proceedings from the purview of the Evidence Rules. As indicated above, the current Rule is silent on the matter, and therefore ambiguous. On the other hand, the courts that have decided the question have reached a uniform result without much problem. Perhaps the best resolution would be that if Rule 1101 is to be amended in some other respect, a reference to supervised release revocation proceedings in subdivision (d) should be included as part of that larger amendment. There does not seem to be a critical need to amend Rule 1101 solely to include a reference to supervised release revocation proceedings.

8. Warrants for Arrest, Criminal Summonses, and Search Warrants

The Advisory Committee Note to Rule 1101(d) states that the nature of proceedings to obtain warrants and criminal summonses "makes application of the formal rules of evidence inappropriate and impracticable." Hearsay is routinely used, for example, in the probable cause determination, and the Supreme Court has roundly rejected the application of technical rules of evidence to the determination of probable cause. See *Illinois v. Gates,* 462 U.S. 213 (1983). Criminal Rule 4(b) states that the finding of probable cause "may be based upon hearsay evidence in whole or in part." Also, like grand jury proceedings, the warrant and summons process is ex parte, so the objection-dependent Rules of Evidence could simply not operate. Under the circumstances, there is no reasonable argument to be made for extending the Rules of Evidence to proceedings to obtain warrants and criminal summonses. And if such an argument did exist, its implementation would require not only an amendment of Rule 1101, but also an amendment of the Criminal Rules.

9. Suppression Hearings

Unlike proceedings to obtain a warrant, suppression hearings are not specifically covered by the Rule 1101(d) exclusion. This has not deterred most courts, however, from holding that the Federal Rules are not applicable to suppression hearings. The Supreme Court dealt with the question in *United States v. Matlock,* 415 U.S. 164 (1974), a pre-Rules case which discussed the then-proposed Rule 1101. The Court reasoned that suppression hearings are essentially preliminary hearings on the admissibility of evidence, and are thus controlled by the general provision of Rule 1101(d) exempting the determination of preliminary questions of fact from the Evidence Rules. The Court also relied on the rationale, discussed several times above, that "in proceedings where the judge himself is considering the admissibility of evidence, the

exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel." The *Matlock* Court concluded that at a suppression hearing "the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." See also *United States v. Schaefer,* 87 F.3d 562 (1st Cir. 1996) ("a judge presiding at a suppression hearing may receive and consider any relevant evidence, including affidavits and unsworn documents that bear indicia of reliability.").

There is one important case, however, that holds that at least certain Evidence Rules are applicable in suppression hearings, and rejects the proposition that suppression hearings are always analogous to preliminary hearings on the admissibility of evidence. In *United States v. Brewer*, 947 F.2d 404 (9th Cir. 1991), the defendant moved to sequester a police officer who was scheduled to testify after another police officer at a suppression hearing. The trial court held that Rule 615 was not applicable to suppression hearings. The two police officers testified virtually identically. The Ninth Circuit reversed. The panel addressed the government's argument that Rule 1101(d)(1) (exempting preliminary determinations from the Evidence Rules) covered suppression hearings. The Court noted that Rule 1101(d)(1) essentially restates Rule 104, and elaborated as follows:

> The commentary that follows Rule 104 makes it clear that this section is limited to the preliminary requirements or conditions that must be proved before a particular rule of evidence may be applied. Notes of the Advisory Committee on 1972 Proposed Rules. The examples of foundational facts that may be proved without complying with the exclusionary Rules of Evidence include the qualifications of an expert, the unavailability of a witness whose former testimony is being offered, the presence of a third person during a conversation between an attorney and client, proof of the interest of the declarant in determining whether the out-of-court statement threatens that interest, the competency of a child to testify as a witness.
>
> As pointed out by Charles Alan Wright and Kenneth W. Graham, the statement in Rule 1101(d) that the Rules of Evidence do not apply to preliminary fact determinations made by the court under Rule 104 "obviously cannot be read literally because, if the Rules do not apply to preliminary fact determinations then Rule 104 is inapplicable in any case to which it is supposed to apply." Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence sec. 5053 at 257 (1977).
>
> Wright and Graham reconcile this facial inconsistency by distinguishing between the type of proof that may be presented as a foundation for the admission of evidence, such as a declaration against interest, or a dying declaration, and procedural rules that have been developed to enhance the search for the truth. "What must be meant is that the traditional exclusionary rules do not apply, but that procedural regulation of the process

of admission and exclusion remains applicable."

The *Brewer* Court found that Rule 615 was a procedural rule designed to guarantee a fair proceeding, as opposed to a rule dealing with the admissibility of evidence.
The Court distinguished the Supreme Court's decision in *Matlock,* which held specifically that the hearsay rule is inapplicable in suppression hearings. The *Brewer* Court stated that *Matlock* "does not support the notion that procedural rules designed to protect the integrity of the fact finding process are inapplicable in a suppression hearing."

The *Brewer* Court concluded as follows:

> We hold that Rule 615 is a procedural rule directed at the fairness of the proceedings, and not a rule affecting the type of evidence that can be considered in an evidentiary hearing. Therefore, the application of Rule 615 to a motion to suppress evidence is not affected by Rule 104. We also conclude that the Federal Rules of Evidence apply in pretrial suppression proceedings pursuant to Rule 1101(d) because such evidentiary hearings are not expressly excluded under Rule 1101(d)(2) and Rule 1101 (d)(3).

See also United States v. Warren, 578 F.2d 1058, 1076 (5th Cir. 1978) (holding that Rule 615 is applicable to a suppression hearing, but not specifically discussing Rule 1101).

The last sentence quoted above from the *Brewer* opinion, i.e., that the Federal Rules are applicable *in toto* to sentencing proceedings, is obviously broader than the actual holding of the case. The *Brewer* Court took pains to distinguish between traditional admissibility rules, such as the hearsay rule, and rules designed to guarantee an accurate *process* of factfinding, such as Rule 615. If the *Brewer* Court really meant that all of the Rules of Evidence are applicable to suppression hearings, it would be rejecting the clear Supreme Court ruling in *Matlock* to the contrary.

The *Brewer* decision raises some important questions for the Committee to consider. The easiest question is whether Rule 1101 should be amended to apply the Evidence Rules, lock stock and barrel, to suppression hearings. The answer to that question should obviously be no. Suppression hearings are indeed substantially similar to preliminary rulings on the admissibility of the evidence, most obviously because the judge is the factfinder. If we assume that judges can and should weigh even inadmissible evidence for what it is worth, then the Rules of Evidence should not apply *in toto* to suppression hearings. That is to say, unless the Committee wishes to

amend both Rule 104 and Rule 1101 to extend the Evidence Rules to *all* preliminary determinations by the judge, then it makes no sense to extend the rules as a whole to suppression hearings. There are also sensitive concerns, probably beyond the scope of the Evidence Rules, as to whether hearsay should be permitted at a sentencing proceeding in order to protect the safety of confidential informants. For all these reasons, it makes no sense to extend the Evidence Rules as a whole to suppression hearings.

A more difficult question is whether Rule 1101(d) should be amended to specifically provide that the Evidence Rules are *inapplicable* to suppression hearings. Such a broad exemption would reject the holding in *Brewer;* it would have to be based on a policy determination that judges at suppression hearings should have complete discretion in determining the facts--including the discretion to allow police officers to be present at the hearing while other officers testify.

A compromise approach would be to amend Rule 1101(d) to provide that Evidence Rules *dealing with the admissibility of evidence* are inapplicable at suppression hearings, while Evidence Rules *designed to guarantee a fair presentation of the evidence* would be applicable. This would codify the specific holding in *Brewer*, and might also allow the application of Rules such as Rules 106 and 612. A more difficult alternative to is to go through the Rules one by one and determine which of them ought to be applicable to suppression hearings, and then to amend Rule 1101 to provide that the Rules of Evidence are inapplicable to suppression hearings, with the exception of these certain enumerated rules.

Finally, the *Brewer* Court raises the question of whether Rule 104 itself should be amended. As Wright and Graham note, the Rule cannot be read literally, otherwise the Rule itself would not be applicable. The distinction set forth in *Brewer*, between rules of admissibility and rules that guarantee fair procedure, might well be used in an amendment to Rule 104 as well.

Ultimately it is for the Committee to decide whether the problems and questions raised by *Brewer* are serious enough to warrant an amendment to Rule 1101. It is true that there is no conflict in the courts as to the questions raised in *Brewer,* because all courts hold that hearsay evidence is admissible at suppression hearings, and all reported decisions on Rule 615's applicability to suppression hearings are consistent with *Brewer*. But the question of Rules applicability to suppression hearings seems important enough--and Rule 1101's silence on the matter appears deafening enough--to warrant further investigation by the Committee.

10. Summary Contempt Proceedings

Rule 1101(b) provides that the Evidence Rules apply "to contempt proceedings, except those in which the court may act summarily". Thus Rule 1101(b) contains an exception to Evidence Rules applicability outside those found in subdivision (d), i.e., an exception for summary contempt proceedings. The Advisory Committee's rationale for excluding summary contempt proceedings from the Evidence Rules is that criminal contempts "are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court." See Criminal Rule 42(a). Thus, it makes no sense to apply the Rules of Evidence where the determination is dependent on what the judge saw or heard. In contrast, "[t]he circumstances which preclude application of the rules of evidence in this situation are not present * * * in other cases of criminal contempt." It would appear nonsensical to extend the Evidence Rules to summary contempt proceedings.

11. Bail Hearings

The Advisory Committee Note to Rule 1101(d) states in conclusory fashion that bail proceedings "do not call for application of the rules of evidence." Perhaps the best rationale is that, as with other preliminary determinations, the bail decision is made by the judge, who can weigh even inadmissible evidence for what it is worth. Also, bail decisions are not simply fact-based; they also entail consideration of the kind of person that the detainee is. In that sense, the bail decision is analogous to a sentencing decision made before the advent of the Guidelines--a decision to which the Rules of Evidence justifiably do not apply.

A final consideration is that a statute specifically provides that "[t]he rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the [bail] hearing." 18 U.S.C. 3142. Therefore any extension of the Rules of Evidence to bail hearings would require not only an amendment to Rule 1101(d), but also an amendment of the statute. That factor certainly counsels caution. Under all these circumstances, it would appear that an amendment to extend the Evidence Rules to bail hearings is not warranted.

12. Psychiatric Release and Commitment Proceedings

Rule 1101 is silent on whether it applies to proceedings for psychiatric commitment and release, such as are established in 18 U.S.C. 4243 for criminal defendants found insane. In *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988), the court held that the Rules of Evidence are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility. The court analogized such hearings to bail release hearings, and further reasoned that a judge determining the question of psychiatric commitment or release "should not be too confined in the kinds of evidence it considers".

The reasoning of *Palesky* certainly seems sound, and is consistent with the rationale for exempting other types of proceedings from the Evidence Rules, such as bail hearings and sentencing hearings. The question remaining is whether Rule 1101 should be amended to specifically *exempt* psychiatric commitment proceedings from the Evidence Rules. Since the court in *Palesky* had little trouble reaching its result, and since there is no contrary authority, it would appear that there is no critical need to amend Rule 1101(d) to specifically exempt psychiatric commitment proceedings. But if the Rule is to be amended on other grounds, a clarification with respect to psychiatric commitment proceedings might usefully be added to that amendment.

13. Arbitrations and Administrative Hearings

Rule 1101 does not specifically exempt arbitrations and administrative proceedings from the Rules of Evidence. However, those proceedings are inferentially so exempted, because Rule 1101(a) provides that the Rules are applicable to "courts", and arbitration and administrative proceedings are not considered "court" proceedings. Nor are they considered "civil actions and proceedings" within the meaning of Rule 1101(b). Despite the lack of specificity in the Rule, the courts have had no problem in exempting arbitrations and administrative hearings from the Evidence Rules. See, e.g., *Drayer v. Krasner,* 572 F.2d 348 (2d Cir. 1978) (arbitrators are not bound by rules of evidence); *Woolsey v. National Transp. Safety Bd.,* 993 F.2d 516 (5th Cir. 1993) (Evidence Rules inapplicable in NTSB proceedings); *American Coal Company v. Benefits Review Board,* 738 F.2d 387 (10th Cir. 1984) (Evidence Rule 301 not applicable in an administrative hearing held under the Black Lung Benefits Act, because such a proceeding is not in the federal court); *Yanopoulos v. Dept. of the Navy*, 796 F.2d 468 (Fed. Cir. 1986) (leading questions rule does not apply to Merit Systems Protection Board hearings); *Dallo v. INS*, 765 F.2d 581 (6th Cir. 1985) (deportation proceedings are administrative in nature and therefore the Federal Rules of Evidence do not apply). Besides the text of the Rule, the courts rely on the rationale that administrative and arbitration hearings are designed to be informal and flexible--the nature of the proceedings would be undermined by formal, trial-geared rules.

For good measure, there are a plethora of statutes and regulations providing that particular administrative proceedings are outside the scope of the Federal Rules of Evidence. See, e.g., 8 C.F.R. 242.14 (c) (in immigration proceedings, "the special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case"); 5 C.F.R. 1201.62(a) (in MSPB hearings, the hearing examiner has broad discretion to admit most forms of evidence, including that which is irrelevant, immaterial, or repetitious). The statutes providing that the Rules of Evidence are inapplicable in social security proceedings are set forth in the attached statutory memorandum.

In sum, there appears to be no reason at all to extend the Federal Rules of Evidence to arbitration and administrative proceedings. Any effort to do so would not only involve an amendment to the Rules of Evidence, but also the abrogation of an indeterminate number of statutes and regulations. Moreover, as with other proceedings to which the Federal Rules are inapplicable, administrative proceedings are not devoid of evidentiary protection. The Federal Rules are often used as "a helpful guide to proper hearing practices." *Yanopoulos v. Dept. of the Navy*, 796 F.2d 468 (Fed. Cir. 1986). And there are many cases imposing requirements on the presentation of evidence that are analogous to those found in the Federal Rules. See, e.g., *Baliza v. INS,* 709 F.2d 1231 (9th Cir. 1983) (in immigration deportation proceedings, the Federal Rules are not applicable, but hearsay affidavits must at least be shown to be authentic, and the government must make a reasonable attempt to produce the affiant for cross-examination).

A more difficult question is whether Rule 1101 should be amended to specifically exempt administrative and arbitration hearings from the Evidence Rules. A similar question was raised above with respect to supervised release proceedings, and a similar answer might be given here. While Rule 1101 could be clarified to exclude these proceedings, the current ambiguity does not appear to present a substantial problem for the courts. Probably the best resolution is to provide clarification only if the decision is made to amend Rule 1101 in other respects.

14. Forfeiture Proceedings

The law of forfeiture is complex, and the question of whether the Evidence Rules apply to various stages of civil and criminal forfeiture proceedings is equally complex. Rule 1101 does not mention forfeiture proceedings, and so there is some ambiguity about the applicability of the Evidence Rules. This section first discusses civil and then criminal forfeitures.

A. Civil Forfeitures

Civil forfeiture proceedings are two-tiered. The first step is a probable cause determination to justify pretrial seizure of the property. See generally *United States v. Real Property Located in El Dorado,* 59 F.3d 974 (9th Cir. 1995). There seems to be a general understanding that the probable cause determination, which is made by a judge, is outside the scope of the Evidence Rules--for reasons similar to those expressed above with respect to preliminary examinations, i.e., this is a determination made by a judge, who can weigh all evidence, admissible or not, for what it is worth.

The second step in civil forfeiture is a trial on the question of forfeitability. This is clearly a civil action, governed by the Evidence Rules. By similar reasoning, the Evidence Rules have been found applicable in ancillary actions involving third parties who claim an interest in the property, whether the property was subject to civil or criminal forfeiture. See *United States v. Premises Known as 281 Syosset Woodbury Road.*, 71 F.3d 1067 (2d Cir. 1995) (Evidence Rules applied in civil forfeiture action in which the wife of a drug trafficker asserted an innocent owner defense).

While there appears to be no dispute on the above propositions, the failure to mention forfeiture proceedings in Rule 1101 renders the whole question of application to civil forfeiture proceedings somewhat murky. If Rule 1101 were to be rewritten, it might be appropriate to specify whether, and at what stages, the Rules of Evidence are applicable in civil forfeiture proceedings. But any need to clarify the question of Rules applicability is probably not critical enough to warrant an amendment in itself.

B. Criminal Forfeitures

As with civil forfeitures, there are essentially two stages to a criminal forfeiture--a pre-trial seizure and a final determination of forfeitability. At the pretrial stage, the government can first move ex parte for restraint of assets. Because of the ex parte nature of this action, the Federal Rules are inapplicable. *United States v. Harvey,* 560 F.Supp. 1040 (S.D. Fla. 1982). Continuation of the pretrial restraint requires a post-seizure, pre-trial adversary hearing, at which the government must establish a likelihood of success on the merits. At this hearing, there has been some dispute over whether the Federal Rules of Evidence are applicable. The Second Circuit, in *United States v. Monsanto,* 924 F.2d 1186 (2d Cir. 1991), held that the Federal Rules were inapplicable to these pretrial proceedings. The Court relied on 21 U.S.C. 853, which specifically provides that the Federal Rules of Evidence are not applicable to pretrial proceedings on forfeiture. In contrast, the court in *United States v. Veon,* 538 F.Supp. 237 (C.D.Cal. 1982)

held that the Federal Rules were applicable to these adversary hearings, on the ground that Rule 1101(d) did not specifically exempt them. But the *Veon* Court failed to account for the specific stautory authority of 21 U.S.C. 853, which holds the Federal Rules inapplicable to pretrial criminal forfeiture proceedings. Moreover, the rationale of the statute is consistent with that for exempting similar kinds of proceedings from the Federal Rules--the judge is the factfinder, and can properly weigh evidence that might unduly sway a jury. So while there is some dispute on whether the Federal Rules are applicable to pretrial adversary hearings on forfeiture, the dispute appears to be based on one court's overlooking controlling statutory authority. It is for the Committee to decide whether this type of "conflict" is one that should be corrected by an amendment to Rule 1101.

As to the final determination of forfeiture in criminal cases, the applicability of the Evidence Rules appears to be dependent on the analysis in *Libretti v. United States,* 516 U.S. 29 (1995). The Court in *Libretti* held that forfeiture is a part of sentencing. Since that is so, it would follow that the Federal Rules of Evidence are not applicable in criminal forfeiture proceedings, for reasons discussed above in the section on sentencing. Any change in this principle would appear to require an overruling of *Libretti.*

It should be noted that the Criminal Rules Committee is currently considering an amendment that would provide for jury trial in criminal forfeiture proceedings — in effect altering the holding in *Libretti.* Any decision that the Evidence Rules Committee might make on the advisability of extending the Evidence Rules to criminal forfeiture proceedings could usefully await the determinations of the Criminal Rules Committee.

15. Juvenile Transfer Proceedings

The Evidence Rules have been held inapplicable to proceedings brought under 18 U.S.C. 5032 to determine whether a juvenile should be tried as an adult. Rule 1101 is silent as to such proceedings, but the courts have reasoned that a transfer proceeding "is of a preliminary nature and is consequently not comparable to a civil or criminal trial." *Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153 (3rd Cir. 1994). The court in *A.M.* stated that juvenile transfer proceedings were most analogous to preliminary examinations in criminal cases, which are specifically exempted by Rule 1101(d)(3). See also *United States v. Anthony Y,* 990 F.Supp. 1310 (D.N.Mex. 1998) (juvenile court records admissible even though hearsay, because the Evidence Rules do not apply to transfer hearings).

As with other types of hearings not specifically covered by Rule 1101(d), there appears to

be two questions for the Committee to consider. First, should the Rule be amended to *extend* the Evidence Rules to these proceedings? If one assumes that the rationale as applied to other preliminary determinations is sound--i.e. that judges can properly weigh all evidence whether it would admissible at trial or not--then there is no reason to distinguish juvenile transfer proceedings from other preliminary proceedings. If, on the other hand, the Committee believes that the justification for exempting preliminary hearings from the Evidence Rules is unsound, then the Committee should revisit all the preliminary hearings discussed in this memorandum to determine whether the Evidence Rules should apply to them.

The second question is whether Rule 1101(d) should be amended to specifically state that the Evidence Rules are *inapplicable* to juvenile transfer proceedings. Probably the best answer is that given with respect to supervised release proceedings and other proceedings not specifically mentioned as exempt, i.e., clarification would be useful, but the need to clarify is not itself so critical as to require an amendment to the Rule. But if the Rule is to be amended on other grounds, a clarification might usefully be added to that amendment.

16. Preliminary Injunctions

Rule 1101 is silent on whether the Federal Rules are applicable to preliminary injunction proceedings. The rather sparse case law on the matter provides that the Evidence Rules are not applicable to such proceedings when they are held independently from the trial. There are at least three reasons for this exemption. First is the familiar principle that the Federal Rules are really designed to protect juries, and therefore they should not be used to hinder judges in making preliminary determinations, because judges can properly weigh inadmissible information. Second, when preliminary injunction hearings are held independently from a trial on the merits, there is a need for speed and flexibility that is inconsistent with the formal Rules of Evidence. Third, Civil Rule 65(a) appears to contemplate that a judge can and will consider inadmissible evidence in determining whether a preliminary injunction will be issued. Rule 65(a)(2) provides that where consolidation of the preliminary injunction proceeding and the trial is not ordered, "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." This provision presumes that some of the evidence considered at the preliminary injunction hearing would *not* be admissible if offered at trial. It also presumes, reasonably enough, that if the preliminary injunction proceeding *is* consolidated with a trial, then the Rules of Evidence will apply.

The court in *SEC v. General Refractories Co.,* 400 F.Supp. 1248 (D.D.C. 1975), summed it up as follows:

> Rule 65(a) of the Federal Rules of Civil Procedure contemplates the introduction at a hearing on a preliminary injunction of evidence which would not be admissible in a final trial on the merits. This relaxation of the rule of evidence at the preliminary injunction stage is consonant with one of the key purposes of a preliminary injunction: the need for speedy relief. Sworn affidavits and investigatory transcripts of testimony taken under oath are properly admitted as probative evidence at a preliminary injunctive hearing, where, as here, testimony of numerous live witnesses is simply not practical and the magnitude of inquiry would preclude any meaningful "trial type" hearing at a preliminary stage.

Again there are two questions. First, should Rule 1101 be amended to extend the Evidence Rules to preliminary injunction proceedings that are held independently from a trial on the merits? The answer depends, again, on whether the Committee agrees with the premise that preliminary determinations by trial judges should be outside the scope of the Evidence Rules. If so, then there is no good reason at all to extend the Evidence Rule to preliminary injunction proceedings held independently from a trial on the merits. In fact, the argument for refusing to extend the Evidence Rules to preliminary injunction hearings is even stronger than other cases, given the need for speed and flexibility at such hearings, and given the implications of Civil Rule 65(a).

Second, should Rule 1101 be amended to specify that the Federal Rules are *inapplicable* to preliminary injunction proceedings, at least where they are not consolidated with a trial on the merits? Again the best answer appears to be that clarification would be useful, but the need to clarify is not itself so critical as to require an amendment to the Rule. But if the Rule is to be amended on other grounds, a clarification might usefully be added to that amendment.

17. Evidence Rule 1101(e)

Evidence Rule 1101(e) sets forth a laundry list of proceedings in which the Evidence Rules are applicable to the extent that matters of evidence are not governed by other rules or statutes. It appears that this provision is devoid of substantive effect. All of the proceedings specified are civil actions or proceedings tried in the federal courts (e.g., habeas corpus proceedings). The Evidence Rules are already applicable to these proceedings under the provisions of Rule 1101(a) and (c). So the only apparent purpose for subdivision (e) is to highlight the fact that other rules and statutes might trump the Evidence Rules in particular circumstances. Yet this merely states the obvious. As indicated by the attached memorandum, there are a large number of statutes that trump the Evidence Rules in specific circumstances.

Rule 1101(e) provides some (incomplete) guidance, but it appears to have no independent content.

An argument can be made that Rule 1101(e) should be abrogated, given the fact that it makes no attempt to be comprehensive and has no substantive effect. On the other hand, it appears to be doing no harm, and can be said to usefully highlight the relationship between the Evidence Rules and the evidentiary law outside those Rules. As with other ambiguities in the Rule, any problem with Rule 1101(e) does not on its own appear to justify an amendment. Yet if a decision is made to amend the Rule on other grounds, the Committee might consider an abrogation of Rule 1101(e) as part of a larger amendment--with the proviso that an abrogation might send the wrong impression concerning the applicability of the Evidence Rules to proceedings where statutory law is also operative.

17. Non-Jury Trials--An Anomaly?

Many of the proceedings to which the Evidence Rules are inapplicable are preliminary proceedings in which the trial judge operates as a factfinder. As stated throughout this memorandum, the justification for exemption from the Federal Rules is that the trial judge will not be swayed unduly by evidence that would be inadmissible at trial. For example, a trial judge, unlike a jury, will be able to weigh inadmissible hearsay "for what it's worth." But if that premise is accepted, one might wonder why the Evidence Rules (or at least why certain Evidence Rules) should be applicable in bench trials.

As an initial matter, it should be noted that at least one Evidence Rule operates differently in bench trials, on the rationale that the trial judge can properly assess the evidence that might improperly affect a jury. Under Rule 403, evidence proffered in a bench trial cannot be excluded on grounds of prejudice or confusion. See *Gulf States Utils. Co. v. Ecodyne Corp.,* 635 F.2d 517 (5th Cir. 1981) ("Rule 403 assumes that a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence"). It should also be noted that this Committee's proposed amendment to Rule 703 will operate in jury trials only.

On the other hand, the hearsay rule has been held fully applicable in bench trials. As the court stated in *In re Oil Spill by Amoco Cadiz,* 954 F.2d 1279 (7th Cir. 1992):

> During the damages trial the district court admitted a great deal of evidence it characterized as hearsay. It did so because it thought that if the rule were to be applied the trial would be too cumbersome. Yet the hearsay rule applies in all trials -- jury and

bench, big and small. Fed. R. Evid. 101, 1101; *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986). A defendant faced with a single $ 200 million claim is no less entitled to the protection of the rule than is a person defending against 200 claims for $ 1 million each, or 2,000 claims for $ 100,000. See, e.g., *UNR Industries, Inc. v. Continental Casualty Co.*, 942 F.2d 1101, 1107 (7th Cir. 1991) (enforcing the rules of evidence in a multi-million dollar case with approximately 100,000 claimants).

The *Amoco Cadiz* court has certainly read Rule 1101 correctly. But the question is why is the Rule as it is? If a trial judge can reliably consider hearsay in determining whether coconspirator testimony is admissible, or whether the defendant being sentenced sold a certain amount of cocaine, why can't the trial judge reliably consider the same evidence in a trial on the merits?

Of course, no reasonable person could advocate that *all* of the Evidence Rules should be abrogated in bench trials. For example, rules on sequestration of witnesses and the oath requirement, and the rules on judicial notice and presumptions, are necessary to promote accurate factfinding even in a bench trial. Still, if the Committee decides that it wants to investigate further whether Rule 1101 should be amended, it might well consider whether the exemption of bench trials from certain Evidence Rules (most importantly the hearsay rule) is justified. Certainly there is a tension under current law between the rationale for exempting preliminary determinations from the Evidence Rules, and the application of some of those Rules in bench trials.

Conclusion

There are a number of ambiguities, and arguable inconsistencies, in Rule 1101. The problems in the language of the Rule include:

1. The Rule is silent about the applicability of the Evidence Rules to supervised release proceedings.

2. The Rule does not specifically mention suppression hearings, and there is a conflict in the case law as to whether the Rules apply at all to such hearings and, if so, which specific Rules are or should be applicable.

3. The Rule is silent about the applicability of the Evidence Rules to proceedings for psychiatric commitment and release.

4. The Rule does not specifically exempt arbitrations and administrative hearings from the Evidence Rules.

5. The Rule does not specifically mention forfeiture proceedings.

6. The Rule does not specifically mention juvenile transfer proceedings.

7. The Rule does not specifically mention preliminary injunction hearings.

8. Subdivision (e) of the Rule has no substantive effect, and is incomplete in its list of proceedings affected by other rules and statutes pertaining to evidence.

9. The Rule contains an inherent analytical tension. It exempts all preliminary determinations by trial judges from the Rules of Evidence, on the ground that trial judges need not be constricted by rules that are basically designed to shield the jury at trial. Yet it provides that virtually all of the Evidence Rules are fully applicable in a bench trial.

Whether these listed ambiguities and anomalies are, taken together, enough to justify an amendment of Rule 1101 is a determination for the Committee. The most intriguing, difficult, and far-ranging question is whether and to what extent the Rules of Evidence should remain applicable to bench trials. That is a difficult question of practice and policy that would call for another memorandum from the Reporter if the Committee is interested in pursuing the issue.

IV-2

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Progress Report on Accommodating Technological Advances in the Presentation of Evidence
Date: March 1, 1998

At the last Committee meeting, I was instructed to review the Evidence Rules to determine whether an amendment or amendments might be necessary to make the rules compatible with technological developments in the presentation of evidence. I have conducted a review of all of the reported federal cases concerning the admissibility of "computerized" evidence, broadly defined. I have also read most of the published literature on the subject--though I probably could have stopped after reading Greg Joseph's materials because everything else is derivative of his work (some with attribution, some not). And I have reviewed some of the other legislative attempts to treat computerized evidence, including the Uniform Rules project and the new Maryland Rules.

This memo contains a description of the above-mentioned background information; a discussion of the rules that might be considered problematic in relation to computerized evidence; a description of the potential scope of any attempt to amend the rules in light of new technology; a discussion of some possible solutions; and some suggestions of where the Committee might go from here.

Rules That Might Be Affected By Technology

Computerized evidence is evidence. Therefore, any reference in the Rules to "evidence" can accommodate any technological change without need for amendment. However, computerized evidence is not necessarily a "document" or a "writing" or a "record" or a "memorandum." That is, any reference to a paper or other tangible product might be considered in tension with evidence that is produced through an electronic medium. Therefore, any Rule that uses one of those terms is, at least potentially, one that might need to be amended to accommodate technology. What follows is a list of the rules containing these potentially problematic terms. I have separated out the rules that refer to "writings" from the rules that refer to other written instruments such as "records." The reason for this is that one possible way to amend the rules is to expand the applicability of the broad definition of "writings" in Rule 1001 to other rules. This solution only works, of course, if the rule to be effected refers to a "writing."

Note that the references to "writings" and "recordings" in Article 10 are not considered in this section, because those terms are expansively defined in Rule 1001 to include "letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation." This definition is at least arguably expansive enough to cover computer-generated information.

It should be noted, however, that the Uniform Rules proposal to amend Rule 1001 would delete the term "data compilation" and replace it with "other technology in perceivable form." Any broad-scale attempt to amend the rules might consider whether the term "data compilation" is itself an outmoded way to define computer-generated evidence. This point will be discussed later on in this memorandum.

Rules That Refer to "Writing" or "Written"

1. Rule 106. Remainder of or Related Writings or Recorded Statements

When a **writing** or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other **writing** or recorded statement which ought in fairness to be considered contemporaneously with it.

2. Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

* * *

(c) PROCEDURE TO DETERMINE ADMISSIBILITY –

(1) A party intending to offer evidence under subdivision (b) must –

(A) file a **written** motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the victim and parties the right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Note also that Rule 412 refers to "papers" in subdivision (c)(2). This could also be a potential problem with respect to computerized information.

3. Rule 609. Impeachment by Evidence of Conviction of Crime

* * *

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

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

4. Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a **writing** to refresh memory for the purpose of testifying, either —

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the **writing** produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the **writing** contains matters not related to the subject matter of the testimony the court shall examine the **writing** in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a **writing** is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

5. Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement.* — A ``statement'' is (1) an oral or **written** assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* — A ``declarant'' is a person who makes a statement.

(c) *Hearsay.* — ``Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

6. Rule 901. Requirement of Authentication or Identification

* * *

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

* * *

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

Note that Rule 901(7) also refers to "records" and this could be problematic in light of computerization. However, the word "record" is grouped with "data compilation" and it is at least arguable that this term is comprehensive enough to accommodate advances in technology. Note also, however, that the Uniform Rules proposal would replace the term "data compilation" with the phrase "other technology in perceivable form". This updated language does seem more flexible and thus able to cover all types of computer-generated information, including advances in communication and presentation that might be developed in the future.

7. Rule 903. Subscribing Witness' Testimony Unnecessary

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

The reference to a "subscribing" witness may or may not be considered potentially outmoded.

Rules That Refer to "Document", "Record" "Certificate," "Memorandum", or Other Terms That Might Not Accommodate Electronic Proof.

1. 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:

* * *

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

(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, 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.

Note that while Rule 803(6) contains problematic references to memoranda, records and reports, it also includes "data compilations in any form". It is possible, though not certain, that this term is broad enough to cover any computerized evidence that would otherwise be admissible under this Rule. The Uniform Rules proposal would replace the term "data compilation" with the phrase "other technology in perceivable form". This updated language does seem more flexible and thus able to cover all types of computer-generated information, including advances in communication and presentation that might be developed in the future.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* — Evidence that a matter is not included in the **memoranda, reports, records**, or **data compilations, in any form**, kept in accordance with the provisions of

paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a **memorandum, report, record, or data compilation** was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

See the note after Rule 803(6).

(8) *Public records and reports.* — **Records, reports**, statements, or **data compilations, in any form**, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

See the note after Rule 803(6).

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

See the note after Rule 803(6).

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

See the note after Rule 803(6).

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

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

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

Note: Besides the reference to records in the title, the items described in the rule are physically-oriented. Query whether the language "or the like" would be broad enough to cover electronically stored or generated family records.

(14) ***Records*** *of documents affecting an interest in property.* — The **record** of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded **document** and its execution and delivery by each person by whom it purports to have been executed, if the **record** is a **record** of a public office and an applicable statute authorizes the recording of **documents** of that kind in that office.

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

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

* * *

2. Rule 901. Requirement of Authentication or Identification

* * *

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

* * *

(8) Ancient **documents or data compilation.** — Evidence that a **document or data compilation**, in any form, (A) is in such condition as to create no suspicion

concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Again, note that the term "data compilation" may render any amendment unnecessary. Though again, the term "data compilation" itself might be considered outmoded. Also note that the hearsay exception for ancient documents refers only to documents and not data compilations--meaning that, under the current rules, an electronically generated "ancient" data compilation might be authenticated and yet not admissible if offered for its truth.

3. Rule 902. Self-authentication

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

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

Note that the word "signature" may be problematic, or at least it might need to be clarified that "signature" could include some kind of electronic transmission. Also, the term "seal" denotes a physical act that might not be considered to encompass an electronic process.

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

See the comment to Rule 902(1).

(3) *Foreign public **documents**.* — A **document** purporting to be **executed** or **attested** in an official capacity by a person authorized by the laws of a foreign country to make the **execution** or **attestation**, and accompanied by a final **certification** as to the genuineness of the **signature** and official position (A) of the **executing** or **attesting** person, or (B) of any foreign official whose **certificate** of genuineness of **signature** and official position relates to the **execution** or **attestation** or is in a chain of **certificates** of genuineness of **signature** and official position relating to the **execution** or **attestation**. A

final **certification** may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official **documents**, the court may, for good cause shown, order that they be treated as presumptively authentic without final **certification** or permit them to be evidenced by an **attested** summary with or without final **certification**.

This rule is rife with references which could be read to be limited to physical, as opposed to electronic, sources of proof.

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

Again, the term "data compilation" probably makes the rule broad enough to cover electronic records. However, the records must be "certified" and that could be read as a reference to physical rather than electronic proof.

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

Note that while "Books" and "pamphlets" could be read as limited to "hardcopy", the reference to "other publications" is probably broad enough to cover electronic evidence.

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

This rule clearly limits self-authentication to printed, as opposed to online, materials. Though maybe it could be argued that an online publication becomes "printed" if it gets printed out.

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

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

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

The reference to paper may not be as problematic as it sounds, since the Uniform Commercial Code defines commercial paper with reference to wire and electronic communication.

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

The term "other matter" can probably be construed expansively enough to cover computerized evidence that might be declared prima facie genuine by an Act of Congress.

Overview of the Possible Need to Modernize the Evidence Rules in Light of Computerization.

There are 29 rules set forth above that are arguably in tension with technological innovations in the presentation of evidence. If the term "data compilation" is considered sufficient to cover any kind of electronically generated evidence, then the number of rules arguably in need of amendment is reduced to 22. Amending 29 or even 22 rules is a daunting task that should only be undertaken if absolutely necessary.

It does not appear, at this point, that it is necessary to amend any of the Evidence Rules to accommodate electronic presentation of evidence. If the reported cases are any indication, the courts have handled computerized evidence quite well under the Rules as they exist. The following discussion describes the current use of electronic evidence, and the treatment of that evidence in the reported federal cases.

Computerized evidence comes in five basic forms at this time:

1. First, a business record is often presented in the form of a computer print-out. Courts have had little problem in using Rules 803(6) and 901 to admit computerized business records. Basically, a computerized business record is admissible whenever the hardcopy underlying record would be admissible. They are authenticated as are other records, and no special rule change seems to be required to allow the courts to rule on the admissibility or authenticity of business records. See *United States v. Whitaker,* 127 F.3d 595 (7th Cir. 1997) (authenticity and admissibility of computerized business records is established by general principles applicable to noncomputerized records); *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.,* 38 F.3d 627 (2d Cir. 1994) (computerized records were not admissible as business records where the underlying information was prepared in anticipation of litigation and would not itself have been admissible). See also *Monotype Corp. v. International Typeface Corp.,* 43 F.3d 443 (9th Cir. 1994) (no error in excluding e-mail from employee of Microsoft to a superior, since such a communication was not regularly conducted activity within the meaning of Rule 803(6)).

2. Second, a computerized presentation may be offered as proof of how an event occurred. For this purpose, the use of a computer to recreate an event is no different in kind from videotaping a recreation of a car crash. Courts consistently apply Rule 403 to determine whether the recreation is substantially similar to the original conditions. If the conditions are substantially different, the recreation, computerized or not, is excluded as substantially more prejudicial than probative. See, e.g., *Racz v. R.T. Merryman Trucking, Inc.,* 1994 WL 124857 (E.D.Pa. 1994) (computerized accident reconstruction held inadmissible under Rule 403, because not all data was taken into account). Any problems of authenticating such a computerized demonstration are handled by Rule 901(b)(9), which permits authentication for "[e]evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."See Greg Joseph, *A Simplified Approach to Computer-Generated Evidence and*

Animations, SB67 ALI-ABA 81 (1997) (noting ways in which authentication questions can be easily handled under current Rule 901(b)(9)). There might also be hearsay problems in the preparation of the demonstration, and there might be problems of reliability under *Daubert* due to the probable use of experts in the recreation process. But these problems are dealt with under standard evidentiary principles that apply to noncomputerized evidence. Fulcher, *The Jury as Witness,* 22 U.Dayton L.Rev. 55 (1996) (noting that the admissibility of computerized recreations can be and has been handled by standard evidentiary principles).

3. Third, a computerized presentation may be offered to illustrate an expert's opinion or a party's version of the facts. As with any other such illustration, a computerized presentation is admissible if it helps to illustrate the expert's opinion, or a party's version of the facts, and does not purport to be a recreation. Again, standard evidentiary principles such as Rule 403 and Rule 702 have appeared to work well. See *Hinkle v. City of Clarksburg,* 81 F.3d 416 (4th Cir. 1996) (finding no "practical distinction" between computer-animated videotapes and other types of illustrations; computer animation was properly admitted where the jury "fully understood this animation was designed merely to illustrate appellees' version of the shooting and to demonstrate how that version was consistent with the physical evidence.").

4. Fourth, a computerized presentation may be offered as a pedagogical device, either to illustrate or summarize the trial evidence to the party's advantage, or to aid in the questioning of a witness. Such computerized presentations are not evidence at all. They are no different in kind from a hardcopy summary or the highlighting of trial testimony or critical language from documents at issue in the case. The question is whether the presentation fairly characterizes the evidence. If the presentation is unfair, computerized or not, it will be prohibited under Rules 403 and 611. See Borelli, *The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom,* 71 Ind.L.J. 439 (1996):

> If one treats the [computerized] display as an extension of the attorney's argument, then it should be subject to the same guidelines that govern what an attorney may say. Proper argument is supposed to be confined to facts introduced in evidence, facts of common knowledge, and logical inferences based on the evidence. Similarly, an attorney cannot argue about facts not in the record, misstate testimony, or attribute to a witness testimony not actually given. If the lawyer discloses the display to the opposing counsel and the judge beforehand, which is the recommended procedure anyway, then its basis in the evidence can be verified and the program altered, if need be. If an attorney using a computer display abides by these ground rules, then it should be allowed as a pedagogical device [without any need to change the evidence rules].

5. A computerized presentation might be offered as a summary of otherwise admissible evidence that is too voluminous to be conveniently examined in court. Such a presentation would be treated as a summary under Rule 1006. Computerized summaries are treated no differently from non-computerized summaries for purposes of Rule 1006. See Federal Rules of Evidence Manual at 2077.

In conclusion, neither the case law nor the commentary supports the argument that the Evidence Rules must be changed immediately to accommodate electronically-generated evidence. I could find no case holding that electronically-generated evidence was inadmissible because it was electronically-generated and therefore not within the language of a Federal Rule. The rules generally appear flexible enough to permit the trial court to exercise its discretion to admit or exclude computerized evidence depending on its probative value, prejudicial effect and reliability.

Some Problems Not Yet Encountered

While the courts currently seem to be handling computerized evidence quite well under current evidence rules, it is possible that new innovations might create problems. To take one example, the use of virtual reality technology might create special evidentiary problems, such as placing the factfinder right at the virtual scene of the crime or the accident. However, it is likely that even this technology can be handled under flexible rules such as Rule 403. See Kelly and Bernstein, *Virtual Reality: The Reality of Getting It Admitted,* 13 J. Marshall J. Computer & Info.L. 145 (1994) (concluding that VR technology should be treated in the same manner as other computerized demonstrative evidence). Other technologies might be developed in the future. Yet even if these new technologies cannot fit within the built-in flexibility of the Federal Rules, any need to amend the rules is hardly pressing. It seems more prudent to await future technological developments and then to determine if the Rules are inadequate.

Even under the current state of technology, some problems in presenting electronic evidence under the Rules can be envisioned, even though these problems have not yet been reported in the cases. Some examples follow:

1. A witness refreshes his recollection with a computerized presentation. Must this be produced for inspection and use by the adversary? Rule 612 refers to a "writing" and the argument could be made that a computerized presentation does not fall within that term.

2. A party seeks to admit a portion of a computerized presentation as substantive evidence. Can the adversary admit another portion under the rule of completeness? Like Rule 612, Rule 106 is cast in terms of a "writing", and therefore is at least arguably inapplicable.

3. A computerized presentation contains underlying assertions that are offered for their truth. The argument is made that the hearsay rule does not apply, since to be hearsay, the evidence must constitute a "statement", and "statement" is defined in Rule 801(a) as an "oral or written assertion." While courts have naturally considered the hearsay rule to be applicable in such a situation, the argument can at least be made that the hearsay rule is completely inapplicable to electronically-generated evidence.

4. Computerized information that would otherwise qualify under hearsay exceptions for past recollection recorded, family records, etc. might be argued to be inadmissible if they are in electronic rather than hardcopy form.

Whether these *potential* concerns, and others like them, warrant amendments to the Rules at this point is a question for the Committee to decide.

The Uniform Rules Solution

The drafting committee for the Uniform Rules of Evidence is considering all-encompassing amendments to the Uniform Rules that would cover all current modes of electronic evidence. The proposal essentially proceeds in three steps.

1. The Rule 1001 definitions are expanded to apply to all the rules, not just Article 10. An expansive definition of "record" is also added to Rule 1001. "Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

2. All of the references to "writings", "documents", etc. are recast in terms of "record." For example, Rule 801(a), which currently refers to oral or written assertions, is changed to "an oral assertion or an assertion in a record." The reference in Rule 106 to "writing" is changed to "record." And so forth.

3. Finally, reference in the Rule to "data compilations" is expanded to include "other technology in "perceivable form."

Representative rules and comment from the latest draft of the Uniform Rules proposal is attached to this memorandum.

Reporter's Comment on Uniform Rules Proposal:

The Uniform Rules proposal is a comprehensive and effective means of expanding the language in the Rules to cover technological advances in the presentation of evidence. However, it results in the amendment of a very large number of rules. This is a reasonable task for the Uniform Rules project, since the goal of that drafting committee is to conduct a complete overview and full-scale revision, where necessary, of the Uniform Rules. The goal of the Advisory Committee on Evidence Rules is, by general consensus, far more limited--to respond to specific instances where the Rules are not working. With respect to computerization, the Federal Rules, as indicated above, seem to be working quite well, at least at this point. Moreover, since the Uniform Rules are not widely adopted, amendments to those rules can be promulgated without the concern that settled practices and substantial case law will be disrupted. The concern over upsetting settled expectations must obviously be taken into account in any attempt to amend the Federal Rules.

Finally, the Uniform Rules proposals on computerized evidence must be considered in the context of other Uniform Rules ventures, particularly in the area of Uniform Commercial Code and electronic contracting. The Uniform Rules project is, quite understandably, integrating

language pertinent to computerization throughout all the Uniform Rules. There is no such need for integration, at this time, with respect to the Federal Rules of Evidence.

Ultimately it is for the Committee to decide whether it is worth the effort to amend so many rules. If the decision is in the affirmative, the Uniform Rules proposal should provide an excellent model.

The Solution of a Single Amendment to Rule 1001

In a preliminary discussion at a previous Advisory Committee meeting, the possibility was suggested that it might be sufficient to expand the definitions set forth in Rule 1001 so that they would apply to all the rules. That proposal would look something like this:

Rule 1001. Definitions

For purposes of ~~this article~~ these rules the following definitions are applicable:

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

(2) *Photographs.* — ``Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

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

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

Reporter's Comment on the Proposal:

This proposal has the virtue of simplicity. However, it appears to be quite limited in its impact on the rules that potentially create a problem with respect to electronic evidence. The only term that is usefully modified by this change is the term "writing." The reference to "recordings" doesn't match up with the rules, since the rules refer to "records". It is even a fair question whether expanding the definition of "writings" will cover the use of the term "written" in the Rules. For example, Rule 801 defines hearsay as an oral or "written" assertion. Will the definition of "writing" in Rule 1001 cover a "written" assertion? At the very least, the proposal, while simple, would create an ambiguity.

At most, the proposal would affect the rules that refer either to "writing" or to "written." As discussed above, those rules are 106, 412, 609, 612, 801, 901(7) and 903. If "writing" does not cover "written", then Rules 412, 609, and 801 would remain unaffected, leaving only four Rules usefully amended by the expansion of Rule 1001.

The Solution of a More Expansive Amendment to Rule 1001

Arguably, if it is worth it to amend Rule 1001 at all, it is worth it to amend Rule 1001 to provide greater coverage of the problematic rules. This could be accomplished by adding to and expanding upon the current definitions set forth in Rule 1001. Taking the liberty of borrowing from the Uniform Rules draft, an amendment might read something like this:

Rule 1001. Definitions

For purposes of ~~this article~~ these rules the following definitions are applicable:

(1) *Writings and recordings.* — ``Writings" and ``recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, ~~magnetic impulse~~, mechanical or electronic recording, or ~~other form of data compilation~~ or other technology in perceivable form. "Written" includes any process that results in a writing.

(2) *Photographs.* — ``Photographs" are forms of a record which include still photographs, X-ray films, video tapes, and motion pictures.

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

(4) *Duplicate.* — A ``duplicate" is a counterpart reproduced by any technique that reproduces the original in perceivable form or that is produced by the same impression as the

original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(5) *Records, documents and certificates.* — "Records", "documents" and "certificates" include information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(6) *Data Compilation* — A "data compilation" is any collection or presentation of information retrieved in perceivable form.

Reporter's Comment on the Proposal:

The above proposal has a far broader effect than the simple proposal to expand the current 1001 definitions to the other Rules. The proposal has the following possible advantages:

1. It provides a technology-based definition of "record", "certificate" and "data compilation." As such, the effect of the more expansive definitions is extended to 19 more rules. These Rules are: 803(5), (6), (7), (8), (9), (10), (11), (13), (14), (15), (16), 901(b)(8), 902(1)(2)(3)(4)(8)(9) and (10). The only arguably problematic rules not modified by this change are Rule 803(12), 902(5),(6) and (7). Nobody is going to lose much sleep over the fact that these latter Rules remain unaffected.

2. The definition of "writings" is modified to take account of possible technological advances. The reference in the current rule to "magnetic impulse" is probably outmoded and at least unduly limiting.

3. The term "written" is defined to make it certain that the expansive definition applies to those rules which refer to "written" rather than "writing."

4. Changes are made to the current Rule 1001 definition of "duplicate" to take account of technological advances.

5. The amendment follows the same principle as the simpler proposal addressed above--instead of amending 29 rules, it amends only one.

The proposal has some disadvantages, however:

1. The definitional section is placed in the Best Evidence Rule. A lawyer researching the meaning of "writing" in Rule 106, for example, might not think of looking in Rule 1001 for guidance. This same criticism is applicable, of course, to the proposal that would simply extend the current Rule 1001 definitions to the other rules. The criticism also applies to the Uniform Rules proposal.

The alternative to using 1001 is to place a separate "definitions" rule in the Federal Rules of Evidence. This might be a daunting task, however. It would seem awkward to set up a new article or rule for definitions, when the only definitions would deal with computerized evidence. Yet it would be equally problematic to draft a definitions rule that goes beyond computerized evidence to cover other terms that are used in the rules. What terms should be defined? What would be the benefit of such definitions? Given the entrenched understandings of most of the terms used in the Rules, based on over 20 years of case law, there is probably little to be gained and much to be lost in adding a full-fledged definitions rule to the Evidence Rules.

2. Because only one Rule is amended, some of the affected rules would have surplus language that would not be deleted. For example, Rule 803(5) refers to a "memorandum or record". With the expansive definition of "record" in an amended Rule 1001, the reference to "memorandum" is unnecessary. There is nothing that a "memorandum" could be that a "record" is not. Arguably, this could lead to unwarranted speculation that the terms are meant to cover different types of evidence. And even if it is not confusing, it is arguably sloppy to retain outmoded or unnecessary terms in a rule. (It is for this reason that the Uniform Rules proposal deletes the term "memorandum" from Rule 803(5)).

On balance, however, the fact that an expanded Rule 1001 will leave unnecessary language in some of the affected rules is not a reason for rejecting the proposal. Assuming that an amendment is necessary to accommodate technological changes, the question really is how that can be done effectively with the fewest amendments to the fewest rules. The benefits of deleting unnecessary language from each of the affected rules is probably outweighed by the costs of having to amend so many rules. At any rate, extraneous language is hardly unheard of in federal legislation and rulemaking. The use of the phrase "right, title and interest" is common. Indeed, even without any amendments, the reference to "memorandum" in Rule 803(5) is probably superfluous, given the inclusion of "records" in the Rule. See also Rule 803(17) (referring to "tabulations, lists, directories, or other published compilations."). Thus, the Committee might wish to consider an expanded Rule 1001, despite the fact that some of the affected Rules will contain superfluous language--again assuming that it is worth it to amend the Rules at all.

3. It could be argued that the proposed amendment tends to equate all of the terms--"writing", "record", "document" and "certificate"--when in fact those terms were intended to, and should, have separate meanings. Nothing in the original Advisory Committee Notes indicate that there was an intent to create some substantive distinctions among the evidence encompassed within these various terms. The Committee may wish to consider, however, whether separate meanings should be attached to these various descriptions, should it decide to venture into the amendment process in order to accommodate computerized evidence.

The Maryland "Solution"

Maryland has recently passed rules concerning the presentation of computerized evidence. These rules are attached to this memorandum. It is apparent from a reading of these rules that they are procedural, rather than evidentiary. They do not deal with admissibility, but rather provide protection to the adversary by way of notice and hearing requirements. While this might be a solution to some of the problems arising from computerized evidence, it is not a solution within the purview of the Evidence Rules.

Conclusion

This is a preliminary report, intended to give the Committee some background into whether the Evidence Rules should be amended to accommodate technological innovations in the presentation of evidence. The Committee must now decide the following questions:

1. Do the Rules currently provide sufficient guidance and flexibility for courts and litigants to handle the special problems created by computerized evidence?

2. If an amendment is necessary, should it be a comprehensive amendment in the manner of the Uniform Rules, or should it be a more limited attempt to employ a single definitional rule?

3. If a definitional rule is to be employed, should it be an amended Rule 1001, or should it be a new rule?

4. If Rule 1001 is to be employed, is it sufficient to expand the current rule so as to apply to all the rules, or should the definitions currently in the rule be modified and expanded as well?

IV-3

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal to Consider an Amendment to Evidence Rule 801(d)(1)(B)
Date: February 5, 1998

Attached to this memorandum is a law review article co-authored by Judge Bullock, who is our liaison to the Standing Committee. In a covering letter, which I also attach, Judge Bullock requests that this Committee consider whether Evidence Rule 801(d)(1)(B) should be amended in the manner suggested in the article.

The article proposes that Rule 801(d)(1)(B) be amended in two respects: 1. to reject the premotive limitation on the Rule set forth in the Supreme Court's decision in *Tome v. United States*; and 2. to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness' credibility. The justification for the former proposal is that postmotive statements can be relevant to rebut a charge of recent fabrication, and therefore there should be no rigid rule of exclusion. The justification for the latter proposal is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Assuming that the Committee agrees with Judge Bullock's position, I believe that an amendment equating rehabilitative and substantive admissibility would be sufficient to address both of Judge Bullock's concerns. The Supreme Court's adoption of the premotive limitation in *Tome* was based in large part on the Rule's tracking of the common-law rule, which contained a premotive limitation. If Rule 801(d)(1)(B) were amended to simply equate substantive and rehabilitative use, there would be no need to specifically state that postmotive statements can be admissible to rehabilitate the witness. They would be admissible whenever they passed the Rule 403 balancing test. The point can be made sufficiently in a Committee Note.

I have attached a draft amendment to Rule 801(d)(1)(B), which would provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the witness. I have also attached a draft Committee Note. The drafts are for discussion purposes. No assertion is made that the amendment is necessary or advisable.

Finally, as background information, I enclose commentary and case annotations on Rule 801(d)(1)(B) from the Seventh (Brand New!) edition of the Federal Rules of Evidence Manual.

Draft of Proposed Amendment To Evidence Rule 801(d)(1)(B)

Rule 801. Definitions

The following definitions apply under this article:

* * *

(d) *Statements which are not hearsay.* — A statement is not hearsay if —

(1) Prior statement by witness. — The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is ~~offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive~~ admissible, subject to Rule 403, to rehabilitate the declarant's credibility as a witness, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. — The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the

party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Draft of Proposed Committee Note for Amendment to Rule 801(d)(1)(B)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide admissibility, for example, for consistent statements that are probative to explain what appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of bad memory. Thus, the Rule left many prior consistent statements potentially admissible for the limited purpose of rehabilitating a witness's credibility, but not admissible for their truth. See, e.g., *Tome v. United States,* 513 U.S. 150 (1995) (noting that prior consistent statements that are probative to rebut a charge of bad memory might be admissible to rehabilitate the witness, but not for their truth). The original Rule

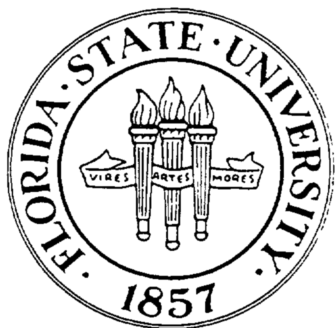
also led to conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others refused to permit admission of such statements even for rehabilitation when they were not admissible for their truth under the Rule. *Compare United States v. Brennan,* 798 F.2d 581 (2d Cir. 1986) (prior consistent statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify what appeared to be an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)"), *with United States v. Miller,* 874 F.2d 1255, 1273 (9th Cir. 1989) ("a prior consistent statement offered for rehabilitation is admissible under Rule 801(d)(1)(B) or it is not admissible at all."). This latter approach resulted in unnecessarily restricted use of prior consistent statements that are probative to rehabilitate a witness.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible, subject to Rule 403, to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between

substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997).

Prior consistent statements were not admissible under the original Rule 801(d)(1)(B) when they were made after the declarant's alleged motive to falsify arose. *Tome v. United States,* 513 U.S. 150 (1995). The Court in *Tome,* in finding a "premotive" requirement in the original Rule, relied heavily on the language of that Rule and on the fact that it appeared to track the common law, which had similarly imposed a premotive requirement. The amendment changes the focus of the Rule by equating rehabilitative and substantive use, and as such it rejects any rigid adherence to a premotive requirement. This is not to say, however, that a prior consistent statement offered to rebut a charge of improper motive is always admissible regardless of when it is made. The fact remains that a consistent statement postdating the witness's motive to falsify is rarely rehabilitative of the witness's credibility, since it is usually made under the same cloud of improper motive as the witness's testimony. Moreover, under Rule 403, the trial judge has the discretion to exclude prior consistent statements when their rehabilitative value is substantially outweighed by the risk that the jury will use the statements improperly. For example, where the charge of improper motive or influence is

weak, a trial judge might well exclude a prior consistent statement, lest "the whole emphasis of the trial * * * shift to the out-of-court statements, not the in-court ones." *Tome v. United States,* 513 U.S. 150, 163 (1995).



FLORIDA STATE UNIVERSITY

LAW REVIEW

PRIOR CONSISTENT STATEMENTS AND THE PREMOTIVE RULE

The Honorable Frank W. Bullock, Jr. and Steven Gardner

VOLUME 24 SPRING 1997 NUMBER 3

PRIOR CONSISTENT STATEMENTS AND THE PREMOTIVE RULE

FRANK W. BULLOCK, JR.* AND STEVEN GARDNER**

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I. INTRODUCTION

The admissibility of prior consistent statements has long been a difficult and contentious issue.[1] The issue impacts a wide variety of significant cases, including sex-abuse cases,[2] criminal drug cases,[3] civil rights cases,[4] and many other actions, both criminal and civil.

Several factors contribute to the difficulty of determining when a prior consistent statement should be admitted. Included among

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1. *See, e.g.*, Hanger v. United States, 398 F.2d 91, 103 (8th Cir. 1969) (noting that aspects of the issue have "plagued the courts for centuries"); Michael H. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 HASTINGS L.J. 575, 576 (1979) ("In modern litigation the use of prior consistent statements has become exceedingly confused and complex."); Annotation, *Admissibility of Previous Statements by a Witness out of Court Consistent with His Testimony*, 41 L.R.A. (N.S.) 857, 858 (1913) (stating that the admissibility of prior consistent statements "is as perplexing as any in the law of evidence") [hereinafter 41 L.R.A. (N.S.)].

2. *See, e.g.*, Tome v. United States, 115 S. Ct. 696, 696-710 (1995), *aff'g* 3 F.3d 342 (10th Cir. 1993); United States v. White, 11 F.3d 1446, 1448-51 (8th Cir. 1993).

3. *See, e.g.*, United States v. Forrester, 60 F.3d 52, 64-65 (2d Cir. 1995); United States v. Montague, 958 F.2d 1094, 1096-98 (D.C. Cir. 1992).

4. *See, e.g.*, United States v. Farmer, 923 F.2d 1557, 1567-68 (11th Cir. 1991); Washington v. Vogel, 880 F. Supp. 1534, 1540 (M.D. Fla. 1995).

them is a tension between the theoretical analysis of the issue and the recognition that such an approach sometimes does not comport with the practicalities of a jury trial. This tension, combined with the desire for "bright-line" rules, resulted in the development of common-law evidence rules that sometimes needlessly prohibited the admission of evidence that would assist the jury in its deliberations.

The Federal Rules of Evidence, enacted in 1975,[5] sought to bring stability and provide guidance to evidence law in the federal courts. Rule 801(d)(1)(B) of the Federal Rules of Evidence exempts from the definition of hearsay certain prior statements made by a testifying witness who is subject to cross-examination concerning the statement.[6] Thus, prior consistent statements within Rule 801(d)(1)(B)'s scope are admissible as substantive evidence to show the truth of the matter asserted. The prior statement of a witness is exempted from the definition of hearsay if the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."[7] Unfortunately, Rule 801(d)(1)(B) has given rise to much confusion regarding several issues.

In *Tome v. United States*,[8] the United States Supreme Court addressed one of the principal points of confusion associated with Rule 801(d)(1)(B): whether prior consistent statements made by the declarant after the alleged fabrication or improper influence or motive arose are admissible under Rule 801(d)(1)(B). The vast majority of courts addressing this question under the common law held such statements inadmissible. These courts reasoned that such statements were of no value because they could be the product of the same improper influence charged at trial.[9] In a 5-4 decision, the Supreme Court reasoned that Rule 801(d)(1)(B) codified the common-law rule and held that a declarant's prior consistent statement may be admitted into evidence under Rule 801(d)(1)(B) only if the statement was made *before* the alleged fabrication or improper influence or motive arose.[10] In other words, the Court held that premotive, but not postmotive, prior consistent statements are admissible under Rule 801(d)(1)(B).[11] This time-line admissibility rule is known as the premotive rule.

5. *See* Federal Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1296 (1975).
6. *See* FED. R. EVID. 801(d)(1)(B).
7. *Id.*
8. 115 S. Ct. 696 (1995).
9. *See infra* Part II.B.1.
10. *See Tome*, 115 S. Ct. at 700.
11. The terms "premotive" and "postmotive" are employed throughout this Article as short-hand for, respectively, before and after "recent fabrication or improper influence or motive" (the language of Rule 801(d)(1)(B) and many common-law courts).

Some commentators have criticized the *Tome* Court's analysis and conclusion.[12] These commentators address the Court's holding that the Federal Rules of Evidence codified the common-law premotive rule. None of these commentators, however, addressed the vital issue: the premotive rule itself.

This Article examines the admissibility of prior consistent statements, concentrating on the premotive rule. The Article concludes that the per se, time-line premotive rule codified in Rule 801(d)(1)(B) is overly restrictive in some instances. The rule can hamper the jury's fact-finding mission by placing an often crucial factual determination where it does not belong—in the hands of the trial judge. Although a per se premotive rule compels the correct result in the vast majority of situations, it does not sufficiently take into account the ebb and flow of an individual's motives and emotions, the infinite array of factual situations in which the issue might arise, or the strength of the jury's ability to weigh evidence. A more flexible approach, one that takes account of the realities of a jury trial, is needed. This need can be met by amending the Federal Rules of Evidence.

Part II of this Article provides background and an historical discussion of the admissibility of prior consistent statements at common law. Part III examines the admissibility of prior consistent statements under the Federal Rules of Evidence, focusing on the premotive rule. Part IV describes the *Tome* case, including a discussion of the Supreme Court's majority and dissenting opinions. Part V suggests that Rule 801(d)(1)(B) should be amended, and sets forth some issues that the amendment should address.

II. THE COMMON LAW AND PRIOR CONSISTENT STATEMENTS

A. *Development of the Common-Law Rule*

Through the early 1700s, courts admitted witnesses' prior consistent statements as substantive evidence without limitation.[13] These courts reasoned that such statements effectively corroborated witnesses' in-court testimony.[14]

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12. *See, e.g.*, Robert P. Burns, *Foreword: Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision*, 85 J. CRIM. L. & CRIMINOLOGY 843 (1995); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283 (1995); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995); Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329 (1995); Christopher A. Jones, Note, *Clinging to History: The Supreme Court (Mis)Interprets Federal Rule of Evidence 801(d)(1)(B) as Containing a Temporal Requirement*, 29 U. RICH. L. REV. 459 (1995).

13. *See* 4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1123, at 254 (Chadbourn Rev. 1972); John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 446-47 (1904).

14. *See* 4 WIGMORE, *supra* note 13, § 1123, at 254.

Around 1675, common-law courts began to question the admissibility of hearsay.[15] However, common-law rules prohibiting the admission of hearsay were not prevalent until the mid-1700s.[16]

The hearsay rule's development impacted the admissibility of prior consistent statements. In the early 1700s, litigants began making hearsay objections to the admission of prior consistent statements.[17] In response, some courts began prohibiting the admission of prior consistent statements for their truth and content.[18] These courts, however, continued to allow the admission of such statements during direct testimony for independent, corroborative, nonsubstantive use, even though the witness had not yet been impeached.[19] Eighteenth-century evidence commentator Sir Geoffrey Gilbert explained the prevailing thought on the matter: although "hearsay [evidence may not be] allowed as direct evidence, . . . it may be in corroboration of a witness's testimony to show that he affirmed the same thing before on other occasions, and that the witness is still consistent with himself."[20]

In the early 1800s, litigants began objecting to prior consistent statements on additional, other-than-hearsay grounds, including relevancy.[21] These objections brought about the common-law rule that a witness's testimony could not be bolstered until the witness's credibility was attacked.[22] Courts recognized that bolstering evidence offered before impeachment provided no value.[23] Courts thus reasoned that prior consistent statements offered before impeachment were no more probative than in-court statements and were unnecessarily cumulative.[24] Indeed, most courts agreed that "a falsehood may be repeated as often as the truth."[25] Based on this analysis, courts held prior consistent statements inadmissible when offered during direct testimony, and admitted such statements only after impeachment[26] of the declarant witness's credibility, and then for

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15. *See* 5 *id.* § 1364, at 18.
16. *See* 5 *id.*
17. *See* 4 *id.* § 1123, at 254.
18. *See* 4 *id.* § 1123, at 254-55.
19. *See* 4 *id.* § 1123, at 254; 5 *id.* § 1364, at 20.
20. GEOFFREY GILBERT, THE LAW OF EVIDENCE 108 (photo. reprint, Garland Publishing, Inc. 1979) (1754). For an interesting look at Gilbert's evidentiary work, see Judy M. Cornett, *The Treachery of Perception: Evidence and Experience in* Clarissa, 63 U. CIN. L. REV. 165 (1994).
21. *See* 4 WIGMORE, *supra* note 13, § 1123, at 254.
22. *See* Graham, *supra* note 1, at 577-78; *see also* United States v. Holmes, 26 F. Cas. 349, 352 (C.C.D. Me. 1858) ("No principle in the law of evidence is better settled than" the rule that direct testimony supporting a witness's credibility "is not to be heard except in reply" to an opposing party's impeachment attempt).
23. *See* 4 WIGMORE, *supra* note 13, § 1124, at 255.
24. *See* 4 *id.*
25. *E.g.*, State v. Parish, 79 N.C. 610, 613 (1878).
26. "Impeachment" includes "attempted impeachment" as applicable throughout this discussion. What constitutes sufficient "impeachment" to satisfy the requirements of Rule 801(d)(1)(B) and the common law is beyond the scope of this Article.

only rehabilitative, and not substantive, purposes.[27] This became the accepted and prevailing common-law rule.[28]

Beginning in the mid-1900s, several commentators advocated the alteration of the hearsay rules to allow admission of a witness's prior statements as nonhearsay. Scholars taking such a position included John H. Wigmore,[29] Edmund M. Morgan,[30] Charles T. McCormick,[31] and Jack B. Weinstein.[32]

The Uniform Rules of Evidence, promulgated in 1953, and the Model Code of Evidence, promulgated in 1942, incorporated these scholars' position.[33] Rule 63(1) of the Uniform Rules of Evidence provided that prior statements were not hearsay if the declarant was present at the trial and was available for cross-examination.[34] The Model Code of Evidence contained the same provision.[35] However, this position was not well-received. Only a few jurisdictions adopted the original Uniform Rules of Evidence.[36] No jurisdictions adopted

27. *See, e.g.*, Conrad v. Griffey, 52 U.S. (11 How.) 480, 491-92 (1850); Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Stewart v. People, 23 Mich. 63 (1871).

28. *See* 4 WIGMORE, *supra* note 13, § 1124.

29. *See* 3A *id.* § 1018, at 996 (discussing self-contradiction and observing that "the whole purpose of the hearsay rule has been already satisfied"); *see also* California v. Green, 399 U.S. 149, 154-55 (1970).

30. *See* Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 (1948). Professor Morgan reasoned that "[w]hen the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. This is especially true where Declarant as a witness is giving as part of his testimony his own prior statement." *Id.*; *see also* Edmund M. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 4 (1937).

31. *See* CHARLES T. MCCORMICK, LAW OF EVIDENCE § 224, at 458 (1954); 2 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 251, at 117 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK ON EVIDENCE]; Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 575-88 (1947).

32. *See* Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 333 (1961) (describing the "practical absurdity in many instances [of] treating the out of court statement of the witness himself as hearsay").

33. The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence. *See generally Symposium on the Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479, 479-646 (1956).

The American Law Institute promulgated the Model Code of Evidence. *See* MODEL CODE OF EVIDENCE (1942). Professor Morgan served as reporter for the Model Code, while Dean Wigmore served as chief consultant. *See id.* at iii-iv.

34. The Uniform Rules of Evidence defined as nonhearsay "[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness." UNIF. R. EVID. 63(1) (1953). In 1974, the Uniform Rules of Evidence abandoned this position and generally conformed to the Federal Rules of Evidence. *See* UNIF. R. EVID. 801(d)(1) (1974).

35. *See* MODEL CODE OF EVIDENCE Rule 503 (1942). "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable to testify, or (b) is present and subject to cross-examination." *Id.*

36. *See* 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5005, at 91-92 (1977).

courts reason that admission of such statements furthers the principle of completeness promoted by Federal Rule of Evidence 106.[91] Essentially, these courts hold that the Federal Rules of Evidence impart to the trial courts great discretion to determine, under the rules of relevancy, the admissibility of prior consistent statements offered for the limited purpose of rehabilitation.[92]

Conversely, the Ninth Circuit holds that "a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all."[93] The Ninth Circuit reasoned that prior to the Federal Rules of Evidence, "prior consistent statements were traditionally *only* admissible for the limited purpose of rebutting a charge of recent fabrication or improper influence or motive."[94] Examining the legislative history, the court determined that Rule 801(d)(1)(B)'s "only effect is to admit these statements as substantive evidence."[95] Therefore, the court concluded, "it no longer makes sense to speak of a prior consistent statement as being offered solely for the more limited purpose of rehabilitating a witness."[96]

B. *The Premotive Rule Under the Federal Rules of Evidence*

The plain language of Rule 801(d)(1)(B) makes no express reference to a time-line premotive requirement. Some commentators maintain that the term "recent" embodies the premotive rule[97] while

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91. *See, e.g.*, *Andrade*, 788 F.2d at 533; *Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 400; *see also* John D. Bennett, Note, *Prior Consistent Statements and Motives to Lie*, 62 N.Y.U. L. REV. 787 (1987). Rule 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." FED. R. EVID. 106. Courts have recognized that this is "not a precise use of Rule 106." *E.g.*, *Pierre*, 781 F.2d at 333.

92. *See, e.g.*, *Engebretsen*, 21 F.3d at 729; *Pierre*, 781 F.2d at 333.

93. United States v. Miller, 874 F.2d 1255, 1273 (9th Cir. 1989); *see also* United States v. Payne, 944 F.2d 1458, 1470-71 (9th Cir. 1991); Judith A. Archer, Note, *Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule of Evidence 801(d)(1)(B)*, 55 FORDHAM L. REV. 759 (1987).

94. *Miller*, 874 F.2d at 1273 (emphasis added).

95. *Id.* (emphasis omitted).

96. *Id.* In reaching this conclusion, the Ninth Circuit quoted a treatise on the Federal Rules of Evidence:

> [T]he drafters believed (i) that the principles governing rehabilitation would remain unchanged by the Rules, (ii) that the rather specific description of circumstances of admissibility contained in Rule 801(d)(1)(B) reaches all cases in which prior consistent statements may be received to repair credibility, and consequently (iii) that this Rule permits the substantive use of every prior statement which may be received to rehabilitate a witness.

Id. at 1273 n.11 (quoting 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 420, at 195 (1980)).

97. *See, e.g.*, Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231, 246. Professor Ohlbaum reasons that:

others consider the term "recent" superfluous.[98] Moreover, none of the cases examining the premotive rule focus on the term "recent."

The Advisory Committee's note to Rule 801(d)(1)(B) is very short and makes no express reference to a premotive requirement. The note states:

> Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.[99]

Fueled in large part by this lack of explicit direction regarding the premotive rule from either Rule 801(d)(1)(B) itself or the Advisory Committee notes, federal circuit courts disagreed on whether Rule 801(d)(1)(B) embodies the premotive rule.

At the time of the *Tome* decision, the federal circuits were closely split as to this issue. The Second, Third, Fourth, Seventh, and Eighth Circuits held that postmotive prior consistent statements were inadmissible for substantive purposes but were admissible for the limited purpose of rehabilitation.[100] In adhering to the time-line

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> [T]he term "recent" . . . purposefully introduces the crucial element of the time frame during which the alleged motive to lie emerged. If improper influence or motive is the basis for the intentionally fabricated testimony, "recent" fabrication requires that the motive occur after the consistent statement was made. Thus, the phrase "recent fabrication" introduces two elements: first, with regard to "fabrication," an intentional or purposeful falsification; second, with respect to "recent," a falsification which results from a motive that developed after the statement was made.

Id. at 246-47.

98. *See, e.g.*, Graham, *supra* note 1, at 583.

99. FED. R. EVID. 801(d) advisory committee's note.

100. **First Circuit:** First Circuit case law discussing this issue is sparse. Only one First Circuit case, *United States v. Vest*, 842 F.2d 1319 (1st Cir. 1988), examines the issue. The *Vest* court determined that the prior consistent statements at issue "were made before [the declarant] acquired a motive to fabricate," and thus were admissible. *Id.* at 1330. Other prior consistent statements were made after the declarant acquired a motive to fabricate. *See id.* The court reasoned that these statements were "not hearsay at all" because they "were not 'offered . . . to prove the truth of the matter asserted.' " *Id.* (quoting FED. R. EVID. 801(c)). Thus, these postmotive statements were "not 'prior consistent statements' under Fed. R. Evid. 801(d)(1)(B)." *Id.* The First Circuit noted the split in the circuits on this issue without further elaboration in *United States v. Piva*, 870 F.2d 753, 759 n.4 (1st Cir. 1989).

Second Circuit: *See* United States v. Brennan, 798 F.2d 581, 587-88 (2d Cir. 1986) (holding prior consistent statement admissible for rehabilitation purposes even if inadmissible under Rule 801(d)(1)(B)); United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986) (same); United States v. Rubin, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring) (arguing that standards of admissibility announced in *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978), should not apply when prior consistent statements are introduced for purely rehabilitative purposes), *aff'd*, 449 U.S. 424 (1981); *Quinto*, 582 F.2d at 234 (litigant seeking to introduce prior consistent statement "must demonstrate that the . . .

statement was made prior to the time that the supposed motive to falsify arose"); *see also* United States v. Castillo, 14 F.3d 802, 806 (2d Cir. 1994) (examining the "*Pierre* exception" for rehabilitative purposes); United States v. Shulman, 624 F.2d 384, 393 (2d Cir. 1980) ("[T]he *Quinto* requirements were satisfied in this case."); *see also generally* Yvette Olstein, Comment, Pierre *and* Brennan*: The Rehabilitation of Prior Consistent Statements*, 53 BROOK. L. REV. 515 (1987) (discussing *Pierre*, *Brennan*, *Quinto*, *Rubin*, and the law of prior consistent statements in the Second Circuit).

Third Circuit: *See* United States v. Casoni, 950 F.2d 893, 904-06 (3d Cir. 1991) (whether to admit postmotive prior consistent statement is a relevancy matter; when statement is made postmotive, the statement is not relevant to rebut an implication of recent fabrication, and is therefore inadmissible for substantive purposes; however, postmotive statements offered only for rehabilitative purposes may be admissible); *see also* United States v. De Peri, 778 F.2d 963, 977 (3d Cir. 1985) (noting, but not reaching, the issue).

Fourth Circuit: *See* United States v. Henderson, 717 F.2d 135, 138-39 (4th Cir. 1983) ("[A] prior consistent statement is admissible under the rule only if the statement was made prior to the time the supposed motive to falsify arose."); *see also* United States v. Bolick, 917 F.2d 135, 138 (4th Cir. 1990). The *Bolick* court "assume[d], without deciding, that the prior consistent statements were admitted as rehabilitation and that they are not subject to the requirements of Rule 801(d)(1)(B)." *Id.* The court further noted that the Fourth Circuit "may have endorsed" the proposition that postmotive prior consistent statements are admissible for nonsubstantive purposes in *United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983). *Bolick*, 917 F.2d at 138 (citing *Parodi*, 703 F.2d at 785-86 (citing in turn *Rubin*, 609 F.2d at 66-70 (Friendly, J., concurring))); *see also* United States v. Mehra, 824 F.2d 297, 300 (4th Cir. 1987) (holding without elaboration in face of defendant's postmotive rule argument that "[a]dmission of the statement, even if erroneous, presents no grounds for reversal") (citing FED. R. CRIM. P. 52(a)); United States v. Dominguez, 604 F.2d 304, 310-11 (4th Cir. 1979) (allowing prior consistent statement for rehabilitation of impeached witness); United States v. Weil, 561 F.2d 1109, 1111 & n.2 (4th Cir. 1977) (assuming that the prior consistent statement was not made before the motive to fabricate existed).

Seventh Circuit: *See* United States v. Patterson, 23 F.3d 1239, 1247 (7th Cir. 1994) (explaining that in order to admit prior consistent statements under Rule 801(d)(1)(B), "the witness must . . . have made the statements before he had a motive to fabricate") (citing United States v. Fulford, 980 F.2d 1110, 1114 (7th Cir. 1992)); United States v. Davis, 890 F.2d 1373, 1379 (7th Cir. 1989) (to admit prior consistent statements as nonhearsay under Rule 801(d)(1)(B), "the statement must have been made before the declarant had a motive to fabricate") (quoting United States v. Monzon, 869 F.2d 338, 342-43 (7th Cir. 1989)); United States v. Harris, 761 F.2d 394, 398-400 (7th Cir. 1985) ("[The postmotive] condition need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."); *see also* Thomas v. United States, 41 F.3d 1109, 1119 n.2 (7th Cir. 1994) ("[The defendant did] not argue that he offered his prior consistent statement merely to rehabilitate his testimony on the stand, that is, not as substantive evidence. Therefore, [the court did] not address whether Fed. R. Evid. 801(d)(1)(B) would encompass the admissibility of his prior statement offered for that purpose."); United States v. Lewis, 954 F.2d 1386, 1391 (7th Cir. 1992) (setting forth four criteria, including the premotive rule, that must be met in order to admit a prior consistent statement under Rule 801(d)(1)(B)).

Eighth Circuit: *See* United States v. White, 11 F.3d 1446, 1450-51 (8th Cir. 1993) ("[T]o be admitted as substantive evidence under Rule 801(d)(1)(B), a prior consistent statement must have been made before the motive to fabricate came into existence.") (citing United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986)). The *Bowman* court had stated that "the better rule imposes a requirement that the consistent statements must come before the motive to fabricate existed"; however, the court noted, no prejudicial error was shown. *Bowman*, 798 F.2d at 338; *see also* United States v. Roy, 843 F.2d 305, 307 (8th Cir. 1988) ("*Bowman* specifically held that prior consistent statements made after the existence of a motive to fabricate are admissible for rehabilitation . . . .") (citing *Bowman*, 798 F.2d at 338); United States v. Andrade, 788 F.2d 521, 532-33 (8th Cir. 1986) (allowing F.B.I. agent's statements to "rehabilitate and support" agent following implied

premotive rule and denying the admission of postmotive prior consistent statements for substantive use, these courts reasoned that such statements are not relevant to rebut an allegation of recent fabrication.[101] These courts observed that such statements demonstrate only that the declarant said the same thing before trial as the declarant said at trial.[102] They noted that the alleged motive to fabricate existed at the time of all of these statements, and that "mere repetition does not imply veracity."[103] Some of these courts reasoned that the premotive requirement is not a literal requirement of Rule 801(d)(1)(B), but is a relevancy requirement examined under the relevancy rules.[104]

In admitting postmotive prior consistent statements for the limited purpose of rehabilitation, some of these courts reasoned that such statements are not hearsay under Rule 801 because they are not offered for the truth of the matter asserted.[105] Some courts noted that Rule 801(d)(1)(B) does not explicitly require the premotive element.[106] Courts also observed that such statements may be relevant to the declarant's credibility.[107] They explained that the statements may demonstrate the context of the impeachment evidence, and may help the jury weigh the impeachment evidence and thus determine the extent of the declarant's credibility.[108] Some of these courts also cite a "doctrine of completeness" promoted by Federal Rule of Evidence 106 in reasoning that the statements are admissible.[109]

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charge of fabrication). The *Andrade* court also noted that the *Quinto* holding was being questioned by the Second Circuit and cited Judge Friendly's concurrence in *Rubin. See id.*; *see also* United States v. Scholle, 553 F.2d 1109, 1121-22 (8th Cir. 1977) (finding that the facts did not support defendant's argument that prior consistent statements were inadmissible because they were postmotive).

101. *See, e.g., Patterson*, 23 F.3d at 1247; *Casoni*, 950 F.2d at 904; *Harris*, 761 F.2d at 399; *Quinto*, 582 F.2d at 233-34.

102. *See, e.g., Harris*, 761 F.2d at 399; *Quinto*, 582 F.2d at 234-35.

103. United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir. 1979) (quoting 4 WEINSTEIN & BERGER, *supra* note 38, ¶ 801(d)(1)(B)[01], at 801-100 (1977)); *see also White*, 11 F.3d at 1450 (quoting same).

104. *See, e.g., Casoni*, 950 F.2d at 904-05; *Harris*, 761 F.2d at 399 (citing FED. R. EVID. 402).

105. *See, e.g., Harris*, 761 F.2d at 400; United States v. Juarez, 549 F.2d 1113, 1114 (7th Cir. 1977).

106. *See, e.g.*, United States v. Parodi, 703 F.2d 768, 785 (4th Cir. 1983).

107. *See, e.g.*, United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986); *Harris*, 761 F.2d at 400.

108. *See, e.g., Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 400; *see also* GRAHAM, *supra* note 70, § 6712, at 461-63.

109. *See, e.g., Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 400; United States v. Rubin, 609 F.2d 51, 70 (2d Cir. 1979); United States v. Baron, 602 F.2d 1215, 1252 (7th Cir. 1979); *see also* United States v. Andrade, 788 F.2d 521, 533 (8th Cir. 1986) ("[T]his rehabilitative use of prior consistent statements is in accord with the principle of completeness prompted by Rule 106."); *supra* note 86 and accompanying text. *But see* Ohlbaum, *supra* note 97, at 282 & n.140 ("[T]hese courts have relied on a tortured reading of the 'rule of completeness' . . . ."). Courts, too, have noted that this is "not a precise use of Rule 106." *E.g., Pierre*, 781 F.2d at 333.

statements—postmotive prior consistent statements—are not admissible as substantive evidence under Rule 801(d)(1)(B).[124]

A. The Majority Opinion

The pertinent common-law evidentiary rule that prevailed in the United States for over a century before the enactment of the Federal Rules of Evidence was important to the Court's analysis. The majority defined the common-law premotive rule as holding that "a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made *before* the alleged fabrication, influence, or motive came into being, but it was inadmissible if made *afterwards*."[125]

In seeking to determine the effect of the Federal Rules of Evidence on the common-law rule, the Court looked to the language of Rule 801(d)(1)(B). The Court found two aspects of Rule 801(d)(1)(B)'s language especially informing: (1) the language's focus on one kind of impeachment (i.e., rebutting charges of recent fabrication or improper influence or motive), and not on other forms of impeachment; and (2) Rule 801(b)(1)(B)'s use of wording from common-law cases describing the premotive rule.[126]

The Court considered it important that the Advisory Committee did not give *all* prior consistent statements nonhearsay status.[127] It emphasized that the Advisory Committee limited the types of prior consistent statements that receive nonhearsay status to those offered to rebut only one form of impeachment: a charge of "recent fabrication or improper influence or motive."[128] This limitation, the Court found, "reinforce[s] the significance of the requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate arose."[129]

The Court reasoned that the rebuttal force of premotive prior consistent statements is very strong when introduced to rebut a

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124. *See id.* at 705.

125. *Id.* at 700 (emphasis added) (citing Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836) ("[W]here the testimony is assailed as a fabrication of a recent date . . . in order to repel such imputation, proof of the *antecedent* declaration of the party may be admitted.")); *see also* People v. Singer, 89 N.E.2d 710, 712 (N.Y. 1949). The majority also cited the treatises of Professor McCormick and Dean Wigmore. *See Tome*, 115 S. Ct. at 700 (citing MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 (2d ed. 1972); 4 WIGMORE, *supra* note 13, § 1128, at 268).

126. *See Tome*, 115 S. Ct. at 701-02.

127. *See id.* at 701.

128. *Id.* The majority noted that the Advisory Committee used "the same phrase . . . in its description of the 'traditiona[l]' common law of evidence." *Id.* (citing FED. R. EVID. 801(d) advisory committee's note).

129. *Id.* The majority rephrased this reasoning: "the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense." *Id.*

charge of recent fabrication or improper influence or motive.[130] The Court, however, explained that little rebuttal force is present when any prior consistent statement is introduced to rebut other forms of impeachment, such as character impeachment by misconduct, convictions, or bad reputation.[131] Likewise, the Court explained, little rebuttal force is present when postmotive prior consistent statements are introduced to rebut a charge of recent fabrication or improper influence or motive,[132] even though such statements may "suggest in some degree that the testimony did not result from some improper influence."[133]

The Court further reasoned that if Rule 801(d)(1)(B)'s drafters intended to permit admission of postmotive prior consistent statements—which have low rebuttal force—then there is "no sound reason" for the drafters to have expressly limited the use of prior consistent statements to rebut impeachment only when such statements have very high rebuttal force,[134] while prohibiting the use of such statements to rebut other forms of impeachment when such statements have low rebuttal force similar to the low rebuttal force of postmotive prior consistent statements.[135] The Court thus found it "clear . . . that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement."[136]

The Court found support for its analysis by observing that Congress easily could have adopted an evidentiary rule that expressly allows admission of postmotive prior consistent statements.[137] In the Court's view, its "analysis is strengthened by the observation that the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common-law cases that describe the premotive requirement."[138] It reasoned that this similarity sup-

130. *See id.* ("A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive.").

131. *See id.* ("[P]rior consistent statements carry little rebuttal force when most other types of impeachment are involved.") (citing MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 (2d ed. 1972); 4 WIGMORE, *supra* note 13, § 1131, at 293).

132. *See id.* ("[O]ut-of-court statements that postdate the alleged fabrication . . . refute the charged fabrication in a less direct and forceful way.").

133. *Id.* at 702.

134. Recall that prior consistent statements have very high rebuttal force when used to rebut impeachment by charges of recent fabrication or improper influence or motive. *See supra* note 130 and accompanying text.

135. *See Tome*, 115 S. Ct. at 702 (explaining that if there is no temporal requirement "imbedded in" Rule 801(d)(1)(B), then there is "no sound reason not to admit consistent statements to rebut other forms of impeachment as well").

136. *Id.*

137. *See id.* The majority suggested that a rule that provides that "a witness' prior consistent statements are admissible whenever relevant to assess the witness's truthfulness or accuracy" would embody the Government's theory. *Id.*

138. *Id.* at 702 (citing Ohlbaum, *supra* note 97, at 245 ("Rule 801(d)(1)(B) employs the precise language—'rebut[ting] . . . charge[s] . . . of recent fabrication or improper influence or motive'—consistently used in the panoply of pre-1975 decisions.")); *see also* Ellicott v.

ports the conclusion that Rule 801(d)(1)(B) "was intended to carry over the common-law pre-motive rule."[139]

The Court rejected the government's argument that "the common-law premotive rule . . . is inconsistent with the Federal Rules' liberal approach to relevancy."[140] It noted that because "[r]elevance is not the sole criterion of admissibility," relevant out-of-court statements may still be inadmissible.[141]

The Court also based its reasoning on the negative aspects of not having such a rule. It feared that the premotive rule's absence could shift a trial's emphasis from the in-court statements to the out-of-court statements.[142] In addition, the Court stated its belief that the absence of the premotive rule would increase the burden of the trial court, and would provide no guidance to attorneys preparing for trial or to reviewing appellate courts.[143]

Four members of the five-justice majority found their analysis "confirmed by an examination of the Advisory Committee Notes to the Federal Rules of Evidence."[144] The plurality explained: "Where, as with Rule 801(d)(1)(B), 'Congress did not amend the Advisory Committee's draft in any way, . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.' "[145] The plurality found that the Advisory Committee's notes stated a "purpose to adhere to the common law" except where expressly provided.[146] They reasoned that when the Rules departed from the common law, "in general the Committee said so."[147] The plurality found no indication from the notes "that Rule 801(d)(1)(B) abandoned the premotive requirement."[148] Moreover, the plurality asserted, the Rules demonstrate the Committee's compromise, one that the Committee stated was "more of experience than of logic,"[149]

Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Hanger v. United States, 398 F.2d 91, 104 (8th Cir. 1968); People v. Singer, 89 N.E.2d 710, 711 (N.Y. 1949).

139. *Tome*, 115 S. Ct. at 702.

140. *Id.* at 704 ("This argument misconceives the design of the Rules' hearsay provisions.").

141. *Id.*

142. *See id.* at 705.

143. *Id.* The majority noted that postmotive prior consistent statements could gain admission under Federal Rule of Evidence 803(24) if the statements met Rule 803(24)'s requirements. *See id.* Rule 803(24) is known as the "catch-all exception." *See generally* GRAHAM, *supra* note 70, § 6775; *see also infra* note 205.

144. *Tome*, 115 S. Ct. at 702. Justice Scalia did not join in Part II.B of the Court's opinion because the majority's discussion "gives effect to those Notes" as displaying "the 'purpose' or 'inten[t]' of the draftsmen." *Id.* at 706 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

145. *Id.* at 702 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 165-66 n.9 (1988)).

146. *Id.*

147. *Id.* at 702-03.

148. *Id.* at 703.

149. *Id.* at 704.

"between the views expressed by the 'bulk of the case law . . . against allowing prior statements of witnesses to be used generally as substantive evidence' and the views of the majority of 'writers . . . [who] ha[d] taken the opposite position.' "[150]

Based on this analysis, the Court overruled six of the federal circuits[151] and held that Rule 801(d)(1)(B) codified the common-law premotive rule.[152] Thus, following *Tome*, postmotive prior consistent statements are not admissible as substantive evidence under Rule 801(d)(1)(B).

B. *The Dissenting Opinion*

Four justices, in a dissent authored by Justice Breyer, expressed their disagreement with the majority opinion. The majority and dissenting opinions began from the same point—acknowledgment of the traditional common-law rule—but quickly parted company.

Although the dissent agreed with the majority's statement of the common-law rule,[153] the dissent emphasized that the reason for the premotive requirement was that postmotive prior consistent statements had "no *relevance* to rebut the charge."[154] This point of departure served as the basis for the Court's fracture in this case.

The dissent characterized the majority's holding as finding that a *hearsay*-related rule—Rule 801(d)(1)(B)—codified a common-law *relevancy* rule, and asserted that Rule 801(d)(1)(B) "has nothing to do with relevance. Rather, that Rule carves out a subset of prior consistent statements that were formerly admissible only to rehabilitate a witness."[155]

The dissent rejected the majority's premise that the Advisory Committee "singled out one category" of rehabilitative prior consistent statements for nonhearsay treatment because of the category's high probative force.[156] It pointed out that other categories also have high probative force in certain situations, including prior consistent statements used to rebut a charge of faulty memory.[157] The dissent further argued that, doubts regarding the majority's premise aside,

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150. *Id.* at 703-04 (quoting FED. R. EVID. 801(d) advisory committee's note).

151. *See supra* note 110 and accompanying text.

152. *See Tome*, 115 S. Ct. at 700.

153. *See id.* at 706 (Breyer, J., dissenting).

154. *Id.* The dissent noted that the treatises discuss the issue "under the general heading of 'impeachment and support' (McCormick) or 'relevancy' (Wigmore), and not 'hearsay.' " *Id.* at 706-07.

155. *Id.* at 707.

156. *Id.*

157. *See id.* " '[I]f the witness's accuracy of memory is challenged, it seems *clear common sense* that a consistent statement made shortly after the event and before he had time to forget, should be received in support.' " *Id.* (quoting MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 n.88 (2d ed. 1972)) (alteration in original).

respect to rehabilitation) the use of postmotive prior consistent statements to rebut a charge of recent fabrication, improper influence or motive (subject of course to, for example, Rule 403)."[179] When allowed, the dissent explained, such admission would be as substantive evidence.[180]

V. OBSERVATIONS REGARDING RULE 801(D)(1)(B) AND THE CURRENT PREMOTIVE RULE

Rule 801(d)(1)(B) of the Federal Rules of Evidence has generated considerable confusion since its enactment. Some commentators have called for the Rule's amendment and have suggested changes.[181] These commentators, however, do not provide for the admission of postmotive prior consistent statements under Rule 801(d)(1)(B).

As the *Tome* Court explained, Rule 801(d)(1)(B) codified a per se time-line premotive rule.[182] Rule 801(d)(1)(B) should be amended. Any such amendment should serve at least two purposes. First, the amendment should reject the per se time-line premotive rule and allow the admission of prior consistent statements where the statements are relevant and have value but are inadmissible under the *Tome* Court's interpretation of Rule 801(d)(1)(B). Second, the amendment should expressly provide for the admission of prior consistent statements as substantive evidence in all cases where such statements are admissible for rehabilitation.

A. *The Pitfalls of the Per Se Approach*

The overwhelming majority of common-law courts applied a per se time-line premotive rule.[183] It is important to understand, however, why a per se time-line rule developed. Courts reasoned that a consistent statement made during the time in which the witness allegedly had the same motivation that resulted in the impeached in-court statement has no rebuttal force and is thus irrelevant.[184] In the vast majority of cases, a strict time-line rule furthers this rationale. Consequently, the rule developed into a per se time-line rule because such a rule is properly determinative in the great majority of cases in which the issue of temporalness and prior consistent statements arise, and theoretically provides predictability and facilitates the decision-making process.

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179. *Id.* at 709-10.
180. *See id.* at 710.
181. *See, e.g.*, Graham, *supra* note 1; Ohlbaum, *supra* note 97.
182. *See* 115 S. Ct. at 702.
183. *See supra* note 39 and accompanying text.
184. *See supra* note 41 and accompanying text.

Common-law courts applying the rule shortly before the development and codification of the Federal Rules of Evidence sensed that something was wrong with the per se time-line premotive rule.[185] This sense had not fully developed when the Federal Rules of Evidence were enacted. As a result, Rule 801(d)(1)(B) codified, as the *Tome* Court explained, the common-law rule accepted by the vast majority of courts, including the time-line premotive requirement.[186]

Courts' wariness of the time-line premotive rule continued and expanded under the Federal Rules. Several courts applying Rule 801(d)(1)(B) before *Tome* allowed the admission of postmotive prior consistent statements as substantive evidence under the Rule in some instances.[187] Moreover, all but one of the circuits admitted postmotive prior consistent statements for the limited purpose of rehabilitation in some instances.[188]

Courts and commentators have become overly focused on a pure time-line analysis when examining prior consistent statements. While it is true that the time-line premotive rule comports to unadorned logic, in practical application the rule's per se approach can be overly restrictive.

There are situations where a postmotive prior consistent statement is relevant, has some rebuttal force or related value, and should be admissible. One such time is when a separate motive to tell the truth or to make a different statement exists at the statement's making. Consider a situation where the declarant has been impeached by a charge of improper influence or motive arising at a particular time. Normally (and logically), a statement that is made after the time the improper influence or motive arose and is consistent with the declarant's in-court testimony offers no rebuttal value and is irrelevant. However, if the postmotive prior consistent statement is made when a separate motive to tell the truth or to make a different statement exists, the postmotive prior consistent statement may offer some rebuttal force. The *Tome* dissent provided examples of this situation:

> A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances also make clear to the speaker that

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185. *See, e.g.*, United States v. Gandy, 469 F.2d 1134, 1134-35 (5th Cir. 1972); Hanger v. United States, 398 F.2d 91, 104-05 (8th Cir. 1968); Copes v. United States, 345 F.2d 723, 725-26 (D.C. Cir. 1964); *see also* United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957).

186. *See* 115 S. Ct. at 702.

187. *See supra* notes 110-20 and accompanying text.

188. *See supra* notes 100-09 and accompanying text. The Ninth Circuit reasoned that prior consistent statements are admissible as substantive evidence or not at all. *See supra* notes 93-95, 110, 116-20 and accompanying text. However, the Ninth Circuit allowed postmotive prior consistent statements for substantive use in certain situations. *See* United States v. Miller, 874 F.2d 1255, 1274 (9th Cir. 1989).

> only the truth will save his child's life. Or, suppose the postmotive statement was made . . . when the speaker's motive to lie was much weaker than it was at trial.[189]

The dissent explained that "[i]n these and similar situations, special circumstances may indicate that the prior statement was made for some reason other than the alleged improper motivation; it may have been made not because of, but despite, the improper motivation."[190]

If a motivation to tell the truth or to make a different statement at the time the prior consistent statement was made appears greater than or equal to the strength of the improper influence or motivation charged at the statement's making, the prior consistent statement may have some rebuttal force or related value, may be relevant, and should be admissible. Any amendment to Rule 801(d)(1)(B) should provide for this situation. A jury is fully capable of making this assessment and should be permitted to do so.

Another situation where a postmotive prior consistent statement is relevant, has some rebuttal force or related value, and should be admissible, is when the charged motive is contextually weak. For example, consider a situation where a criminal defendant alleges that a large number of police officers are conspiring to frame the defendant. The defendant impliedly charges that the officers are lying on the stand about their investigation, and charges that the improper motivation arose as soon as each officer arrived on the crime scene. Should such a charge prevent the officers from being rehabilitated by showing that they made prior consistent statements from the beginning of their investigation? Would not their consistency tend to show the absence of such a conspiracy even though the prior consistent statements were made after the alleged conspiracy began?

Still another example where the charged motive may be contextually weak and the postmotive prior consistent statement would have some rebuttal force or related value was cited by the *Tome* dissent: postmotive statements made spontaneously.[191] Circumstances may reveal that any alleged effect of the charged motive on the declarant was greatly weakened by the reliability evidenced by the statement's spontaneity. The statement could serve to rebut a charge of improper motive and its admissibility should be determined in context.

There are other situations where postmotive prior consistent statements may have some value and should be admissible. A declarant's ability to tell a complicated or unique story more than once

189. 115 S. Ct. at 708 (Breyer, J., dissenting).
190. *Id.*
191. *See id.*

may, in some instances, indicate reliability and be relevant. Child sex-abuse cases are one example of this situation. A young child's postmotive description of the details of sexual abuse can offer some value and indicate that the child is not fabricating the story. A jury is able to weigh these possibilities in context and should be allowed to do so.

In addition, in a situation when a witness testifies as to his or her own prior consistent statement, the jury's ability to view the witness testifying offers more than the statement itself. It gives the jurors another opportunity to observe the witness and judge the witness's credibility.

It is important to note that in most cases, postmotive prior consistent statements will be inadmissible under the relevancy rules for the reasons originally noted by courts developing common-law evidentiary rules.[192] The suggestions made in this Article will not change the result in the vast majority of situations, but will refocus the inquiry regarding the admission of prior consistent statements where it belongs—on relevancy.

An argument can be made that anything but a time-line rule leaves some uncertainty in the parties' pre-trial preparation. However, this potential uncertainty does not outweigh the need to allow the jury to consider relevant matters. Moreover, rejecting the time-line rule would leave no more uncertainty than is present with the current rule. The parties cannot know exactly how the court will rule in regard to relevancy or the premotive or postmotive status of a prior consistent statement. This is particularly evident in the many co-defendant-turned-state's-evidence cases. Whether the trial court will find that the co-defendant's motive arose when he or she was first approached by the government, after a deal was put on paper, or at some other time, seems nearly impossible to predict ahead of the ruling.[193] Similarly, witnesses' uncertainty of dates and wavering testimony will often leave pre-trial predictions on the admissibility of a prior consistent statement difficult.

The per se premotive rule also results in administrative problems that hamper the fact-finding process. Sometimes, a trial judge may find that the motive arose and the prior consistent statement was made on particular dates when a different fact-finder could reasonably choose different dates. This results in a trial judge sometimes finding a prior consistent statement to be made postmotive when a jury could reasonably find it to be made premotive, or vice-versa. Prior consistent statements that may rehabilitate should not be excluded in such circumstances. This situation could be rectified

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192. *See supra* Part II.

193. *See infra* notes 195-99 and accompanying text.

by using the Second Circuit's *Grunewald* standard: If it is "reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them."[194] This standard acknowledges that the determination of a prior consistent statement's admissibility is often too crucial to deprive the jury of weighing the statement and determining its value when reasonable minds could differ on the timing of events. Although the use of this rule would be a step in the right direction, it is not enough to solve the numerous other problems with the per se premotive rule.

Additionally, it is often difficult for the trial court to pin down the date when a charged improper influence or motive arose or the date when a statement was made. Frequently, and particularly in criminal drug trials, witnesses cannot remember even the month in which a particular event occurred. Evidence concerning when an improper influence or motive arose and when a particular prior consistent statement was made may be scant. The trial judge should be free to allow the jury to weigh the evidence under all the circumstances without being bound by a restrictive time-line rule.

These problems with the per se time-line rule have, on occasion, resulted in some legal gymnastics on the issue of when a motive arose. For example, in *United States v. Henderson*,[195] the defendant impeached the government's informant by charging that the informant fabricated his allegations against the defendant in return for leniency.[196] On redirect, the trial court admitted the informant's prior consistent statements made after arrest but before the informant and the government reached a plea agreement.[197] On appeal, the defendant argued that such admission was error. The Fourth Circuit rejected the defendant's argument. The court reasoned that the defendant's argument "effectively swallows the rule with respect to prior consistent statements made to government officers: by definition such statements would never be prior to the event of apprehension or investigation by the government which gave rise to a motive to falsify."[198] The court explained that "[s]uch a result also would render superfluous our [previous] distinction . . . between statements made to police after arrest but before a bargain and statements made after an agreement is reached. We decline to so eviscerate Rule 801(d)(1)(B)."[199] Thus, the arrestee-declarant's prior consistent

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194. United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957); *see supra* note 43 and accompanying text.

195. 717 F.2d 135 (4th Cir. 1983).

196. *See id.* at 138.

197. *See id.*

198. *Id.* at 139.

199. *Id.* (citations omitted).

statements made after arrest but before the government and the arrestee-declarant reach a plea agreement are admissible under the *Henderson* rule, while such statements made post-agreement are not.

In many cases, it is doubtful that a motive to fabricate suddenly changes upon the signing of an agreement. It seems much more likely that the motive to fabricate was the same before and after the agreement. In such instances, a pre-agreement (or premotive per *Henderson*) prior consistent statement offers little that a post-agreement (or postmotive) prior consistent statement does not. The parties, and the jury, would be better served if the court could consider the admissibility of a proffered prior consistent statement in relation to all of the circumstances of the particular case.

When considering the admissibility of prior consistent statements, courts' attention should be directed toward the charged motive, its context, and *all* of its characteristics, not merely the motive's alleged birthday. When the characteristics and context of a prior consistent statement, including a postmotive prior consistent statement, indicate that the statement is relevant to the juries' consideration of a witness's credibility, or to other relevant issues, the statement should be admissible.

B. *Admissibility of Prior Consistent Statements Outside of Rule 801(d)(1)(B)*

Any amendment to Rule 801(d)(1)(B) also should clarify the question of the admissibility of prior consistent statements outside of Rule 801(d)(1)(B). This is particularly important because, before *Tome*, all circuits but the Ninth Circuit held postmotive prior consistent statements admissible for the limited purpose of rehabilitation. Many of these courts explained that Rule 801(d)(1)(B) did not govern such statements.

Some commentators and the Ninth Circuit reason that the drafters of the Federal Rules meant to provide that prior consistent statements are admissible under Rule 801(d)(1)(B) or not at all.[200] Of course, statements that are not offered for the truth of the matter asserted are not hearsay by definition. Thus, logically, there would be no reason to seek the admission of a statement offered merely for rehabilitation purposes—and not for the truth of the matter asserted—under Rule 801(d)(1)(B). Absent a desire to use the statement substantively, there would be no reason to seek to classify as nonhearsay under Rule 801(d)(1)(B) a statement that is already outside the definition of hearsay. Therefore, the admission of such a statement

200. *See supra* notes 93-96 and accompanying text.

would be governed by the relevancy rules. It would seem that Rule 801(d)(1)(B), part of Article VIII—the hearsay rules—would play no part in the calculus. The circuits allowing the admission of prior consistent statements offered for the limited purpose of rehabilitation without reference to Rule 801(d)(1)(B) follow the logical path provided by the Federal Rules.

Any indication that *Tome* provides in relation to the question of whether postmotive prior consistent statements offered for the limited purpose of rehabilitation are admissible is dictum in the classic sense. It was not necessary for the Supreme Court to decide this question to reach its decision in *Tome*. The prior consistent statements at issue in *Tome* were admitted by the trial court as nonhearsay under Rule 801(d)(1)(B). The statements were not offered for the limited purpose of rehabilitation. The government's brief explained that "[t]his case does not require the Court to decide whether a premotive rule also applies to prior consistent statements that are not admitted as substantive evidence, but are used merely to rehabilitate a witness."[201] Moreover, the *Tome* opinion clearly states that "[o]ur holding is confined to the requirements for admission under Rule 801(d)(1)(B)."[202]

After *Tome*, there are two possible scenarios regarding the admission of prior consistent statements. The first is that premotive prior consistent statements are admissible as substantive evidence, while postmotive prior consistent statements are not admissible for *any* purpose. As explained above, this situation is unsatisfactory. The second scenario is that premotive prior consistent statements are admissible as substantive evidence, while postmotive prior consistent statements are admissible for the "limited purpose of rehabilitation." This, too, is an unsatisfactory situation.

Distinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning. Juries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use. This is likely a large part of the reason that the drafters of Rule 801(d)(1)(B) provided that evidence that meets the Rule's requirements is admissible substantively.

It makes little sense to differentiate prior consistent statements with a cumbersome time-line rule in regard to the statements' admission as substantive evidence while also allowing the admission of statements rejected by such a rule when juries normally do not make such differentiations. Experience shows that jurors are adept at determining the *weight* to be given to a witness's testimony and can

201. Respondent's Brief at 45 n.24, *Tome* (No. 93-6892).
202. 115 S. Ct. at 705.

easily recognize the interest a witness has in the matter about which he or she testified, including any motive that could affect the witness's credibility. In recognition of this, the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence. The weight given these statements would then be for the jury to determine. Amending Rule 801(d)(1)(B) to account for the issues raised herein would alleviate the concern over substantive versus limited rehabilitative use of prior consistent statements, eliminate the often misunderstood limiting instruction, and make the Rule compatible with the realities of a jury trial.

Courts have cited other evidence rules in allowing the admission of postmotive prior consistent statements. Several courts cite Rule 106 to account for a "completeness" admission of prior consistent statements.[203] Courts have recognized that this is not a precise use of Rule 106.[204] Indeed, it appears that this is not a contemplated use of Rule 106 at all. However, the admission of a prior consistent statement to clarify a self-contradiction is often a practical necessity of trial. Such statements should not be forced through the back door of Rule 106, but should be explicitly recognized as admissible when relevant.

As the *Tome* Court noted, postmotive prior consistent statements, even though not admissible under Rule 801(d)(1)(B), may be admitted substantively under Rule 803(24)[205] if the statements meet Rule 803(24)'s requirements.[206] Although this avenue is available, Rule 803(24) does not address the issues raised above. Moreover, it is often difficult to meet all of Rule 803(24)'s requirements,[207] and such

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203. *See supra* note 109 and accompanying text.

204. *See supra* note 109 and accompanying text.

205. Rule 803(24) provides that:

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

FED. R. EVID. 803(24).

206. *See* 115 S. Ct. at 705; *see also* United States v. Obayagbona, 627 F. Supp. 329, 340-41 (E.D.N.Y. 1985); United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976); Arizona v. Huerta, 826 P.2d 1210, 1212-14 (Ariz. Ct. App. 1991); Arizona v. Thompson, 805 P.2d 1051, 1053-55 (Ariz. Ct. App. 1990); *see generally* Arthur H. Travers, Jr., *Prior Consistent Statements*, 57 NEB. L. REV. 974, 998-1002 (1978).

207. *See generally* GRAHAM, *supra* note 70, § 6775.

requirements are usually unnecessary when addressing the admissibility of postmotive prior consistent statements. For example, Rule 803(24)'s notice requirement is normally superfluous in such a situation because an opposing litigant knows that if a charge of recent fabrication or improper influence or motive is made, prior consistent statements may be admissible. In addition, the notice requirement of Rule 803(24) would require the proponent of a postmotive prior consistent statement to anticipate the opponent's impeachment of the declarant with a charge of recent fabrication or improper influence or motive. Because some courts may continue a trial in recognition of Rule 803(24)'s notice requirement when a party seeks to use the rule and has not notified the opposing party before trial, the use of Rule 803(24) in this situation could result in needless delay.[208]

A charge of recent fabrication or improper influence or motive is a serious charge reflecting unfavorably on its recipient. The charging party is aware that such a charge can open the door to relevant prior consistent statements that meet the requirements of Rule 801(d)(1)(B). Once that party has opened the door in this manner, there is no convincing reason not to admit, as substantive evidence, prior consistent statements that have some value to the jury from a practical standpoint and that meet the relevancy rules' requirements.

VI. CONCLUSION

Federal Rule of Evidence 801(d)(1)(B) is overly restrictive in regard to the admission of prior consistent statements in many instances. The primary example of this problem is the focus of this Article: postmotive prior consistent statements. Such statements, on occasion, are relevant and offer sufficient value to warrant their admission. Nevertheless, Rule 801(d)(1)(B), as interpreted by the Supreme Court in *Tome v. United States*, provides a per se prohibition on such statement's admission as substantive evidence. Rule 801(d)(1)(B) should be amended to allow the admission of a prior consistent statement as substantive evidence in instances where the statement is relevant and valuable, but is inadmissible under the current Federal Rules of Evidence after *Tome*.

The issue of the admissibility of prior consistent statements has long been recognized as "perplexing."[209] Much of the confusion arises from conflict between the theoretical and the practical approaches to the issue. This tension must be recognized and reconciled or the is-

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208. *See id.* § 6775, at 744-47. Rule 803(24)'s other requirements are similarly unnecessary and overburdensome in this situation.

209. 41 L.R.A. (N.S.), *supra* note 1, at 858.

sue will remain a puzzle. An amendment to the Federal Rules of Evidence addressing the several observations discussed in this Article would serve to clarify the admissibility of prior consistent statements and to further the goals of the Federal Rules of Evidence.

on the ground that the witness is in essence repudiating the prior statement by taking refuge in a lack of memory; and (2) bona fide memory loss, which precludes the use of a prior statement on the ground that it is not inconsistent with a subsequent loss of memory.[26] Thus, in a case like *Owens*, where the witness' memory loss was clearly bona fide (he had been hit over the head with a lead pipe), a prior statement of the witness would not be admissible under Rule 801(d)(1)(A): The witness *would* be subject to cross-examination within the meaning of *Owens*, but the prior statement *would not* be inconsistent with any in-court testimony that the witness would provide. However, if the previous statement was a prior identification, as was the case in *Owens*, it would be admissible under Rule 801(d)(1)(C), because that Rule contains no requirement that the prior statement be inconsistent with the subsequent testimony; and even the forgetful witness would be "subject to cross-examination" within the meaning of the Rule, for reasons already discussed.

Prior consistent statements that are nonhearsay

Subdivision (d)(1)(B) of Rule 801 covers the substantive use of prior consistent statements. Such statements are admissible at common law to rebut an express or implied charge of recent fabrication on the part of a witness. It is interesting to note that under the House version of the Rule, a prior consistent statement could be introduced for its truth whether or not it was given under oath, although in common-law jurisdictions, prior consistent statements and prior inconsistent statements receive similar treatment in that both are excluded when offered for their truth. The Senate version tracked the common law.

Why did the House want to differentiate? The answer lies in practical aspects of testimony. Once a witness testifies and an attack is made on the witness' credibility, if the cross-examiner manages to impeach the witness or to break down the witness' story, it is likely that any prior consistent statement will fall with it. If the trial testimony is rejected as unbelievable by the trier of fact, an identical out-of-court statement also will be rejected.

Contrast this with the situation where a prior inconsistent statement is introduced. The party offering the prior statement hopes that the trial testimony will be disbelieved and that the inconsistent statement will be accepted as true. Here, it is only when trial testimony fails that the inconsistent statement will be used as substantive evidence. Because the party offering an inconsistent statement as substantive evidence wants the trier of fact to accept it as true, and in preference to trial testimony, arguably greater circumstantial guarantees of trustworthiness should be required than in the case of consistent statements.

The Conference compromise rejects common-law uniformity, which would have been provided by the Senate version, and apparently accepts the arguments for differentiation. Thus, prior consistent statements are, in one respect, more readily admissible than inconsistent statements. Consistent statements need not have been made under oath or in a pro-

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26. See, e.g., United States v. Bigham, 812 F.2d 943 (5th Cir. 1987) (feigned memory loss is inconsistent with a prior statement); United States v. DiCaro, 772 F.2d 1314, 1321 (2d Cir. 1985) ("[P]articularly in a case of manifest reluctance to testify, if a witness has testified to certain facts before a grand jury and forgets them at trial, his grand jury testimony falls squarely within Rule 801(d)(1)(A)."), *cert. denied*, 475 U.S. 1081 (1986); United States v. Balliviero, 708 F 2d 934 (5th Cir.) (faulty memory is not inconsistent with a previous statement), *cert. denied*, 464 U.S. 939 (1983).

ceeding. On the other hand, the distinction between substantive use and impeachment use is much less significant for prior consistent statements than it is for prior inconsistent statements. With prior consistent statements, the substance of the statement is already before the factfinder by way of the witness' in-court testimony. Consequently, an error in either admitting or excluding a statement for its truth under Rule 801(d)(1)(B) is more likely, though not certain, to be harmless.[27]

Limitation on use of prior consistent statements

Rule 801(d)(1)(B) limits substantive admissibility of consistent statements to cases in which some suggestion is made that the witness has fabricated testimony or has been the subject of undue influence. The reason for this restriction is that consistent statements are easily manufactured prior to trial and thus are often not very probative of truthfulness. A witness could lie or distort facts on several occasions as easily as on one. However, once the suggestion is made that trial testimony is fabricated or that the witness has been unduly influenced, consistent statements made prior to the time when there was a motive for the witness to lie or the influence was likely are especially probative and are admissible under Rule 801.[28]

Prior consistent statements might also be useful for purposes other than to rebut a charge of fabrication or bad motive. For example, if the witness is charged with a bad memory, a statement by the witness made near to the event and consistent with the in-court testimony tends to rebut the charge. Rule 801(d)(1)(B), however, provides for substantive admissibility *only* when the prior consistent statement rebuts a charge of fabrication or bad motive. If the prior consistent statement is used for any other rehabilitative purpose, it may be admitted only as proof of the witness' credibility, and not as substantive evidence.

Timing of a prior consistent statement and use for rehabilitation, not for truth

At one time, there was dispute among the Courts about whether a statement can be admissible for its truth under Rule 801(d)(1)(B) when the witness is attacked for having a motive to falsify and the prior consistent statement was made *after* the motive to falsify arose. The Supreme Court resolved this dispute in *Tome v. United States*, 513 U.S. 150

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27. See, e.g., United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993) (the defendant's defense to a drug charge was that he was luring drug dealers to Florida in order to turn them in to the authorities; at trial, the government argued that the defense was an afterthought; the defendant had made a statement prior to his arrest that was consistent with his defense; the Trial Court excluded the statement, and the Court of Appeals found this to be error; the statement was admissible as a prior consistent statement to rebut a charge of recent fabrication; but the error was harmless, because the defendant had testified to his version of the events); United States v. White, 11 F.3d 1446 (8th Cir. 1993) (prior consistent statement was improperly admitted for its truth because it preceded the witness' motive to fabricate; but the error was harmless because the statement was "duplicative" of the witness' in-court testimony).

28. See, e.g., United States v. Barrett, 937 F.2d 1346 (8th Cir.) (consistent statement of the complainant, made before any motive to falsify arose, was held properly admitted for its truth under Rule 801(d)(1)(B)), *cert. denied*, 502 U.S. 916 (1991); United States v. Payne, 944 F.2d 1458 (9th Cir. 1991) (prior consistent statements were properly admitted for their truth, to show that the complainant's alleged motive to fabricate was largely speculative), *cert. denied*, 503 U.S. 975 (1992).

(1995). The defendant in *Tome* was tried for sexual abuse of his young daughter. At trial, the daughter implicated the defendant, basically by answering yes or no to a series of leading questions. On cross-examination, defense counsel asked 348 questions, many of which were background questions, some of which concerned her allegations of abuse, and some of which were designed to show that the daughter preferred living with her mother to living with her father. The daughter refused to answer many of the questions. The prosecution then called six witnesses, each of whom testified that the daughter had made statements to them accusing the defendant of sexual abuse. The Tenth Circuit held that all of these statements were properly admitted for their truth under Rule 801(d)(1)(B).[29]

It should be noted that the Court of Appeals in *Tome* had rejected the defendant's argument that there was no charge of recent fabrication or improper motive that would trigger the necessity of introducing prior consistent statements. The Court stated that "the defense's questions on cross-examination clearly implied that A.T. had fabricated the allegations of abuse out of a desire to live with her mother." By getting her to express her opinion about where she would rather live, defense counsel "attacked more than her general credibility or memory." The Court of Appeals was clearly correct in its assertion that a charge of fabrication or improper motive can be made implicitly as well as explicitly. Of course, not every attack on credibility opens the door for rehabilitation with prior consistent statements; for example, if the witness is attacked for having an untruthful character, he cannot be rehabilitated with prior consistent statements because such statements do not respond to the attack that the witness has a character trait for lying. But if there is an implicit attack on the witness' motivation, the party who sponsors the witness should be permitted a response.[30] The Supreme Court did not grant certiorari as to this aspect of the decision in *Tome*.

The Tenth Circuit had also rejected Tome's argument that the girl's consistent statements should not have been admitted because they were made at a time when she had the desire to live with her mother, i.e., they were made subject to the same motive to falsify as existed at the time the witness testified. The Court was of the opinion that Rule 801(d)(1)(B) does not require that a statement predate the charged motive to fabricate before it can be admissible. It reasoned that a "pre-motive" limitation on the Rule would be too broad, because "it is simply not true that an individual with a motive to lie will always do so." The Court of Appeals opted for a case-by-case approach which evaluated whether, "in light of the potentially powerful motive to fabricate, the prior consistent statement has significant probative force bearing on credibility apart from mere repetition." Here the Court found that the charged motive was "not particularly strong" and that the child's statements were "spontaneous" and not coached. Hence they were, in the Court's view, properly admitted for their truth under Rule 801(d)(1)(B).

It is this ruling in *Tome* on which the Supreme Court granted review. In an opinion by Justice Kennedy for five Justices, the Court held that a prior consistent statement is not

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29. United States v. Tome, 3 F.3d 342 (10th Cir. 1993).

30. See, e.g., Gaines v. Walker, 986 F.2d 1438 (D.C. Cir. 1993) (a charge of fabrication is not made merely because counsel points out inconsistencies in the witness' testimony; but where counsel argues that an officer made up a charge after the fact, this amounted to an allegation of fabrication that could be rebutted by a consistent statement).

Timing of a prior consistent statement and use for rehabilitation, not for truth (cont'd)

admissible for its truth under Rule 801(d)(1)(B) unless the statement was made *before* the charged fabrication or improper influence or motive arose. Because of this temporal limitation, the daughter's consistent statements in *Tome* could not be admitted as proof that the defendant abused her.

Justice Kennedy relied heavily on the common-law rule, under which prior consistent statements were not admissible to rebut a charge of recent fabrication or improper motive unless they were made before the fabrication or motive to falsify arose. According to Justice Kennedy, the drafters of the Federal Rules intended to preserve the common-law timing requirement. He based this conclusion on several factors: (1) the "somewhat peculiar language" of Rule 801(d)(1)(B) tracked the language concerning prior consistent statements in common-law cases, thus implying an intent to carry over the common-law timing rule; (2) the Notes by the Advisory Committee which initially drafted the Federal Rules "disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary" and there is no indication in the Notes of an intent to abrogate the common-law pre-motive requirement with respect to prior consistent statements; (3) the common-law Courts uniformly adhered to the pre-motive requirement, and "with this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement]"; (4) imposing a pre-motive requirement on prior consistent statements was consistent with the Advisory Committee's generally cautious approach to such statements, or, as the Court put it, the Committee's "stated unwillingness to countenance the general use of prior prepared statements as substantive evidence."

It is odd that the *Tome* Court relied so heavily on the common law in finding a pre-motive requirement in Rule 801(d)(1)(B). The common-law rule concerned admissibility of prior consistent statements solely to rehabilitate the credibility of a witness. The common law did not provide that such statements could be admitted for their truth. So it is clear that the Advisory Committee *did* intend to change the common-law rule, in a rather fundamental way. This certainly diminishes the strength of the majority's argument that the Advisory Committee was wedded to the common-law pre-motive requirement.

While the Court's reliance on the common law provides a weak basis for its decision, this does not mean that the Court was wrong to impose a pre-motive requirement for prior consistent statements offered as substantive evidence. Justice Kennedy was clearly correct in his assertion that a pre-motive requirement was implicit in Rule 801(d)(1)(B). Such a construction is required in order to make sense out of the categories of prior consistent statements that could qualify for substantive admissibility under the Rule. The Rule states that only those prior consistent statements that are offered to rebut a charge of fabrication, motive, or influence can be used substantively — i.e., for the truth of the statement as opposed to use for rehabilitation of a witness' credibility. But many prior consistent statements could be offered for other kinds of rebuttal. If the drafters of the Federal Rules did not intend to impose a pre-motive requirement, then there would have been no need to carve out those statements offered to rebut a charge of fabrication, motive, or influence for special substantive treatment. It is only the pre-motive requirement that distinguishes prior consistent statements offered to rebut a charge of fabrication, motive, or influence from all other consistent statements. As Justice Scalia put it in his

concurring opinion: "Only the premotive-statement limitation makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks."

The strongest support for the *Tome* Court's adoption of the pre-motive requirement is a policy argument: it is best, with respect to prior consistent statements, to have a bright-line rule that tends to limit their admissibility. If Trial Judges are allowed to admit prior consistent statements whenever they are merely relevant to rebut an express or implied charge of fabrication, improper motive, or influence, the opponent of the evidence — often a criminal defendant as in *Tome* — will be subject to all manner of bolstering statements of adverse witnesses. The case will often be decided on the basis of the witness' hearsay rather than on the witness' in-court testimony. As Justice Kennedy put it: "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

Tome itself was a case in point. In response to what the Lower Courts found to be a "weak" charge of improper motive — that the child fabricated her testimony so that she could remain with her mother — the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount the girl's detailed out-of-court statements to them. Because these statements were made at a time when the witness had the same motive to fabricate that she allegedly had at trial, they were not very relevant to rebut the charge of fabrication — assuming they were relevant at all. Notably, at closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive. The "rehabilitation" was really a smokescreen for bringing hearsay in front of the jury.

The risk of an unbridled use of Rule 801(d)(1)(B) is therefore that the Trial Court may play fast and loose with principles of relevance. This danger is reflected in Justice Breyer's dissenting opinion, in which he argued for a flexible, relevance-based approach to the admissibility of prior consistent statements, rather than a rigid pre-motive requirement. And yet, when assessing whether the statements offered against *Tome* at trial were even relevant to rebut the weak charge of fabrication, Justice Breyer punted. He found "no reason to reevaluate this factbound conclusion" of the Trial Court. The majority, aware of the fact that prior consistent statements that post-date a motive are almost always irrelevant as rebuttal evidence at any rate, and unwilling to leave the question of relevance to possible Trial Court abuse, chose the proper result — a bright-line, pre-motive requirement for admissibility.

It is important to remember that the Court in *Tome* did not hold that the pre-motive requirement must always be satisfied before prior consistent statements may even be heard by the factfinder. Prior consistent statements can be introduced for *credibility* purposes, to rehabilitate a witness, whenever they are responsive to an attack on credibility. One such situation is where the consistent statement is offered to explain or to clarify an inconsistent statement introduced by the adversary.[31] If the witness claims, for example, that the apparently inconsistent statement was taken out of context, he can explain the

31. See, e.g., United States v. Brennan, 798 F.2d 581 (2d Cir. 1986) (prior statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)").

context, which may include statements consistent with his testimony. Rule 801 is not needed to justify such an explanation. The evidence is relevant under Rule 401 and admissible under Rule 402 to rehabilitate the witness' credibility.[32] As the Court stated in *United States v. Harris*, 761 F.2d 394 (7th Cir. 1985), the general principle set forth in Rule 801(d)(1)(B) — i.e., "the motive to fabricate must not have existed at the time the statements were made or they are inadmissible" — "need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."

However, to be admitted *substantively*, in the absence of some other hearsay exception, a prior consistent statement must be relevant to rebut a charge of recent fabrication or improper influence or motive. Where a consistent statement is admissible for other, rehabilitation purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence under Rule 801(d)(1)(B), the adversary is entitled to a limiting instruction as to the appropriate use of the evidence.[33]

Perhaps the distinction just made — between consistent statements offered solely for rehabilitation and those offered under the Rule as substantive evidence to rebut a charge of recent fabrication or improper influence or motive — is an insubstantial one. Since consistent statements are identical to trial testimony, an instruction that some of them should not be considered for their truth is, as stated above, unlikely to be understood by a jury. A line between substantive and rehabilitative use of these statements may well be of little use. Yet this is the line drawn by the Rule, which carves out only certain prior consistent statements for substantive use: those that rebut a charge of recent fabrication or improper influence or motive. And most importantly, the *Tome* pre-motive requirement assures that many prior consistent statements — those made to rebut a charge of fabrication or motive and yet which post-date the motive — will not be admissible *at all*, either substantively or for impeachment purposes. This will help to ensure that the jury decides

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32. See, e.g., United States v. Pierre, 781 F.2d 329 (2d Cir. 1986):

> When the prior statement tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony, its use for rehabilitation purposes is within the sound discretion of the trial judge. Such use is also permissible when the consistent statement will amplify or clarify the allegedly inconsistent statement.

See also United States v. Parodi, 703 F.2d 768 (4th Cir. 1983) ("proof of prior consistent statements of a witness whose testimony has been allegedly impeached may be admitted to corroborate his credibility whether under Rule 801(d)(1)(B) or under traditional federal rules, irrespective of whether there was a motive to fabricate.").

33. See, e.g., United States v. Castillo, 14 F.3d 802 (2d Cir.) (a prior consistent statement can be offered to rehabilitate the witness' credibility, even though it is not admissible under Rule 801(d)(1)(B); however, a limiting instruction must be given and the prosecutor cannot abrogate "the court's limiting instructions by improperly arguing the truth of the hearsay testimony" during opening and closing arguments"), *cert. denied*, 513 U.S. 829 (1994); United States v. White, 11 F.3d 1446 (8th Cir. 1993) (although rehabilitative statements "were admissible when accompanied by a limiting instruction," they were not admissible for their truth under Rule 801(d)(1)(B) because they did not precede the witness' motive to fabricate; the Trial Court therefore erred in admitting the statements without a limiting instruction; but the error was harmless since the prior consistent statements were "duplicative" of the witness' testimony at trial).

the case on the basis of testimony at the trial rather than on prior statements of witnesses.[34]

Identifications

As proposed by the Advisory Committee and approved by the House, Rule 801(d)(1)(C) established that an identification of a person made after perceiving him[35] is not hearsay if the person making the identification is available to testify at the trial or hearing. While such identifications are certainly hearsay, there was a belief that they are more reliable than in-court identifications. The Senate objected to the proposed Rule, and it was deleted. But in 1975, an amendment restored the provision. Interestingly, the Senate concluded upon further reflection that its initial concern that prior identifications are too weak to support a conviction "appears misdirected," since the language does not cover the "weight" to be given the evidence and "all hearsay exceptions" (technically this is an exemption rather than an exception) allow into evidence statements that may not have been made under oath (except former testimony). Moreover, the identifying witness must be available for cross-examination. Finally, the Senate noted that the earlier in time the identification takes place, the more likely it is that memory problems will be avoided.

Although we support the amendment, we believe that the prospect that prior identifications will be admissible as substantive evidence should lead the Supreme Court to reconsider *Kirby v. Illinois*, 406 U.S. 682 (1972), *United States v. Ash*, 413 U.S. 300 (1973), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), and to require greater care in the conduct of identification procedures. Unfortunately, there is no evidence of a judicial inclination toward requiring better procedures.[36] In fact, in *United States v. Owens*, discussed *supra*, the Court referred with apparent approval to the Advisory Committee's belief that use of out-of-court identifications was to be fostered rather than discouraged, and held that a witness who had no memory of his identification was nonetheless subject to cross-examination about it within the meaning of the Rule.

In our discussion of Rule 801(d)(1)(A), *supra*, we offered a hypothetical bank robbery case. It is helpful to return to it again here. If an eyewitness, who told the police after the robbery that "Frank Smith robbed me," testifies at trial that "Frank Smith was not present at the time of the robbery," is the prior statement admissible under (C) if it is not made under oath in a proceeding, as required under (A)? What is a recent identification for purposes of (C)? Certainly, if the witness picked out Frank Smith's picture as that of the robber and later denied at trial, under oath, that Smith was the culprit, the identification

34. See, e.g., United States v. Forrester, 60 F.3d 52 (2d Cir. 1995) (reversing a defendant's cocaine convictions, in part because a prior statement of a government witness was erroneously introduced; defense counsel asserted that a cooperating witness was making up her story; a consistent statement made by the witness after her arrest was not admissible because the witness' motive to fabricate arose as soon as she was arrested, thus the consistent statement post-dated the motive to falsify).

35. The language "after perceiving him" is superfluous and probably is the result of having been included in other drafts that contained slightly different language from that found in the Rule.

36. For a discussion of the constitutional limitations on pretrial identification evidence, see S. SALTZBURG & D. CAPRA, AMERICAN CRIMINAL PROCEDURE, ch. 4 (5th ed. 1996).

RULE 801(d)(1)(B) — STATEMENTS WHICH ARE NOT HEARSAY — PRIOR STATEMENT BY WITNESS — CONSISTENT

Anticipating impeachment

Ross v. Saint Augustine's College, 103 F.3d 338 (4th Cir. 1996): After the plaintiff gave testimony against the defendant in a reverse-discrimination suit, her fortunes as a student changed radically, causing psychological injury necessitating psychiatric treatment. In her subsequent action against the college for reckless infliction of emotional distress, the plaintiff missed most of the trial on advice of her psychiatrist. Before she testified, several other witnesses were permitted to provide, as "corroborating" evidence over the defendant's objection, hearsay testimony as to what she had said. The statements were confirmed by documentary evidence or by her subsequent testimony, and all were subjected to impeachment efforts during the defendant's thorough cross-examination of the plaintiff. The Court held that although there was a violation of the sequence required by Rule 801(d)(1)(B), the risks it had identified in *United States v. Bolick*, *infra*, were not present and the violation did not affect any substantial right of a party, so any error was harmless. In *United States v. Bolick*, 917 F.2d 135 (4th Cir. 1990), the Court reversed a conviction for selling cocaine because a government agent had testified to prior consistent statements by informant witnesses before those highly impeachable witnesses had given testimony or had their credibility called into question. The dissenting Judge believed that admission of the evidence was within the Trial Court's discretion regarding the proper order of proof, as the statements provided background helpful to a complete understanding of the agent's testimony.

United States v. Azure, 801 F.2d 336 (8th Cir. 1986): The Court indicated that statements should not be admitted under this Rule until a witness has been cross-examined.

Corroborating accused's testimony

United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993): The defendant in a cocaine conspiracy prosecution testified he had made a trip to Florida to turn others in to the DEA. The Court held that his girlfriend should have been allowed to corroborate his testimony that he had told her the purpose of the trip before going, but the error was harmless.

Corroborating witness' testimony

United States v. Acker, 52 F.3d 509 (4th Cir. 1995): The Court reversed a bank robbery conviction because an officer was permitted to recount a statement given by the principal prosecution witness after he had been arrested and indicted for participation in the robbery. The evidence was erroneously admitted only to corroborate the witness' testimony and not to rebut a charge of fabrication; in any event, it would have been difficult to satisfy the foundation requirement that the statement was made before the witness had a motive to fabricate.

Hearsay within hearsay

United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988): The Court reversed a conviction for marijuana offenses, finding that a Coast Guard officer's handwritten report of events on the night of a chase of a small boat from which marijuana was thrown was improperly admitted. Even if the officer had been sufficiently attacked to justify rehabilitation, the report contained hearsay within hearsay and therefore was more than a prior statement of the officer.

Opportunity for examination

United States v. Piva, 870 F.2d 753 (1st Cir. 1989): Affirming a marijuana conviction, the Court held that an officer's testimony regarding an informant's prior consistent statement to which an officer testified was properly admitted even before the defendant had an opportunity to examine the informant about the statement. No showing was made that the defense was unable to recall the informant and to examine him.

United States v. Bond, 87 F.3d 695 (5th Cir. 1996): Affirming the Trial Judge's refusal to permit a defendant to withdraw his guilty plea, the Court held that a Magistrate Judge properly excluded a tape made by the defendant while he was a fugitive, since the defendant did not testify and could not therefore offer evidence of a prior consistent statement.

Opportunity for cross-examination

United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995): At the defendant's trial for cocaine importation and possession, testimony given by a coconspirator at a prior trial *in absentia*, at which the defendant was neither present nor represented, was admitted as a prior consistent statement, as former testimony, and under the residual exception. The Court held that it was not admissible as consistent with the coconspirator's subsequent deposition because the defendant had not been notified of the government's intention to offer the former testimony at the time of the deposition, and thus had no opportunity to cross-examine the witness concerning the statements in the former testimony. The evidence was also not admissible under Rule 804(b)(1), but the Court held that the former testimony was properly admitted under the residual exception.

Rehabilitation use only

United States v. Castillo, 14 F.3d 802 (2d Cir.), *cert. denied*, 513 U.S. 829 (1994): Seeking to discredit an undercover officer's testimony by arguing that he lied about the presence of a gun to justify his snorting cocaine during a drug purchase, defense counsel contrasted the officer's testimony that he told his superior immediately after the buy that he had been forced to ingest cocaine "at gunpoint" with his testimony that the gun was displayed but never removed from an accomplice's waistband. The Court held it was not an abuse of discretion to admit testimony from the superior repeating what the officer had said to him, as the evidence was offered only to rehabilitate credibility rather than for its truth, and thus it did not matter if the officer had a motive to fabricate when he was

debriefed by his superior. According to the Court, the superior's testimony helped the jury decide whether "at gunpoint" was shorthand for the presence of the gun in the waistband, but according to the dissenting Judge, the hearsay had no rebutting force beyond the mere fact that the witness had repeated on a prior occasion a statement consistent with his trial testimony. In *United States v. Pierre*[116] the Court affirmed a heroin conviction, finding that the Trial Judge properly admitted evidence that an agent's formal report stated that the defendant refused to make a controlled delivery, after the defense elicited testimony from the agent that his notes of his interview with the defendant contained no reference to the refusal. Examining its earlier opinions on prior consistent statements, the Court reasoned that

> not every prior consistent statement has much force in rebutting the effect of a prior inconsistent statement, and the issue ought to be whether the particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.

The Court rejected the notion that every use of a prior consistent statement is governed by Rule 801(d)(1)(B), and stated that "a prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition." In *United States v. Brennan*[117] the Court, affirming a former State Judge's bribery and corruption convictions, followed *Pierre* and held that the Trial Judge properly admitted grand jury testimony to rehabilitate a witness who had been attacked on cross-examination with suggestions that he had made inconsistent statements to the grand jury.

United States v. Casoni, 950 F.2d 893 (3d Cir. 1991): When the defendant sought on cross-examination to impeach the principal witness in a trial of racketeering offenses by suggesting he fabricated his testimony to gain immunity, the government called the witness' attorney to testify to what the witness had told him at their first meeting, before the attorney advised him to seek immunity by offering testimony that incriminated others in the scheme. The Court held there was no abuse of discretion in finding the statements were made before the motive to fabricate arose, even though there was evidence that the witness knew he was in trouble before he consulted the attorney. When, as here, the statements are offered only to rehabilitate, the possibility that a motive to fabricate existed when the statements were made is a matter of relevance, not a condition barring admissibility. The Court also indicated that the statement was consistent with the witness' trial testimony, even though there were some differences in details.

United States v. Ellis, 121 F.3d 908 (4th Cir. 1997): Affirming convictions arising out of a bank robbery, the Court held there was no abuse of discretion in admitting summaries of FBI interviews with a cooperating witness as prior consistent statements, since they were offered only for the limited purpose of rehabilitating the witness' credibility. In such a situation, the only requirement is that the prior statement have some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement

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116. 781 F.2d 329 (2d Cir. 1986).

117. 798 F.2d 581 (2d Cir. 1986).

consistent with his trial testimony; the restrictions of Rule 801(d)(1)(B) and the "pre-motive rule" of *Tome v. United States* do not apply.

Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994): Affirming a defendant's judgment in a product liability case, the Court held that reports containing opinions of defense expert witnesses as well as prejudicial hearsay should not have been admitted under Rules 702 and 703 simply because the experts testified. Rule 702 permits admission of expert opinion *testimony*, and Rule 703 permits an expert to base an opinion on inadmissible evidence but not to introduce that evidence for its truth. However, because the plaintiffs relied on the reports in impeaching the experts, the reports were properly admitted for rehabilitation rather than for their truth. The Court concluded that there is greater latitude when admitting statements for rehabilitation than for their truth, although it added in a footnote that a Judge may be obliged to limit rehabilitation to testimony about documents rather than to admission of the documents themselves.

United States v. Harris, 761 F.2d 394 (7th Cir. 1985): This case is discussed in the Editorial Explanatory Comment to this Rule.

United States v. White, 11 F.3d 1446 (8th Cir. 1993): In a prosecution for sexual abuse, a child victim testified for the government and the defendant sought to discredit the testimony by showing it was fabricated. The Court held there was no error in admitting testimony by other witnesses that the victim had told them he had been abused, as an instruction was given that the evidence was admitted only for whether the victim had said he had been abused, not whether he had in fact been abused. Although the Court implied that the requirements of the Rule need be complied with only when the prior consistent statement is offered as substantive evidence, it did not explain how the statements in this case were relevant to rehabilitate the witness. In *United States v. Andrade*[118] the Court affirmed fraud convictions, holding there was no error in admitting evidence of an agent's notes concerning an interview with a defendant. The defendant questioned two other witnesses concerning the notes and left the impression of inaccuracies in the notes and the suggestion that there might have been collaboration between government witnesses. Under these circumstances, the Court found that the rehabilitation was proper. In *United States v. Bowman*[119] the Court found it was error to admit statements under Rule 801(d)(1)(B) where they were made during plea bargaining and after a motive to falsify may have arisen, although it affirmed a defendant's convictions arising out of the robbery of a pharmacist. The error was harmless, partly because "the prior consistent statements were admissible for the purposes [*sic*] of rehabilitating the witness, even if not admissible for the truth of the matters asserted in those statements." See also *United States v. Demarrias*[120] (the Court did not decide whether prior statements of the victim in this sex abuse prosecution were offered to rebut an implied claim of fabrication, but held that the statements were not impermissible hearsay, because the Trial Judge gave a limiting instruction that the jury was to consider them only with regard to the victim's credibility and not as substantive evidence); *United States v. Roy*[121] (upholding admission of

118. 788 F.2d 521 (8th Cir.), *cert. denied*, 479 U.S. 963 (1986).

119. 798 F.2d 333 (8th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

120. 876 F.2d 674 (8th Cir. 1989).

121. 843 F.2d 305 (8th Cir.), *cert. denied*, 487 U.S. 1222 (1988).

accomplices' prior consistent statements in a murder case for rehabilitation, but not as substantive evidence, because they were made after a motive to fabricate arose).

United States v. Collicott, 92 F.3d 973 (9th Cir. 1996): In cross-examining a prosecution witness in a drug case, the defense asked her what time of day she had told an arresting officer that a drug dealer had come to the hotel room she was sharing with the defendant, but she said she did not remember. Defense counsel then called the officer to recount what the witness said about the time the dealer arrived. On cross-examination of the officer, the government elicited other statements the witness had made to the officer during that conversation about the defendant's connection with the dealer. Reversing the conviction, the Court held that the remainder of the conversation was not admissible under Rule 801(d)(1)(B) because the statements were not made before the existence of a motive to fabricate. Neither could the remainder come in on the ground that the defendant had "opened the door" by introducing the officer's testimony, which was inconsistent with the witness' stated failure of memory; the remaining hearsay statements did not clarify or provide context for the inconsistent statements, such that they would become relevant for a purpose other than to prove the truth of the matters asserted therein. Rather, they merely augmented the inconsistency and further impeached the witness by contrasting her detailed conversation with her testimony denying memory of the conversation. In *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991), *cert. denied*, 503 U.S. 975 (1992), the Court affirmed a conviction for carnal knowledge of a female under age sixteen, holding that prior consistent statements could be admitted, even though made after the motive to fabricate arose, when they came from the same investigative reports from which impeaching inconsistent statements had been drawn, as they demonstrated that the inconsistencies were a minor part of an otherwise consistent account.

United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1841 (1997): Affirming convictions arising out of a public corruption scheme, the Court held there was no abuse of discretion in admitting tape recordings of breakfast/bribery meetings between a conspirator cooperating with the government and two other councilmembers, in which the cooperating witness made several references to the defendant. Because the tapes were made after the witness began working for the government, it was error to admit them under Fed. R. Evid. 801(d)(1)(B). However, admission of the tapes was upheld because, *inter alia*, the conversations were innocuous and they tended to rehabilitate the witness' testimony that the people involved had a familiar relationship and had regular breakfast meetings.

Response to inconsistent statement

United States v. Coleman, 631 F.2d 908 (D.C. Cir. 1980): The Court said that "[e]ven where the suggestion of contradiction is only imputation of an inaccurate memory, a prior consistent statement is admissible to rebut the inference."

United States v. Zuniga-Lara, 570 F.2d 1286 (5th Cir.), *cert. denied*, 436 U.S. 961 (1978): The Court upheld the introduction of a prior consistent statement to rehabilitate a government witness who was impeached on cross-examination on the basis of his failure to include information in a written report. This case is also illustrative of the need sometimes to rehabilitate a witness impeached, not on the basis of a prior statement, but on the basis of a prior failure to make a statement.

United States v. Allen, 579 F.2d 531 (9th Cir.), *cert. denied*, 439 U.S. 933 (1978): The Court approved the admission of government evidence that its key witness in this armed bank robbery case, an accomplice, made consistent statements, after the defense emphasized an inconsistent statement and "contended that her testimony on direct examination was the result of an attempt to avoid criminal prosecution." Interestingly, after the defense indicated in the opening statements its plan to impeach the witness, the government offered the inconsistent statement under Rule 607, but it did not offer the consistent statement until the defense impeached the witness on cross-examination.

Rainey v. Beech Aircraft Corp., 827 F.2d 1498 (1987), *reinstating en banc* 784 F.2d 1523 (11th Cir. 1986), *aff'd in part and rev'd in part*, 488 U.S. 153 (1988): The Court reversed a judgment for the defendants in an action by spouses of two people killed in a Navy aircraft. It found error when the defendant was permitted to cross-examine one plaintiff about portions of a letter he had written to a Navy officer investigating the crash, but the plaintiff was denied the opportunity assured by Rule 106 to place the evidence in perspective by bringing out other portions of the letter. The Court added that since the defendant used the portions of the letter as a prior inconsistent statement, the plaintiff should have been permitted to introduce other portions as prior consistent statements under Rule 801(d)(1)(B). The Supreme Court affirmed the Rule 106 decision, so it did not address the Rule 801(d)(1)(B) point.

Scope of rehabilitation

United States v. Pedroza, 750 F.2d 187 (2d Cir. 1984): The Court criticized the admission of hearsay statements pursuant to the government's representation that the declarants would subsequently testify. This procedure permitted the government to benefit from statements that would not have been admitted under Rule 801(d)(1)(B), since the declarants had not been attacked and rehabilitation was neither necessary nor permissible. Compare *Pedroza* with *United States v. Wilkinson*, 754 F.2d 1427 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985) (a prior consistent statement was properly used to rehabilitate a witness impeached with an inconsistent statement).

United States v. Brantley, 733 F.2d 1429 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985): One codefendant in a marijuana importation case prepared, with his counsel, a thirty-one-page statement in the hopes of obtaining a good plea bargain. He subsequently pleaded guilty and testified for the government. On cross-examination, he was asked whether his statement disclosed all the facts to which he testified. In response to the implication that the witness might have fabricated facts, the government introduced the entire statement. The Court upheld its admission, finding that no request had been made to eliminate any specific portions. This is a troubling case. Surely, the government should have been permitted to show that its witness was consistent after the witness was attacked. But the showing of consistency could have been narrowly confined to the facts at which the cross-examination was directed. The probative value for rehabilitation of admitting thirty-one pages might have been substantially outweighed by the danger that the jury would unduly rely on the written statement, which amounted to a summary of this witness' complete testimony on direct examination.

Subject to cross-examination

United States v. Hebeka, 25 F.3d 287 (6th Cir. 1994): In a food stamp fraud prosecution, defense counsel attacked the credibility of the government's star witness, Dennis Alfred, by implying that he fabricated his testimony to avoid prosecution. The Court found no error when a rehabilitating prior consistent statement was introduced through another witness rather than through Alfred himself: the "literal requirements of Rule 801 can be met even when a third party testifies as to someone else's prior statement." The Court noted that Alfred was in Court, subject to cross-examination, and could easily have been recalled after the third party's testimony. The Court stated that "the Seventh Circuit appears to be a minority of one" in its rule in *West* (*infra*) that prior statements may be admitted through the declarant only.

United States v. West, 670 F.2d 675 (7th Cir.), *cert. denied*, 457 U.S. 1124, 1139 (1982): After a key government witness was impeached with extrinsic evidence of inconsistent statements, the government called a police officer to testify about the witness' consistent statement. The Court held that this was error (but harmless), because the rehabilitated witness was not subject to cross-examination concerning the consistent statement.

Suggestion of fabrication — civil cases

Gaines v. Walker, 986 F.2d 1438 (D.C. Cir. 1993): Reversing an arrestee's judgment against a police officer alleged to have inflicted unnecessary force, the Court held that the defendant should have been permitted to offer his police report as a prior consistent statement. In response to the defense that the officer merely responded to the plaintiff's attempt to knife him, the plaintiff cross-examined the officer as to the difference between the offenses of carrying a deadly weapon and possession of a prohibited weapon. The officer responded that the possession crime implies an intent to use the weapon; the plaintiff then elicited that the document prepared by the U.S. Attorney's office regarding the incident, which likely would have been based upon the officer's report, charged the plaintiff only with carrying, and not with possession. Although the Court recognized that not every attempt to impeach a witness by showing inconsistencies between trial testimony and pretrial statements amounts to a charge of recent fabrication, it concluded that the only reasonable interpretation of the questions put to the officer was to suggest that he had fabricated his account of the plaintiff's use of the knife. The failure to admit the officer's report in this case was especially prejudicial because the charge of fabrication was based upon a misleading or partial rendering of the officer's own past statements in the report.

Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979): The Court held that a rape complaint, made a few days after the event, was admissible to rehabilitate the credibility of a plaintiff, who encountered a defense that the rape never occurred.

Thomas v. United States, 41 F.3d 1109 (7th Cir. 1994): Affirming a judgment assessing penalties against corporate officers for wilfully failing to pay withheld employment taxes to the government, the Court held that a prior consistent statement of one of the officers (Thomas) was properly excluded. Thomas testified that he left the corporation because he thought the corporation was headed toward financial ruin. On cross-examination, the government implied that Thomas quit in part because he was afraid of

incurring liability for the corporation's unpaid employment taxes. An IRS form prepared by Thomas after he left the corporation was consistent with his testimony as to his reasons for leaving, but the Court held that the document was properly excluded because the government had not charged Thomas with fabricating his testimony. The Court stated that "[o]ne may impeach for lack of credibility without going so far as to charge recent fabrication." It concluded that the "line of questioning was intended to show that Thomas was not telling the whole story, that an *additional* reason for his leaving was his fear that he would be liable for the unpaid taxes."

Mayoza v. Heinold Commodities, Inc., 871 F.2d 672 (7th Cir. 1989): The Court affirmed a judgment for brokers who were sued by a commodities investor, holding that the plaintiff's wife was properly barred from testifying to a statement made during a telephone conversation with his principal broker, as no effort had been made to prove that the husband had recently fabricated testimony. In *Christmas v. Sanders*[122] the Court affirmed a judgment for the plaintiff in a civil rights action against a police officer, upholding the exclusion of two police reports offered as consistent statements. It found that there was no charge made of recent fabrication and that the reports might have been rejected in any event because of their extensive references to the testimony of other witnesses.

Breneman v. Kennecott Corp., 799 F.2d 470 (9th Cir. 1986): Affirming a judgment for an employer in a sex discrimination case, the Court upheld exclusion of handwritten notes apparently made by a supervisor concerning a conversation he had with the plaintiff where it was unclear when the notes were made and the defendant did not imply fabrication on the part of the plaintiff.

Garcia v. Watkins, 604 F.2d 1297 (10th Cir. 1979): The Court held it was error to exclude evidence of a statement made following an auto accident by a plaintiff who, the defendants implied, was fabricating her testimony.

Suggestion of fabrication — criminal cases

United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986): In a kidnapping case, the Court found that evidence that a defendant allegedly attempted to send a note to the victim prior to his arrest was not admissible as a prior consistent statement until such time as the government attempted to suggest that the defendant's trial testimony was fabricated.

United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 909 (1996): Affirming a conviction for holding a household servant in involuntary servitude, the Court held there was no error in admitting the servant's prior consistent statements to nurses, a therapist, and a police officer, as the defense had impugned her motives by cross-examination suggesting that she had recently met with a Hollywood producer interested in purchasing film rights to her story and that she had been interviewed by Boston papers to drum up publicity for her story. In *United States v. Arias-Santana*, 964 F.2d 1262 (1st Cir. 1992), the Court affirmed convictions for cocaine distribution, holding that a police report identifying the defendant at a drug buy, which would normally be inadmissible under Rule 803(8)(B), was admissible under the Rule after the report was used on cross-examination and the officer was impliedly charged with recent fabrication. In

122. 759 F.2d 1284 (7th Cir. 1985).

United States v. Vest[123] the Court held that responses of a witness during a phone conversation were admissible, since the witness' credibility was questioned on cross-examination and the witness had no motive to fabricate at the time of the conversation.

United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977): In a prosecution for soliciting and accepting a bribe, the chief prosecution witness was an officer in a corporation that was seeking a government contract who claimed that the defendant indicated that the contract could not be awarded unless a bribe was paid. The defendant denied this conversation and argued that the corporate officer had suggested the bribe. He explained that tape-recorded conversations he had with the corporate officer were attempts to gather evidence against the corporate officer. Evidence at trial also revealed that the defendant had told the FBI after his arrest that his conversations with the officer had been a joke. In rebuttal, the government introduced two witnesses who testified that the corporate officer reported to them on the same day as the alleged bribe request that the defendant had solicited a bribe. Noting that the statements of the witnesses on rebuttal would be hearsay at common law, the Trial Judge cited Rule 801(d)(1)(B) as authority for the proposition that the statements were not hearsay. This is an example of a case in which a prior consistent statement is introduced even though no prior inconsistent statement has been offered to impeach the relevant witness.

United States v. Provenzano, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980): Even though the Trial Judge did not actually find that certain out-of-court statements were in furtherance of a conspiracy, the Court concluded that they were admissible anyway, since they were consistent with the declarant's trial testimony and tended to rebut the implicit defense claim that the declarant's testimony was a fabrication used to buy his way out of prison.

United States v. Henderson, 19 F.3d 917 (5th Cir.), *cert. denied*, 513 U.S. 877 (1994): The Court affirmed a conviction for fraudulent banking activities, holding that cross-examination of a government witness about an FBI investigation raised questions about the witness' motives and possible collusion between the witness and the government, which provided a foundation for admission of prior statements by the witness consistent with his trial testimony. After the defendant in *United States v. Peña*, 949 F.2d 751 (5th Cir. 1991), insinuated that a testifying DEA agent may have inserted facts he learned subsequently in his final report on his interview with the defendant, the agent's handwritten notes on the interview were admitted. The Court held that the defendant had opened the door to the notes made the day of the interview by challenging the final report made seventeen days after the interview.

United States v. Smith, 746 F.2d 1183 (6th Cir. 1984): The Court reversed a conviction arising from the robbery of a postal employee because the defendant's brother's confession was admitted at trial before the brother actually testified. The Court found that the confession was not admissible as a consistent statement, since no charge of improper motive had been made when the statement was offered.

United States v. Cherry, 938 F.2d 748 (7th Cir. 1991): The Court held that the defendant's extensive cross-examination challenging the core of the victim's testimony in a

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123. 842 F.2d 1319 (1st Cir.), *cert. denied*, 488 U.S. 965 (1988).

sexual abuse case could constitute an implied charge of recent fabrication justifying admissibility of prior consistent statements.

United States v. Barrett, 937 F.2d 1346 (8th Cir.), *cert. denied*, 502 U.S. 916 (1991): In a sexual abuse prosecution in which the defendant argued that the victim changed her story about the attack from first saying she was awake before penetration to later saying she was awake only after penetration had occurred, the Court held that an FBI agent was properly permitted to testify that shortly after the assault, the victim had told him that she was not aware of the defendant until after he had penetrated her. In *United States v. Red Feather*[124] the Court affirmed sexual assault convictions of a father who abused his daughter, and held that the daughter's diary entries were properly admitted to rehabilitate her after a cross-examination that suggested she had been coached by social service counselors. In *United States v. Nelson*[125] the Court sustained a conviction for failing to file income tax returns and held it was not error to exclude the defendant's offer of a prior statement that was consistent with his trial testimony. Since the government's cross-examination indicated only that the defendant's explanation had differed on a prior occasion, not that he had fabricated testimony, the Court declined to disturb the ruling below that the prior statement was unnecessary for rehabilitation.

United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985): In a prosecution for obstruction of justice and conspiracy, the Court upheld the admission of testimony of a government witness' wife as to her husband's statements concerning the defendant's telephone instructions to destroy records. Since the defendant had cross-examined the witness in a way that suggested the fabrication of his testimony concerning the telephone conversations, the wife's testimony was admissible to rehabilitate the witness.

United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991): Affirming a conviction for violating civil rights, the Court held there was no error in admitting a prior consistent statement where the implication that testimony had been fabricated fairly arose from the line of questioning pursued. In *United States v. Griggs*[126] the Court reversed a conviction for conspiring to pass counterfeit money because of a prosecutorial comment on the defendant's failure to testify, but it upheld the admission of a statement made by one conspirator to another concerning the defendant. The Court indicated that the statement was admissible under Rule 801(d)(1)(B) as well as under the coconspirator rule, since the conspirator-declarant testified at trial and was under attack continuously by the defense. In *United States v. Andrews*,[127] a prosecution for illegal trafficking in food stamps, the Court upheld the admission of a tape made by an undercover police officer, while looking through the window of the defendant's home, that recorded his visual impressions. It found that the tape qualified as a prior consistent statement that was properly used to rebut the defendant's claim that the officer could not have seen inside the house.

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124. 865 F.2d 169 (8th Cir. 1989).
125. 735 F.2d 1070 (8th Cir. 1984).
126. 735 F.2d 1318 (11th Cir. 1984).
127. 765 F.2d 1491 (11th Cir. 1985).

Timing of prior consistent statement

Tome v. United States, 513 U.S. 150 (1995): In reversing and remanding a conviction for child sex abuse, the Court held (5-4) that Rule 801(d)(1)(B) permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged fabrication, influence, or motive arose. Accordingly, the child's out-of-court statements implicating her father were erroneously admitted for their truth under the Rule, because the statements were made at a time when the child had a motive to fabricate (i.e., a desire to live with her mother rather than her father). The Court held that Rule 801(d)(1)(B) embodies the prevailing common-law rule in existence for more than a century before the Federal Rules of Evidence were adopted: that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but was inadmissible if made afterwards. The Court remanded for a determination of whether the child's hearsay statements were admissible under the residual exception or under some other exception. The dissenting Justices contended that Rule 801(d)(1)(B) contains no ironclad temporal limitation, and that the real question of admissibility of prior consistent statements was one of relevance. The dissenters concluded that a prior consistent statement could be relevant to rebut a charge of recent fabrication or improper motive, even if the statement was made after the charged fabrication or motive arose. This case is discussed in the Editorial Explanatory Comment to this Rule.

United States v. Forrester, 60 F.3d 52 (2d Cir. 1995): A witness who had been arrested as a member of the conspiracy gave testimony in a cocaine trial that implicated the defendant. On cross-examination defense counsel asserted that the witness was making up her story. In response, the prosecutor had marked for identification, and used to refresh the recollection of the witness, a handwritten statement that the witness had prepared for the government three weeks after her arrest; the statement was consistent with her trial testimony. The Court held it was error to permit use of the document as a prior consistent statement. Because the witness' motive to fabricate arose as soon as she was arrested, the consistent statement post-dated the motive to falsify. The Court concluded that "the *Tome* rationale applies to a document marked for identification where the government has admitted that its purpose in using the statements contained in the document was to rebut the inference that the witness was making up [her] story." See also *United States v. Quinto*,[128] which anticipated *Tome* in reversing a conviction for tax evasion when the government was improperly permitted to introduce a detailed IRS memorandum as a prior consistent statement after a witness was subjected to vigorous cross-examination. The Court concluded that the IRS memorandum was not made prior to the time that the motive to falsify arose, since the defendant contended that, from the beginning, government agents were ruthlessly seeking a conviction, regardless of actual guilt.

United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984): The Court upheld a bank robbery conviction, finding no error in permitting the prosecution to bring out a prior consistent statement of an important government witness.

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128. 582 F.2d 224 (2d Cir. 1978).

The statement was made after arrest, but before a plea bargain was struck. Thus, the Court concluded that it was made prior to the time that a motive to falsify existed.

United States v. Riddle, 103 F.3d 423 (5th Cir. 1997): Reversing a bank chairman's conviction for fraud in connection with loans in which he was interested, the Court noted that it was no longer permissible to admit a prior consistent statement made after the declarant had an improper motive to fabricate testimony. Thus, it was error to admit a proffer made in the course of plea bargaining by another participant in the scheme.

United States v. Fulford, 980 F.2d 1110 (7th Cir. 1992): Affirming convictions for methamphetamine distribution offenses, the Court held there was no abuse of discretion in admitting postarrest consistent statements of a cooperating witness for rehabilitation after it was suggested his testimony was a recent fabrication. The defense implied the witness' motive to fabricate arose from his cooperation agreement, so statements prior to that agreement were relevant to rehabilitate. In *United States v. Davis*[129] the Court held that there had been no abuse of discretion in excluding the tape of a television interview offered by the defendant in a political corruption prosecution to rebut a charge he had fabricated his defense, because the interview was conducted seven days after FBI agents had indicated to him he was the subject of an investigation. In *United States v. Feldman*[130] the Court affirmed convictions for fraud in a scheme to use false bank guarantee letters to fulfill the collateral requirements for trading in stock options. After defense counsel emphasized in his opening statement and on cross-examination of a codefendant that he had made a deal with the government, the prosecutor was properly permitted to introduce a statement that the codefendant had made to the FBI prior to entering into a plea agreement. The Court found that no motive to help the government at the expense of the defendant existed when the statement was made. In *United States v. McPartlin*[131] the Court upheld a ruling that statements made by a defendant prior to trial could not be introduced as prior consistent statements when the same motive to falsify existed at the time of the statements as at the time of trial.

United States v. White, 11 F.3d 1446 (8th Cir. 1993): In a prosecution for sexual abuse, the Court held that statements of the child victim to a social worker regarding the abuse were not admissible as substantive evidence consistent with the victim's testimony because they were made after the motive to fabricate implied by the defendant's questioning and evidence came into existence. The error in admitting the statements was harmless, however.

United States v. Collicott, 92 F.3d 973 (9th Cir. 1996): In cross-examining a prosecution witness in a drug case, the defense asked her what time of day she had told an arresting officer that a drug dealer had come to the hotel room she was sharing with the defendant, but she said she did not remember. Defense counsel then called the officer to recount what the witness said about the time the dealer arrived. On cross-examination of the officer, the government elicited other statements the witness had made to the officer during that conversation about the defendant's connection with the dealer. Reversing the conviction, the Court held that the remainder of the conversation was not admissible under Rule 801(d)(1)(B) because the witness' motive to falsify was exactly the same when

129. 890 F.2d 1373 (7th Cir. 1989), *cert. denied*, 493 U.S. 1092 (1990).

130. 711 F.2d 758 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983).

131. 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S 833 (1979).

the arrest took place as at trial. See also *United States v. Rohrer*[132] (affirming cocaine convictions, but holding that a diagram made by a witness shortly before signing a cooperation agreement was improperly used to rehabilitate the witness); *United States v. Stuart*[133] (affirming convictions for misapplying funds of a savings and loan and finding the government was properly permitted to offer consistent statements made prior to the plea agreement to bolster the testimony of its key witness, after the defendant vigorously cross-examined the witness regarding the agreement).

United States v. Moreno, 94 F.3d 1453 (10th Cir. 1996): The Court found error, albeit harmless, in the admission of a prior consistent statement offered to rehabilitate a government witness. The witness was a participant in the crime and testified against the defendant pursuant to a plea agreement. The consistent statement was made before the witness entered into the plea agreement, but after the witness had been arrested. The Court held that the post-arrest statement was not made before the motive to falsify arose, because the witness "had an incentive to concoct a story" implicating the defendant as soon as he was arrested. In a prosecution for conspiring to manufacture methamphetamine, *United States v. Albers*, 93 F.3d 1469 (10th Cir. 1996), the Court held that it was error (but harmless) to introduce prior consistent statements made, in one case, after the declarant had been arrested on unrelated charges, and in the other, after the declarant's guilty pleas had been accepted but while he was still seeking to appeal his sentence.

RULE 801(d)(1)(C) — STATEMENTS WHICH ARE NOT HEARSAY — PRIOR STATEMENT BY WITNESS — IDENTIFICATION

Drawings

United States v. Moskowitz, 581 F.2d 14 (2d Cir.), *cert. denied*, 439 U.S. 871 (1978): The Court affirmed an armed bank robbery conviction. One piece of evidence offered at trial was a drawing made by an artist from information supplied by witnesses. Two witnesses testified that the drawing looked like the robber. The statements about the sketch looking like the robber, the Court unanimously agreed, were admissible under Rule 801(d)(1)(C), and the majority of the panel believed that the sketch itself was not hearsay. Judge Friendly's one-paragraph concurring opinion said that he thought it would be a more straightforward analysis to regard the sketch as an integral part of the prior identification evidence admissible under the hearsay exemption. Under either approach, the evidence was properly admitted.

Memory problem

United States v. Owens, 484 U.S. 554 (1988), *rev'g* 789 F.2d 750 (9th Cir. 1986): A correctional counselor at a federal prison was attacked and severely beaten, leaving him with severely impaired memory. At the defendant's trial for assault with intent to murder, the victim had no present memory of his attacker's identity and admitted on cross-examination that he could not remember seeing his assailant, but said he remembered identifying the defendant to an FBI agent who visited him in the hospital. He could not

132. 708 F.2d 429 (9th Cir. 1983).

133. 718 F.2d 931 (9th Cir. 1983).

IV-4

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Civil Rule 44
Date: March 1, 1998

At the last meeting of the Evidence Rules Committee, there was some preliminary discussion about whether Civil Rule 44 should be abrogated in light of its apparent overlap with some of the Rules of Evidence governing proof of public records. The question was referred to the Civil Rules Committee, and the initial impression was that it would be easy to simply delete Rule 44 and leave the field to the Evidence Rules. But it was discovered upon further investigation by Ed Cooper, the Reporter to the Civil Rules Committee, that the problem was not as simple as it might initially appear. Ed's conclusion was that substantial thought must be given to whether Rule 44 and the Evidence Rules are coextensive. If Rule 44 in fact provides coverage that is broader than the Evidence Rules in some respects, then it is apparent that the Rule cannot simply be abrogated. Rather, the Evidence Rules would either have to be amended to pick up the slack, or a decision would have to be made that the more expansive coverage of Rule 44 should simply be rejected. Ed Cooper's letter on these points is attached to this memorandum, and I would like to thank him very much for his excellent contributions to our joint effort.

Ed and I have agreed that the initial research on the relationship between Rule 44 and the Evidence Rules should be conducted by the Advisory Committee on Evidence Rules. This memorandum sets forth my research on this very technical, complicated and headache-inducing question. I have reached the following tentative conclusions:

1. Rule 44 has been applied in a few situations in which the Evidence Rules are apparently not applicable. Mostly this has occurred in immigration cases, specifically deportation proceedings. The Federal Rules of Evidence are not applicable to these proceedings. Thus, unless there is a desire to amend the Federal Rules to make them applicable to these proceedings, the abrogation of Rule 44 would appear to have some practical effect. That practical effect might be limited, however, since there is a regulation that is employed in these immigration proceedings which closely tracks the language of Rule 44. Moreover, the irony is that Rule 44 is not really supposed to apply to these proceedings either--and yet the courts apply it. So if the Rule is

abrogated, at the very least the extant case law, and probably some settled expectations, will be affected.

2. Rule 44 does directly overlap with certain Evidence Rules, specifically Rules 803(10), 902(3),(4), and (5), and 1005. Generally speaking, the Evidence Rules are either coextensive with, or broader in application than, Rule 44. A few situations could be hypothesized, however, in which a public record might be self-authenticating under Rule 44 but not under the Evidence Rules. Whether it is worth it to abrogate Rule 44 and then to amend the Evidence Rules to account for these loopholes is a question for the Evidence Rules Committee as well as for three other Advisory Committees. Given the intricate, technical nature of these rules, it would be difficult to state with certainty that nothing would be lost in abrogating Rule 44 and transposing some of that Rule's language into the Evidence Rules.

3. No reported case or commentary could be found expressing dissatisfaction with the current state of affairs. This counsels strongly against change. While the dual system of authentication could be seen as inelegant, the Evidence Rules Committee must decide (together with the other Committees) whether it is worth the cost of change to streamline the Federal Rules, when there is no apparent problem in practice under the current rules.

Civil Rule 44

Civil Rule 44 provides as follows:

Proof of Official Record

(a) Authentication.

(1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

Reporter's Introductory Comment to Rule 44

Rule 44 is basically divided into three parts. Subdivision (a)(1) provides for authentication of domestic official records. Subdivision (a)(2) provides for authentication of foreign official records. Subdivision (b) provides for admissibility, as well as authentication, of evidence of a lack of an official record.

Note that Rule 44 is referred to indirectly in Criminal Rule 27, which provides that "[a]n official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions." And Rule 44 is referred to directly in Bankruptcy Rule 9017, which provides that "[t]he Federal Rules of Evidence and Rules 43, 44 and 44.1 F.R.Civ.P. apply in cases under the Code." Consequently, any decision to abrogate Rule 44 will implicate the interests of both the Criminal and Bankruptcy Rules Advisory Committees, as well as, of course, the Civil Rules Committee.

Evidence Rules That Might Overlap With Civil Rule 44

There are a number of Evidence Rules dealing with the admissibility of official records, which must be investigated to determine whether and to what extent they overlap with Rule 44. It should be kept in mind, however, that *overlap* does not mean *conflict*. Rule 44 (c) states that it is not intended to preclude authentication under any other rule. And Rules 901 and 902 similarly provide for authentication by other rules.

The public records rules, and their relationship to Rule 44 or lack thereof, will be discussed sequentially.

1. Rule 803(8)--Rule 803(8) sets forth a hearsay exception for certain public records. However, this Rule does not at all overlap with Rule 44. With respect to proof of public records, Rule 44(a) specifically provides that an official record, "when admissible for any purpose, may be evidenced by an official publication thereof . . ." Thus, Rule 44(a) does not establish a hearsay exception for public records. As the district court stated in *Phillips v. Medtronic,* 1990 WL 58440 (D.Kan.), compliance with Rule 44(a) "does not render a document admissible under the Federal Rules of Evidence. Rule 44 simply provides the method of proving an official record if it is otherwise admissible.".

2. Rule 803(10)--Rule 803(10) provides a hearsay exception for the absence of a public record. Unlike Rule 803(8), Rule 803(10) does extensively, if not completely, overlap with Rule 44. This is because Rule 44(b) provides that a statement that no record was found, when authenticated under subdivision (a), "is admissible" to prove the lack of a record. See *United States v. Beason,* 690 F.2d 439 (5th Cir. 1982) (affidavit offered as proof of nonpayment of tax was admissible under either Rule 803(10) or Civil Rule 44).

3. Rule 901(b)(7)--This Rule describes, as an example of sufficient authentication, evidence that a public report "is from the public office where items of this nature are kept." Certainly, satisfaction of the proof requirements of Rule 44 would provide sufficient evidence that an official record "is from the public office where items of this nature are kept." Thus, the two rules have some overlapping application. However, Rule 44 is a provision dealing with self-authentication and Rule 901 is not.

4. Rule 901(b)(10)--This Rule describes, as an example of sufficient authentication, any method of authentication provided by, inter alia, "rules prescribed by the Supreme Court pursuant to statutory authority." The Advisory Committee Note to the Rule indicates that Civil Rule 44 is one of the rules contemplated as a source for authenticating evidence outside the Evidence Rules.

5. Rule 902(1)--This Rule provides that domestic public documents under seal are self-authenticating when accompanied by "a signature purporting to be an attestation or execution." It

is obviously targeted at the same kinds of records covered by Civil Rule 44(a)(1), though Rule 902(1) is significantly less detailed.

6. Rule 902(2)--Rule 902(2) provides that domestic public documents not under seal are self-authenticating if a public officer certifies under seal that the signer has signed the document in an official capacity and that the signature is genuine. Again, there is an overlap in coverage with Rule 44(a)(1), which provides a means for establishing self-authentication of domestic official records--though the path to self-authentication provided by Rule 44(a)(1) is somewhat different from that provided by Rule 902(2).

7. Rule 902(3)--This Rule sets forth requirements for self-authentication of foreign public documents. It closely tracks, but is not identical to, Rule 44(a)(2). The Advisory Committee Note to Rule 902(3) states that the Rule is "derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records."

8. Rule 902(4)--Rule 902(4) provides that a copy of an official record or document authorized by law to be recorded is self-authenticating where certified as correct by the custodian or other authorized person, and where the certificate complies with the self-authentication provisions of Rules 901(1)-(3), or, inter alia, any "rule prescribed by the Supreme Court pursuant to statutory authority." Thus, the Rule authorizes the court to treat a properly certified copy of a public record as properly authenticated. According to the Advisory Committee Note, the reference to certification procedures in other rules is designed is a deliberate reference to Rule 44, which also permits self-authentication of copies.

9. Rule 902(5)--This Rule establishes self-authentication for "[b]ooks, pamphlets, or other publications purporting to be issued by public authority." According to the Advisory Committee Note, Rule 902(5) is based on Civil Rule 44(a), which provides that domestic and foreign official records may be evidenced by an official publication.

10. Rule 1005--Rule 1005 provides a limited exception to the best evidence rule by permitting the admission of copies of two kinds of public records: (1) official records, and (2) documents authorized to be recorded or filed that have actually been recorded or filed. There is an overlap with Rule 44, which allows proof of copies of official records that meet the certification requirements of that Rule.

Does Rule 44 Provide Coverage that the Evidence Rules Do Not?

If the coverage of Rule 44 and the Evidence Rules is exactly contiguous, then a case can be made for the abrogation of Rule 44. Likewise, if the Evidence Rules have a broader application than Rule 44, then the case can be made for the abrogation of Rule 44. (Though again, in each of these cases, Bankruptcy Rule 9017 would have to be amended as well, and the Criminal Rules Committee would have to be consulted).

So the situation in which abrogation of Rule 44 would have substantial practical consequences is where that rule provides a ground of authentication that might not be provided in the Evidence Rules. If that is the case, then abrogation of Rule 44 would only work under one of two circumstances: either the Evidence Rules would have to be amended to incorporate the Rule 44 provisions that provide greater coverage, or a decision would have to be made that inclusion of the greater coverage provided by Rule 44 is not worth an amendment to the Evidence Rules. The case for abrogating Rule 44 is, therefore, much more problematic if that Rule provides for authentication in some cases where the Evidence Rules do not.

Most of the case law indicates that the Evidence Rules and Rule 44 are generally coextensive, and that in certain situations the Evidence Rules are actually broader in application. There are, however, some possible situations in which Rule 44 might permit authentication where the Evidence Rules would not.

Situations In Which Rule 44 and the Evidence Rules Are Interchangeable

Cases in which Rule 44 and the Evidence Rules were found interchangeable include: *United States v. Darveaux,* 830 F.2d 124 (8th Cir. 1987) (Rule 44 and Evidence Rule 902(3) are applied to reach the same result in authenticating a judgment of conviction); *First National Life Ins.Co., v. Calif. Pac. Life Ins. Co.*, 876 F.2d 877 (11th Cir. 1989) (complaint and cross-claim offered into evidence without a seal held not properly authenticated under either Rule 44 or Evidence Rules 901(1) and (2)); *California Assoc. Of Bioanalysts v. Rank,* 577 F.Supp. 1342 (C.D.Cal. 1983) (official publication was self-authenticating "under Rule 902(5) of the Federal Rules of Evidence, as well as under Rule 44(a)(1) of the Federal Rules of Civil Procedure"); *United States v. Hart,* 673 F.Supp. 932 (N.D.Ind. 1987) (report concerning nonpayment of taxes was admissible under Evidence Rule 803(10), Criminal Rule 27 and Civil Rule 44(b)); *Vote v. United States,* 753 F.Supp. 866 (D.Nev. 1990) (certificates of assessments and payments were admissible under Rule 803(8), and properly authenticated under both Rule 902(1) and Rule 44); *United States v. Jongh,* 937 F.2d 1 (1st Cir. 1991) ("good cause" excuse for the lack of a final certification, provided in Rule 902(3), was derived from Rule 44 and the rules are to be read identically as to the "good cause" exception); *United States v. Yousef,* 175 F.R.D. 192 (S.D.N.Y. 1997) ("good cause" standard for dispensing with final certification in Rule 902(3) is derived

from Rule 44 and should be applied in the same manner).

Situations In Which the Evidence Rules Are More Comprehensive Than Rule 44

There are a few situations in which the Evidence Rules might be found more comprehensive than Rule 44. For example, Rule 1005 includes "data compilations" among the official records that can be proven by copy. Rule 44 contains no such reference. Judge McLaughlin opines that although there is no conflict between Rules 44 and 1005, the latter rule is "broader" because it permits copies of computerized printouts, that might not be permitted under Rule 44. McLaughlin, *Weinstein's Evidence* par. 1005[3]. Also, the Advisory Committee Note to Rule 902(3) states that it is broader than Rule 44 because Rule 902(3) "applies to public *documents* rather than being limited to public *records*." (Emphasis supplied).

For some cases finding or implying that the Evidence Rules are broader than Rule 44, see *United States v. Pent-R-Books, Inc.*, 538 F.2d 519 (2d Cir. 1976) (administrative records certified by a postal official rather than the custodian were not admissible under Rule 44; however, Rule 902 "has expanded the means by which official documents and copies thereof may be authenticated"; here the record was properly authenticated under Rule 902(1) because it was certified by a person who had authority to make the certification); *Amfac Distribution Corp. v. Harrelson,* 842 F.2d 304 (11th Cir. 1988) (state court judgment might not have been admissible under Rule 44 because the attestation and certification were stapled to the front of the judgment instead of the back; however, the judgment was properly authenticated under Rule 902 because the copy of the judgment bore a seal and a signature purporting to be an attestation of the custodian of the original judgment).

Situations In Which Rule 44 Has Been Applied Without Reference to the Evidence Rules

There are a few reported cases in which Rule 44 has been used as the sole means of authenticating official records. In some of these cases, I cannot figure out why the Evidence Rules were not used. For example, in *INA v. Italica,* 567 F.Supp. 59 (S.D.N.Y. 1983), the plaintiff offered certified copies of Italian weather records, to support a claim for damage due to freezing of two cargoes of wine. The records were certified by the custodian and by a department of the Italian government, but they did not bear a final certification attesting to the genuineness of the signature and official position of the persons who attested to the records's accuracy. Nonetheless, the Court found "good cause" to dispense with the final certification under Rule 44. The Court cited only Rule 44; but it seems clear that the documents were also admissible under Rule 902(3). That Rule contains a "good cause" standard that is derived from and is just as generous as that provided by Rule 44. See *United States v. Jongh,* 937 F.2d 1 (1st Cir. 1991) ("good cause" excuse for the lack of a final certification, provided in Rule 902(3), was derived

from Rule 44 and the rules are to be read identically as to the "good cause" exception).

Similarly, in *Crescent Towing & Salvage Co., v. M/V Anax*, 40 F.3d 741 (5th Cir. 1994), an action brought to enforce a maritime lien, the court considered the type of evidence that must be presented to prove a judicial sale conducted in a foreign country, such as would extinguish all pre-existing maritime liens. The Court stated that the evidence must include "a certified copy of the foreign court's judgment which meets the authentication requirements of Federal Rule of Civil Procedure 44(a)(2)". But it would seem that authentication of such a judgment would also be permissible under the virtually identical Rule 902(3). It is unclear why the Court mentioned only the Civil Rule, since the Evidence Rules do in fact apply to an admiralty action of the type presented in *Crescent Towing.*

At any rate, the fact that some litigants and courts rely solely on Rule 44 for authentication of official documents, even when they might not have to, is more rather than less reason to retain the Rule. Deletion of the Rule in these circumstances would upset at least some settled expectations of courts and litigants.

Immigration Cases

Rule 44 has often been invoked in immigration deportation hearings, as a means of authenticating official records such as immigration forms. No reference in these cases is made to the Evidence Rules governing authentication, i.e., Rule 44 is used independently of the Evidence Rules. See *Espinoza v. INS,* 45 F.3d 308 (9th Cir. 1994) (form prepared by border agents who apprehended the alien was properly authenticated under Rule 44, where it was certified by the district director of the INS); *Lopez v. INS,* 45 F.3d 436 (9th Cir. 1994) (I-213 form was properly authenticated under Rule 44). In relying on Rule 44, the courts note that civil deportation hearings are not governed by the Federal Rules of Evidence. *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983). Thus, at first glance, it would appear that abrogation of Rule 44 would be problematic, because it would mean that there would be no authentication rules that could be invoked in these deportation hearings.

The issue is not that simple, however. While Rule 44 is cited as authority for authenticating official records in deportation hearings, the fact is that the Civil Rules are no more applicable than the Evidence Rules in these proceedings. The courts have, through case law, imported Rule 44 as a proper means of authentication. See, e.g., *Chung Young Chew v. Boyd,* 309 F.2d 857 (9th Cir. 1962) (while Rule 44 was not controlling in administrative hearings, the Rule nevertheless defined an acceptable method of authenticating a public record that should have been followed); *Maroon v. INS*, 364 F.2d 982 (8th Cir. 1966) (although Rule 44 did not control in an administrative proceeding, the procedure therein set forth should be followed to the extent possible). These cases were decided well before the Evidence Rules were in effect. It is

reasonable to assume that when the Evidence Rules became effective, the courts saw no need to invoke Rule 902 as a means of authenticating official records in deportation proceedings, since Rule 44 was all but identical and sufficient to meet the purpose, and since neither Rule 44 nor the Evidence Rules were directly applicable to these proceedings anyway.

What complicates matters further is that it appears that a party does not even need Rule 44 in order to authenticate official records in deportation proceedings. 8 C.F.R.§ 287.6 contains language that is "virtually identical" to Rule 44. *Espinoza v. INS,* 45 F.3d 308 (9th Cir. 1994) (form prepared by border agents who apprehended the alien was properly authenticated under both Rule 44 and C.F.R. 287.6). This would seem to mean that, at least with respect to civil deportation proceedings, the abrogation of Rule 44 would not be critical. But the issue is so complex and arcane that it would be hard to confidently state that the abrogation of Rule 44 in this area would have no effect at all. At the very least, the abrogation of Rule 44 would upset, at least to some degree, the settled practice of courts and litigants in deportation proceedings, where that Rule is routinely referred to.

Official v. Public Records

Rule 44 provides for authentication of "official" records. The captions to Rules 902(1)-(4) and Rule 1005 refer to "public" records. Could a record be "official" and yet not "public"? It would seem so. For example, in *Banco De Espana v Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940), a case decided well before the adoption of the Federal Rules, the Federal Reserve offered the affidavit of the then Spanish ambassador testifying to the contents of secret instructions from his government, authorizing the sale of silver to the United States. The Spanish bank argued, inter alia, that Rule 44 (a) applied only to public records and copies thereof, so that any evidence relating to secret documents should not be subject to authentication under that Rule. Rejecting this contention, the Court stated that the Rule spoke not of "public" records, but only of "official" ones, and that it saw no necessity for reading into the Rule a requirement that the original be open to examination by the public. The Rule, said the court, was based on the presumption of ministerial regularity in the attestations and certifications of the public officials involved; given that premise, it did not matter that the document was not released to the public. Consequently, the Court held the ambassador's affidavit to be an appropriate subject for authentication under Rule 44 (a).

If the Evidence Rules govern only public records and not all official records, the case could be made that Rule 44 should not be abrogated because it provides more expansive coverage. In fact, however, the reference to "public" records in Rules 902 and 1005 is in the captions only. There is no such limitation in the text of any of these rules. The rules permit authentication of any document for which the certification requirements have been met. Indeed,

while the captions refer to public records, the text of at least Rules 902(4) and 1005 refers explicitly to "official" records and documents. So it is possible that Rule 44 is not in fact more expansive in application than the Evidence Rules with respect to official, as opposed to public, documents.

However, there is at least some uncertainty created by the tension in the Evidence Rules between the captions and the text. Perhaps this could be solved by an amendment to the captions of each of the problematic Rules, along with minor clarifications of the text. But perhaps it is better to retain Rule 44 as a safety valve to resolve any such tension. Whether it is worth the cost of amending the rules to solve a problem that has not yet arisen and may never arise is a question for the Committee.

Other Possible Cases In Which Rule 44 Might Be Broader than the Evidence Rules

While the Evidence Rules discussed above are drawn from Rule 44, there is no single Evidence Rule that is identical to Rule 44. If the Rules are parsed, it is possible to hypothesize some situations in which the Evidence Rules might not provide for authentication that would be provided for under Rule 44. These situations have not arisen in the cases yet, but their possibility counsels against simply deleting Rule 44. Some of the possible "gaps" in the coverage of the Evidence Rules that are covered by Rule 44 include the following:

1. Publications--As Ed Cooper mentions in his letter, Rule 44 permits proof of any domestic or foreign record "by an official publication thereof." The only Federal Rule providing self-authentication for a *publication* of an official record is Rule 902(5). That Rule states that "Books, pamphlets, or other publications purported to be issued by public authority" are self-authenticating. As Ed notes, Rule 902(5) seems to be using "publications" in a somewhat different sense than that employed in Rule 44, which covers publication of any official record. However, the admittedly sparse case law on the subject seems to say that Rule 902(5) provides for self-authentication of any official publication, not limited as to type or subject matter. *California Assoc. Of Bioanalysts v. Rank,* 577 F.Supp. 1342 (C.D.Cal. 1983) (official publication was self-authenticating "under Rule 902(5) of the Federal Rules of Evidence, as well as under Rule 44(a)(1) of the Federal Rules of Civil Procedure"). Weinstein's Evidence, citing the Advisory Committee Comment to Rule 902(5), states that "Rule 902(5) is based on Rule 44(a) of the Federal Rules of Civil Procedure, which provides that domestic and foreign official records may be evidence by an official publication." Thus, Rules 44 and 902(5) *appear* to be coextensive with respect to official publications. However, there is enough uncertainty in the language of the Rules to indicate caution before simply abrogating Rule 44.

2. Treaty Exception--As Ed Cooper points out in his letter, Rule 44(a)(2) allows

certification of a foreign official document without the ordinarily required final certification if a treaty provides for that. There is no such exception provided for in Rule 902(3), the Evidence Rules analogue in this respect. It is possible, of course, that a court would hold that any treaty dispensing with final certification must take precedence over the final certification requirement of Rule 902(3). However, the lack of a treaty exception in Rule 902(3) would at least be troubling if Rule 44 were abrogated. Therefore, if Rule 44 were to be abrogated, the prudent course would be to amend Rule 902(3) to pick up Rule 44's treaty exception. This emphasizes the point, however, that deletion of Rule 44 is not as simple as it appears at first glance.

Conclusion

The abrogation of Rule 44 presents a complex question because there are six Evidence Rules that are directly derived from Rule 44, and several others that are related in coverage. It is a daunting task to try to figure out whether abrogation of Rule 44 would actually create a gap in coverage with respect to authentication. There is enough uncertainty, however, to indicate that a gap in coverage is at least possible. And this gap, if it exists, would be difficult to cover by amending the Evidence Rules, for the very reason that it is difficult to tell where those gaps might be.

While the case law is admittedly sparse, there is no indication that courts or litigants are having a problem with the "dual" system presented by Rule 44 and the Evidence Rules. It is for the Committee to decide whether the current system, though somewhat awkward, should be changed in the absence of any indication of a problem in practice. The law of unintended consequences might well govern any attempt to make a change in this area.

IV-5

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

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

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

and/or whether the jury should be cautioned against excessive reliance on the expert; 6. Whether limitations should be imposed on the selection process.

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

1. Technical Advisers, Special Masters, Expert Witnesses

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

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

While courts have had no trouble finding *authority* to make an appointment, the actual *delineation* of the appointee's role might be problematic, given the acknowledged overlap among the roles of technical adviser, special master, and expert witness. A Rule could be drafted to sort out the overlap among these roles, though it would probably be hard to come up with language that could be applied easily to every case. But before any attempt to amend Rule 706 is undertaken in this respect, it should be recognized that the Civil Rules Committee has before it a proposal to amend Civil Rule 53 to provide greater elaboration on the role that can be played by a special master. That proposal is attached to this memorandum. Any attempt to delineate an overlap between the roles that can be performed by an appointed expert should probably be accomplished in collaboration with the Civil Rules Committee. Indeed, commentators have expressed the opinion that the problems of dealing with court-appointed experts are ordinarily problems of case management and pre-trial practice that are more properly addressed in the Federal Rules of Civil Procedure than in the Federal Rules of Evidence. See Cecil and

Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 Emory L.J. 995 (1994). See also the letter to Ed Cooper from Margaret Berger, attached to the proposed amendment to FRCP 53 at the end of this memo. (It should be noted that the Civil Rules proposal is, at least currently, "on the shelf," due to the two major projects that the Civil Rules Committee is currently pursuing--discovery and class actions).

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

2. Funding in Civil Cases

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

(b) **Compensation.** – Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from

funds which may be provided by law ~~in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the~~. *Where no law provides for compensation of the expert, the expert's* compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

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

The Committee might also consider the option provided by Arizona Rule 706, which states, in its first sentence, that "Appointment of experts by the court is subject to the availability of funds or the agreement of the parties concerning compensation." This language presumably takes care of the reluctance of one or more parties to pay for the expert. The

problem with that Rule, however, is that it could leave control of the appointment process solely in the hands of the parties--the parties could prevent the court from appointing an expert by simply refusing to agree on compensation. Rule 706, at least currently, presumes that the court should have authority to appoint an expert independent of the wishes of the parties.

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

3. Ex Parte Communications

Currently, Rule 706 does not address whether either the Judge or the parties can communicate ex parte with the court-appointed expert. As to judge-expert communications, there is a general recognition that ex parte communications are often essential, especially during the appointment process. However, safeguards have been suggested to allay concerns of the parties as to the ex parte nature of these communications. Apparently, the preferred practice is to make a record of all discussions and disclose the record to the parties. *See Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988) (noting this procedure with approval).

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Limitations on Cross-examination and Deposition

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

depositions or cross-examination of court-appointed experts when necessary.

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

5. Informing and Instructing the Jury

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

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

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

d. Jury Instructions. If an expert witness retained by the court testifies at trial,

i. No Identification as Court Appointee. The court ordinarily should not identify the witness as one appointed by the court.

ii. If Identified as Court Appointee. If the court determines that, in the circumstances, it is appropriate to identify the witness as a court appointee, the court should instruct the jury that:

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

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

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

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

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

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

43 Emory L.J. at 1038.

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

6. Selection Process

Rule 706 provides that the court may, in its discretion, request the parties to submit nominees for appointment, and that the court can appoint an expert agreed to by the parties or an expert of the court's own selection. Thus, the selection process is essentially left to judicial discretion. Cecil and Willging report, in the Emory Law Journal article, that in a large minority of the appointments (29 of 66), "the judge used pre-existing personal or professional contacts to identify an expert." The authors criticize this practice because it "may reflect a narrow spectrum of professional opinion that was suited to the interests of the judges' former clients and colleagues" and that the parties "may perceive such an expert as biassed."

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

ABA Civil Trial Practice Standard 11(a) sets forth the

following suggested limitations on the process of selecting a court-appointed expert:

a. Selection.

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

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

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

iv. Before selecting an expert unilaterally, the court should

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

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

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

Memorandum To: Members of the Advisory Committee on the Federal Rules of Evidence
From: Daniel Capra, Reporter
Re: Expanded Use of the Residual Exception
Date: November 7, 1996

I. Introduction

The minutes of the April, 1996 meeting of the Advisory Committee indicate that the Reporter "should look into the expanded use of the residual exception." This memorandum is addressed to that issue. The basic conclusions are as follows:

1. The residual exception has undoubtedly received expansive treatment in many courts, which is probably contrary to the intent of Congress.

2. One type of expansive treatment--liberal application of the trustworthiness requirement--presents less of a pure legal question and more of a question of application of fact to law. Whether a court has admitted residual hearsay of questionable trustworthiness obviously depends on the facts and is often a question on which reasonable minds can differ. If the Committee decides that courts are being too liberal because they are admitting hearsay of questionable trustworthiness, the Rule's language could be strengthened from the current "equivalence" standard that is currently in the Rule. But the evidence in the cases of a lessened threshold of trustworthiness is anecdotal.

3. Another type of expansive treatment--using the residual exception for classes of evidence that narrowly miss other

hearsay exceptions--is more a question of law. Generally, courts have rejected the argument that a hearsay statement is "specifically covered" by another exception when the statement is in fact inadmissible under that exception. The residual exception has often been employed to admit hearsay that is a "near miss" from another hearsay exception. If the Committee decides that "near misses" should not be admissible under the residual exception, then more specific language should be included to that effect.

II. The Rule and Its History

Proposed Rule 807, which is an amalgam of current Rules 803(24) and 804(b)(5), provides:

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

The residual exceptions were designed to leave room for growth and development in the law of hearsay. Federal drafters thought it "presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued" and therefore adopted these provisions to allow Judges to admit hearsay in "new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the

specifically stated exceptions."[1] It is clear, however, that the intent of the drafters was that the exception would be used sparingly; the concern was that overuse of the residual exceptions would undermine the categorical approach to the hearsay exceptions set forth in the Federal Rules.[2] An original draft of the Federal Rules contained only one hearsay exception, which mandated a case-by-case inquiry to determine the trustworthiness of each proffered hearsay statement. This approach was rejected because it was too unpredictable and time-consuming, and was replaced by a system of categorical admissibility requirements. The residual exception was the safety valve to the underinclusiveness of the categorical approach. Liberal use of the residual exception runs the risk of establishing, de facto, the dominance of the case-by-case approach that was rejected previously. To put it another way, to broaden the residual exception could permit the case-by-case exception to swallow the categorical rules.

III. Equivalent Guarantees of Trustworthiness

The most important requirement for residual hearsay is that it possess guarantees of trustworthiness equivalent to those supporting the enumerated exceptions. No inclusive list of factors determining admissibility can be devised since admissibility hinges upon the peculiar factual context within which the statement was made. But some non-dispositive generalizations can be made from a review of the cases.

There are certain standard factors which courts appear to consider in evaluating the trustworthiness of a declarant's statement. These include:

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[1] Advisory Committee Note to Fed. R. Evid. 803(24).

[2] See, e.g., S.Rep. No. 93-1277, 93d Cong., 2d Sess. 19-20 (1974) ("It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances"). See also Rock v. Huffco Gas & Oil Co., 922 F.2d 272 (5th Cir. 1991) (noting that the exception must be used "sparingly", and holding that statements of the deceased concerning the cause of his injury were not sufficiently trustworthy).

1. the relationship between the declarant and the person to whom the statement was made. For example, a statement to a trusted confidante would be considered more reliable than a statement to a total stranger.

2. the capacity of the declarant at the time of the statement. For instance, if the declarant was drunk or on drugs at the time, that would cut against a finding of trustworthiness, and vice versa.[3]

3. the personal truthfulness of the declarant. If the declarant is an inveterate liar, this cuts against admissibility, while unimpeachable veracity cuts in favor of admitting the statement.[4]

4. whether the declarant appeared to carefully consider his statement. [5]

5. whether the declarant recanted or repudiated the statement after it was made. [6]

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[3] See, e.g., United States v. Wilkus, 875 F.2d 649 (7th Cir. 1989) (affidavit signed while declarant was under heavy medication, and as to which declarant has no current memory, is insufficiently trustworthy to qualify as residual hearsay).

[4] See, e.g., United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where the declarant "was an almost comically unreliable character"; "the government cannot seriously argue that the trust due an isolated statement should not be colored by compelling evidence of the lack of credibility of its source: although a checkout aisle tabloid might contain unvarnished truth, even a devotee would do well to view its claims with a measure of skepticism")

[5] See, e.g., United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (where declarant answered affirmatively to every question asked by United States Attorney, trustworthiness could not be found: "Apparently, not even a single placebo question was amongst the lot to ensure that Tommy was considering the substance of each question and answering responsively, rather than simply agreeing with every question that the government posed.").

[6] See, e.g., United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (statement not trustworthy where declarant recanted).

6. whether the declarant has made other statements that are either consistent or inconsistent with the proffered statement.

7. whether the declarant by his conduct, exhibited his own belief in the truth of the statement.[7]

8. whether the declarant had personal knowledge of the event or condition described.[8]

9. whether the declarant's memory was impaired due to the lapse of time between the event and the statement.[9]

Compare United States v. Curro, 847 F.2d 325 (6th Cir. 1988) (grand jury testimony is trustworthy, in part because the declarant never tried to disavow the statement).

[7] See, e.g., United States v. Workman, 860 F.2d 140 (4th Cir. 1988), *cert. denied,* 109 S. Ct. 1529 (1988) (statement by an accomplice to law enforcement official met the trustworthiness requirement of the residual exception; the statement subjected the declarant to criminal liability and was made by a person who agreed to meet with one of the defendants and to wear a tape recorder to the meeting).

[8] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) (grand jury testimony held admissible as residual hearsay, in part because it "was based entirely on [the declarant's] own personal knowledge—he revealed what he saw on the job"). *Compare* United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where it contained many instances of hearsay within hearsay: "Although the government argues that each individual piece of double or triple hearsay would come in under one of the standard exceptions, see Fed. R. Evid. 805, experience suggests an inverse relationship between the reliability of a statement and the number of hearsay layers it contains").

[9] See, e.g., United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996) (statement offered by the defendant as residual hearsay was properly excluded, in part because of the great lapse of time between the declarant's statement and the events described); United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (statement about events occurring five years earlier was insufficiently trustworthy).

10. whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous.

11. whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it.[10]

12. whether the statement appears to have been made in anticipation of litigation and is favorable to the preparer.[11]

13. whether the declarant was cross-examined by one who had interests similar to those of the party against whom the

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[10] See, e.g., Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542 (9th Cir. 1990) (S-1 registration statement filed with Securities Exchange Commission held admissible as residual hearsay to prove the corporate history of plaintiff; "The standard of due diligence applied by securities lawyers with regard to Registration Statements is sufficient to guarantee the requisite circumstantial guarantees of trustworthiness"). United States v. Curro, 847 F.2d 325 (6th Cir. 1988) (grand jury testimony admissible as residual hearsay, in part because it was made under oath subject to penalty of perjury). Compare United States v. Snyder, 872 F.2d 1351 (7th Cir. 1989) (fact that grand jury testimony was made under oath is relevant but not dispositive; testimony not admissible as residual hearsay where declarant was serving two life sentences at the time of his testimony).

[11] See, e.g., Kirk v. Raymark Industries, Inc., 51 F.2d 1206 (3rd Cir. 1995) (Trial Court erred in admitting, as residual hearsay, interrogatory responses from a codefendant who had settled; the responses, which denied liability, were offered by the plaintiff to rebut the non-settling defendant's contention that the plaintiff's injury was solely caused by the settling defendant; the interrogatory responses were not sufficiently trustworthy because they were made while the declarant was still a defendant in the litigation and "had every incentive to set forth the facts in a light most favorable to itself.").

statement is offered.[12]

14. whether the statement was given voluntarily or pursuant to a grant of immunity.[13]

15. whether the declarant is a disinterested bystander or rather an interested party.[14]

One of the dangers of the trustworthiness requirement is

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[12] See, e.g., United States v. Zannino, 895 F.2d 1 (1st Cir. 1990) (testimony of witness who was cross-examined in the trial of defendant's accomplices held admissible as residual hearsay in defendant's separate trial; "though Zannino's counsel never had an opportunity to question Smoot, the declarant was vetted at the earlier trial by defense attorneys who shared appellant's interest in denigrating Smoot's credibility ... the functional equivalent of cross-examination by the defendant was present here, bolstering the inherent reliability of the testimony); United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994) (cross-examination by accomplices in a prior trial satisfied the residual exception's trustworthiness requirement).

[13] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) (grand jury testimony held admissible as residual hearsay, in part because it was given voluntarily: "Because Barbaro's testimony was not given under a grant of immunity, he exposed himself to potential criminal liability.... Thus, his grand jury testimony has the circumstantial guarantee of trustworthiness supporting the hearsay exception for statements against interest"). Compare United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where the declarant testified under a grant of immunity).

[14] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) ("Another indicium of reliability is the declarant's disinterest; the testimony of a mere bystander with no axe to grind tends to be more trustworthy"); Dogan v. Hardy, 587 F. Supp. 967 (D. Miss. 1984) (the Court held inadmissible in a personal injury action a self-serving statement by the driver of a car, made while he was hospitalized).

that it can be applied lackadaisically, given the mandated case-by-case approach and the fact that there is little meaningful appellate review. At least one commentator has argued that a permissive attitude toward the trustworthiness requirement has fallen hard on criminal defendants.[15] One possible example of a permissive attitude is found in *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993). Officers in *Clarke* seized a toolbox containing a large quantity of cocaine. The toolbox was in a car driven by Latimer. Latimer identified Michael Clarke as a co-conspirator. Michael moved to suppress the cocaine. At the suppression hearing, in order to establish standing, Michael testified that he had directed his brother, Christopher, to buy the toolbox and arrange for Latimer to distribute the cocaine. This testimony was used against Christopher at his trial; Michael refused to testify at Christopher's trial. The Court held that the suppression hearing testimony was not admissible under Rule 804(b)(1), the prior testimony exception, because Christopher was not present at Michael's suppression hearing, and had no opportunity to cross-examine Michael at that time. But the Court found the testimony properly admitted against Christopher under the residual exception.

The *Clarke* Court concluded that Michael's suppression hearing testimony was sufficiently trustworthy, by relying on the following factors: Michael was cross-examined by a government attorney; the statement was under oath and contemporaneously recorded; Michael knew that his suppression hearing testimony could not be used against him at his own trial, so any incentive to lie to avoid conviction was removed; Michael was subject to a perjury charge if he did lie; and he had no incentive to specifically implicate Christopher in order to establish standing with respect to the toolbox, since "he could have simply referred to an anonymous source."

The factors relied upon by the *Clarke* Court are subject to dispute. For example, the government's cross-examination of Michael at the suppression hearing was not conducted with the

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[15] See Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured*, 25 Loyola L.Rev. 1326 (1992) (arguing that the residual exception affects criminal defendants disproportionately).

intent of doing Christopher any favors. The Court's assumption, that Michael had no incentive to implicate Christopher rather than an anonymous source in order to establish his own standing, is arguable. It is always more effective in establishing a point to blame or implicate a specific person rather than an anonymous source. [16]

Because the trustworthiness analysis is so fact-intensive, it is difficult to draw any conclusions as to whether the residual exception has been unacceptably expanded to admit evidence of dubious reliability. Certainly, there are cases which exclude proffered evidence as insufficiently trustworthy, which could have just as easily been decided the other way under a more permissive approach.[17] On the other hand, because the Congress

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[16] For a case similar to *Clarke,* see United States v. Seavoy, 995 F.2d 1414 (7th Cir. 1993): Robert and Ronald were brothers charged with robbing a bank. Robert decided to plead guilty, and at the guilty plea hearing, Robert made a statement implicating himself and Ronald. Part of the plea agreement was that the government would recommend a two-level reduction in Robert's sentence for acceptance of responsibility. Robert then filed a motion to withdraw his plea, and refused to testify at Ronald's trial. The government proffered and the Trial Court admitted the plea transcript as residual hearsay against Ronald. The Court found no error. It reasoned that the hearsay was sufficiently trustworthy, relying on the following factors: 1. Robert's character as a witness was not tarnished by any prior criminal activity (apparently not even by the crime for which he was charged); 2. The testimony was given under oath, and both the prosecutor and his counsel (though not Ronald) questioned Robert about the bank robbery; 3. There was no apparent attempt to shift blame to Ronald; and 4. The testimony was heavily corroborated by the physical evidence. The Court rejected the defendant's arguments that Robert's motivation to obtain a sentence reduction, and his subsequent recantation of the guilty plea statement, rendered the statement untrustworthy.

[17] See, e.g., United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995): Although the Court affirmed the conviction of a defendant on various charges resulting from a bomb explosion, it concluded that the Trial Judge erroneously admitted evidence

intended the residual exception to be sparingly applied, it could be argued that *any* permissive application of the trustworthiness requirement is unwarranted. If the Committee is of the view that the trustworthiness requirement is insufficiently rigorous, it could give thought to changing the requirement from one of "equivalence" to a stricter standard, such as "circumstantial guarantees which clearly indicate the trustworthiness of the statement."

IV. Near Misses

The residual exception applies to statements "not specifically covered" by Rule 803 or 804. Thus, courts face the issue whether hearsay which almost, but not quite, fits another exception may be admitted under the residual exception. A major concern of some members of Congress was that certain types of hearsay deliberately excluded from the categorical exceptions might nevertheless be admitted as residual hearsay.[18] Most courts have demonstrated that there were good grounds for the congressional concerns, often admitting hearsay under the

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concerning information obtained from an ATF database (EXIS) of explosion and arson incidents. The prosecution sought to show that, out of more than 14,000 bombing and attempted bombing incidents, only the bombing charged and one prior incident alleged to have been committed by the defendant shared certain queried characteristics. The government's expert explained that the database derived from reports by a variety of law enforcement agencies, and that no agency was required by law to send reports to the database. The Court found that "it is far from clear the extent to which information memorialized in any of the reports derives from laboratory analyses, on-the-scene observations of police officers, second-hand descriptions of the device by layperson witnesses, or some other source." It concluded that the reports lacked sufficient guarantees of trustworthiness to be admitted.

[18] See 120 Cong. Rec. H12255-57 (Dec. 18, 1974) (expressing concern that the residual exceptions would result in the erosion of the admissibility requirements of the standard exceptions).

residual exception where it is a "near miss" of an enumerated exception.[19]

One important question as to the meaning of "not specifically covered" is whether grand jury statements can be offered by the government as residual hearsay. Criminal defendants have argued that they cannot, since such statements are similar to, but do not fall within, Rule 804(b)(1) when they are offered by the government (because there was no opportunity for the defendant to cross-examine). Defendants argue that if Congress had wanted to make an exception for grand jury statements, it could have done so, and that it is not an appropriate use of the residual exception to engraft a judicially-created exception for grand jury statements.

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[19] See, e.g., United States v. Furst, 886 F.2d 558 (3d Cir. 1989) ("Rule 803(24) is not limited in availability as to types of evidence not addressed in the other exceptions; [it] is also available when the proponent fails to meet the standards set forth in the other exceptions"); United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994) (prior inconsistent statement not under oath is not admissible under Rule 801(d)(1)(A) but may be received under the residual exception); Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) (deposition offered against defendant who was not a party to the litigation in which deposition was taken; party who cross-examined deponent was not a predecessor in interest as that term is used in Rule 804(b)(1); however, since defendant could have added nothing to the cross-examination which did take place, the deposition was admissible against the defendant under the residual exception, as a "near miss" of the prior testimony exception); United States v. Doe, 860 F.2d 488 (1st Cir. 1988) (telexes and certificate issued by Honduran Naval Force, verifying that permission had been granted to board a vessel, were not admissible under Rule 803(6) since no foundation witness had been called to testify; however, they were admissible under Rule 803(24) since they were normal and regular like business records); Turbyfill v. International Harvester Co., 486 F. Supp. 232 (E.D. Mich. 1981) (statement which fails to meet the requirements of Rule 803(5) because preparer of the record is not available to testify is admitted on "near miss" grounds under Rule 804(b)(5)).

Most courts have rejected the argument that grand jury statements are "specifically covered" by Rule 804(b)(1) and thus not admissible as a matter of law under the residual exception. One Court has explained the predominant Federal approach as follows:

> We decline to rally behind appellants' call for a per se ban on the admission of grand jury testimony under the residual exception. If a statement does not satisfy all of the requirements of Rule 804(b)(1), then it is not a statement "covered by [one] of the foregoing exceptions" within the meaning of Rule 804(b)(5). We consider admissible those statements that are similar though not identical to hearsay clearly falling under ... the codified exceptions, if the statements otherwise bear indicia of trustworthiness equivalent to those exceptions. The contrary reading would create an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even arguably fit into a recognized mold. If the proponent can show that a particular piece of hearsay carries "circumstantial guarantees of trustworthiness" ... that statement should be admissible regardless of its affinity to a statement falling squarely within a codified exception.[20]

Similarly, in *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993), the Court held that suppression hearing testimony was admissible under the residual exception, where it did not qualify as prior testimony because the defendant was not a party to the hearing and thus had no opportunity to cross-examine the declarant. The Court rejected the argument that a statement cannot qualify as residual hearsay if it is a "near miss" of another specific exception. While the residual exception refers to hearsay "not specifically covered" by the other exceptions, the Court argued that a broad reading of this language would

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[20] United States v. Fernandez, 892 F.2d 976, 981 (11th Cir. 1989) (finding ultimately that the grand jury testimony was not sufficiently reliable to qualify under the residual exception).

render the residual exceptions "a nullity": "We believe that 'specifically covered' means exactly what it says: If a statement does not meet all of the requirements for admissibility under one of the prior exceptions, then it is not 'specifically covered.'"[21]

In other words, the Federal Courts read the language "not specifically covered" as meaning "not admissible under." One possible problem with this reading is that it arguably renders the language superfluous. If the statement *were* admissible under one of the categorical exceptions, the applicability of the residual exception would never arise.

Judge Easterbrook took the contrary view in his concurring opinion in *United States v. Dent*, 984 F.2d 1453 (7th Cir. 1993).[22] He argued that the residual exception could not be used as a means of admitting grand jury testimony, because the exception is applicable only to hearsay statements "not covered" by the other exceptions. According to Judge Easterbrook, grand jury testimony *is* covered by another exception--that for prior testimony. Judge Easterbrook read the Supreme Court's decision in *United States v. Salerno*, 112 S.Ct. 2503 (1992), as implicitly deciding that grand jury testimony was "covered" by Rule 804(b)(1). He argued that the prosecution should not be permitted to evade the limitations on grand jury testimony placed in Rule 804(b)(1) by simply proffering the same testimony under the

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[21] See also United States v. Donlon, 909 F.2d 650 (1st Cir. 1990) (holding grand jury testimony admissible and arguing that "the very use of the word 'equivalent,' suggesting there must be something special about the guarantee of trustworthiness, offers, in principle, a safeguard against the courts' use of the residual exception to swallow up the hearsay rule.").

[22] The majority in *Dent* noted that the Circuit Courts are in conflict as to whether grand jury testimony can be admitted against a criminal defendant under the residual exception, and found it unnecessary to decide this question of law, since the grand jury testimony admitted at trial was insufficiently reliable to qualify as residual hearsay at any rate.

residual exception. [23]

Another question of expanded use of the residual exception arises with respect to law enforcement reports offered against criminal defendants. Rule 803(8) contains language excluding some law enforcement reports. Can such reports nonetheless be admitted as residual hearsay? The courts have generally held in the negative, but not because of the "not specifically covered" language in the residual exception. Rather, under the predominant view of Rule 803(8), law enforcement reports will only be excluded where they are prepared under adversarial circumstances and thus suffer from suspect motivation. [24] Such reports are thus

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[23] See also United States v. Vioga, 656 F. Supp. 1499 (D.N.J. 1987), *aff'd,* 857 F.2d 1467 (3d Cir. 1988) (although the Court recognized that several Circuits have approved the admission of grand jury testimony under the residual exception, it concluded that the residual exception is unavailable when grand jury testimony is offered, since Rule 804(b)(1) specifically covers former testimony and does not include grand jury testimony).

[24] See, e.g., United States v. Enterline, 894 F.2d 287 (8th Cir. 1990) (computerized list prepared by police of vehicles reported stolen held admissible despite exclusionary language in Rule 803(8)(B) and (C): "The computer report does not contain contemporaneous observations by police officers at the scene of a crime, and thus presents none of the dangers of unreliability that such a report presents. Rather, the report is based on facts: that cars with certain vehicle numbers were reported to have been stolen. Neither the notation of the vehicle identification numbers themselves nor their entry into a computer presents an adversarial setting or an opportunity for subjective observations by law enforcement officers"). United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988) (breathalyzer report admitted because "the preparation of this report is a routine, non-adversarial act made in a non-adversarial setting... [N]othing in the record reveals a motivation to misrepresent the test results or records."); United States v. Dancy, 861 F.2d 77 (5th Cir. 1988) (fingerprint card in penitentiary packet, offered to show that defendant was a convicted felon, was admissible under Rule 803(8)(B) because it is unrelated to a criminal

excluded because they are untrustworthy, and so they will also be excluded under the residual exception.

If the Committee believes that hearsay which nearly misses one of the categorical exceptions should never be admissible under the residual exception, then the residual exception must be amended. The "not specifically covered" language has not served to exclude "near miss" hearsay. One possibility is to state that hearsay which meets all but one of the admissibility requirements of one of the other exceptions shall not be admissible under the residual exception. Whether this is a desired result is a policy question for the Committee.

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investigation; the Rule excludes only records that report the observation or investigation of crimes).

Memorandum To: Members of the Advisory Committee on the Federal Rules of Evidence
From: Professor Daniel Capra, Reporter
Re: **Residual Exception Notice Requirement**
Date: November 11, 1996

I. INTRODUCTION

The minutes of the April, 1996 meeting of the Committee indicate that the Reporter was directed to report on whether courts have reached different results when applying the notice requirement in the residual exception to the hearsay rule. This memorandum addresses that question and some others related to the notice requirement. The conclusions are as follows:

1. There is no consistent approach to the various notice requirements found throughout the Federal Rules.

2. Only one Circuit applies the notice requirement absolutely, i.e., holding residual hearsay inadmissible whenever the proponent fails to give pretrial notice. The rest of the Circuits hold that the notice requirement can be excused for good cause, so long as the opponent is given a sufficient opportunity to prepare to meet the evidence.

3. One Circuit holds that the opponent must receive notice not only of the evidence itself, but also of the proponent's intent to offer it as residual hearsay. The rest of the Circuits hold that the notice requirement is satisfied when the opponent is somehow made aware, in advance of trial, of the existence of the evidence and its

potential admission at trial.

4. A strong argument can be made that the flexible approach to the notice requirement, taken by the majority of the courts, is at odds with the apparent intent of Congress that the notice requirement be applied rigidly.

II. LANGUAGE OF THE RULE

The residual exception provides that hearsay offered thereunder shall not be admissible

> unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

III. COMPARISON TO OTHER NOTICE PROVISIONS IN THE FEDERAL RULES

There is a good deal of inconsistency in the notice requirements found throughout the Federal Rules. For example, the residual exception notice requirement, set forth above, is different from the notice provision added to Rule 404(b) in 1991. Rule 404(b) expressly permits notice during trial "if the court excuses pretrial notice on good cause shown * * *." A similar good cause requirement is found in Rule 412, but that Rule has a different approach as well: it requires notice by way of a *written motion*, and sets forth a specific time period--notice must be provided at least 14 days before trial. Rule 412 explicitly contains a good cause exception. Rules 413-15 take another approach. These Rules require advance notice at least 15 days before trial, but the notice need not be in writing and there is an exception for good cause. Finally, the notice provision contained in Rule 609(b) requires written notice and does not admit on its face of any good cause exception; no explicit time period is set forth.

The Committee may wish to consider whether it is appropriate to amend the various notice requirements so that they are more consistent with one another. A consistent approach could be taken to three questions: 1. Whether an advance notice requirement can be excused for good cause; 2. Whether notice must be in writing; 3. Whether notice must be given a specific number of days before trial. At the least, the Committee might wish to think through the reasons, if any, for differentiating between the notice requirements.

Given the history of Rules 413-15, and the previous efforts of the Committee with respect to the notice requirements therein, it is possible that an integrated approach cannot encompass those rules. However, there may be sufficient inconsistency in the other notice requirements to warrant the Committee's attention.

III. LEGISLATIVE HISTORY OF THE NOTICE REQUIREMENT

The legislative history of Rules 804(b)(5) and 803(24) can be summarized as follows. The House of Representatives deleted the forerunners of the residual hearsay exceptions "as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." H.R.Rep.No.650, 93d Cong., 1st Sess. 5-6 (1973), Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7079. The Senate reinstated the provisions in a narrower form, believing that "exceptional circumstances" would on rare occasions justify the admission of hearsay not covered by other exceptions, and stating its expectation that "the court will give the opposing party a full and adequate opportunity to contest the admissibility of any statement sought to be introduced . . . ." S.Rep.No.1277, 93d Cong., 2d Sess. 18-20, Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7051, 7065-66. The Conference Committee retained the provisions but added the pretrial notice requirement, without elaborating on the reason for the requirement. Joint Explanatory Statement of the Committee on Conference, H.R.Rep.No.1597, 93d Cong., 2d Sess. 13, Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7105-06.

During the debates on the floor, two representatives who had participated in the conference commented upon the pretrial notice

provision. Representative Hungate said of the notice requirement:

> We met with opposition on that. There were amendments offered that would let them do this right on into trial. But we thought the requirement should stop prior to trial and they would have to give notice before the trial. That is how we sought to protect them.

120 Cong.Rec. H12,256 (daily ed. Dec. 18, 1974). Representative Dennis said that, although he disliked the residual hearsay provisions, he thought that the insertion of a notice requirement so that counsel could get ready for such evidence was an adequate compromise. 120 Cong.Rec. H12,256-57 (daily ed. December 18, 1974).

The legislative history thus indicates (1) congressional concern over the expansive use of the residual exception; (2) the inclusion of a notice requirement as an explicit means to protect the opponent; and (3) the specific rejection in the Conference of a proposal to allow notice "on into trial". Given all these factors, it is probably fair to state, as the Court did in *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978): "There is absolutely no doubt that Congress intended the requirement of advance notice be rigidly enforced."

IV. CASE LAW APPLICATION OF THE NOTICE REQUIREMENT

A. Advance Notice

Some courts have purported to apply the advance notice requirement rigidly. Others use an avowedly more liberal approach. In terms of result, however, it appears that every Circuit, with one major exception, allows the trial judge to forego a rigid adherence to the requirement of pretrial notice, so long as two conditions are met: 1. the proponent is not at fault for failing to give pretrial notice; and 2. the opponent is given a fair opportunity to meet the evidence. Where a court has applied the notice requirement "strictly", it has usually done so in a fact situation where the proponent had no excuse for failure to comply. Where a court has applied the notice requirement "liberally", it has done so when the aforementioned requirements

have been met. Thus, while a good cause limitation is not set forth in the Rule, it has generally been applied by the courts--again, with one exception.

The Second Circuit is the only circuit which has rejected a "good cause" defense. In *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978), the government was not made aware of the need to proffer documents under the residual exception until defense experts had testified. Moreover, the trial judge offered to call a recess to allow the defense time to prepare for the evidence. Nonetheless, the Court held that it was error, though harmless, for the trial court to admit the evidence under the residual exception. Allowing a recess for preparation, as here, might have been "the most efficient and evenhanded way to deal with the troublesome question with which [the trial judge] was confronted." Approval of that remedy would, however, "countenance outright circumvention of the carefully considered and drafted requirements of Fed.R.Evid. 803(24)."

A more common application of the "strict" approach to notice is found in *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995). The Court held that it was error to admit residual hearsay where no pretrial notice was given. It noted, however, that the notice requirement "can be met where the proponent of the evidence is without fault in failing to notify his adversary and the trial judge has offered sufficient time, by means of granting a continuance, for the proponent to prepare to contest its admission." Here, there was no showing of lack of fault, and therefore admission was error. See also *United States v. Furst*, 886 F.2d 558 (3d Cir. 1989) (where the government's first reference to the residual exception was on the first day of trial, one day prior to the introduction of the evidence, and where no excuse for the late notice was proffered, the statement was not admissible as residual hearsay); *United States v. Beard*, 39 F.3d 1193 (10th Cir. 1994) (notice requirement cannot be excused where the government made no attempt to provide notice and had no good cause for failing to notify: "Admitting hearsay evidence under this exception without notice to the adverse party exceeds the bounds of permissible choice under the circumstances.").

Courts taking a "liberal" approach to the pretrial notice

requirement generally do so only where good cause for excusing that requirement has in fact been found. Thus, in *United States v. Doe,* 860 F.2d 488 (1st Cir. 1988), the Court noted that it was opting for a "flexible" approach to the notice requirement. The government offered a telex at trial under the residual exception, but it did not become aware of the existence of the telex until after the trial had begun. The defendant was given an opportunity for a continuance, which he did not take. The Court held that, under these circumstances, the failure to provide pretrial notice would be excused, but that "[e]ven under a flexible approach, evidence should be admitted only when the proponent is not responsible for the delay and the adverse party has an adequate opportunity to examine and respond to the evidence." See also *United States v. Baker,* 985 F.2d 1248 (4th Cir. 1993) (notice requirement flexibly applied where the evidence did not appear to be needed until an unexpected development at trial, and the opponent was given time to meet the evidence; in light of these "exceptional circumstances" the court upheld "notice flexibility"); *United States v. Lyon,* 567 F.2d 777 (8th Cir. 1977) (transcribed interview of witness held admissible under residual exception despite lack of pretrial notice: "The government was not aware of Mrs. Lorts' poor memory prior to trial and Lyon had copies of her statement.").

B. Notice of Intent to Invoke the Residual Exception

There is some dispute among the courts as to the type of notice that the opponent of the evidence must receive. The Third Circuit holds that the opponent must be notified not only about the evidence itself but also of the proponent's intent to invoke the residual exception. All of the other Circuits that have decided the question appear to hold that the opponent need only be made aware in advance of the existence of the evidence and its potential proffer at trial. The usual fact situation in which this question arises is where the proponent has not even purported to give pretrial notice, and yet the opponent is well aware before trial of the existence of the evidence and its possible admission at trial.

The minority position is found in *United States v. Pelullo,* 964 F.2d 193 (3d Cir. 1992). The *Pelullo* Court noted that while

the Rule could be read to require notice only of the statement itself, the Third Circuit requires specific notice of the proponent's intent to use the residual exception. Here, even though the defendant was given the documents months before trial, there was no specific notice of the government's intent to invoke the residual exception, so the statement was held improperly admitted as residual hearsay. See also *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995)("[T]he proponent must give notice of the hearsay statement itself as well as the proponent's intention specifically to rely on the rule as a grounds for admissibility of the statement.")

The more common result is that the notice requirement is deemed satisfied when the opponent has received actual notice, before trial, of the existence of the evidence and its possible use at the trial. The reasoning is that under these circumstances, the opponent cannot complain about surprise or inability to prepare. Thus, in *United States v. Bachsian*, 4 F.3d 796 (9th Cir. 1993), the Court declared that "failure to give [explicit] pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence." In *Bachsian*, the government did not give notice under the residual exception, but the defendant was more generally notified two months before trial that the government intended to use the evidence, and the defendant was given copies. Also, the defendant did not move for a continuance. Under these circumstances, the Court found that the spirit of the notice requirement was met. See also *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (no prejudice from lack of notice since the defendants had the affidavit for 7 1/2 years and anticipated that it would be used at trial; also, the defendants rejected the offer of a continuance); *Prudential Insurance Co. v. Kaltofen*, 951 F.2d 352 (7th Cir. 1991) (where it was clear in the defendant's opening statement that he anticipated the evidence, there was no surprise, and therefore residual hearsay was not to be excluded for lack of notice); United States v. Munoz, 16 F.3d 1116 (11th Cir. 1994)(defendants knew about the statements, but did not know of the intent to offer them under the residual exception: "There is no particular form of notice required under the rule. As long as the party against whom the document is offered has notice of its existence and the proponent's intention to introduce it--and thus has an opportunity to counter it and protect himself against

surprise--the rule's notice requirement is satisfied.") Compare *LLoyd v. Professional Realty Services, Inc.*, 734 F.2d 1428 (11th Cir. 1984)(the opponent knew about the evidence, but not about its intended admission as residual hearsay, so the trial court excluded it: "While some appellate courts have affirmed district court findings that an adverse party's knowledge of the substance of the testimony will render formal notice unnecessary * * * these cases do not suggest that a trial court following the strict language of the rule to exclude testimony is guilty of an abuse of discretion.").

Query whether the cases finding the notice requirement satisfied whenever the opponent somehow becomes aware of the evidence, are consistent with the terms of the Rule. The Rule specifies that the proponent must herself provide notice to the adverse party. On the other hand, where the proponent has in fact given advance notice about the hearsay evidence, but has failed to invoke the residual exception specifically, the Rule is, as the Third Circuit admits, vague as to whether the notice requirement is satisfied.

V. CASE LAW AND CONGRESSIONAL INTENT

As discussed above, the vast majority of courts have employed a liberal construction to the notice requirement of the residual hearsay exception. The terms of the Rule do not admit of a good cause exception, and yet most courts have adopted one. A strict construction of the Rule could require the proponent to provide specific notice of her intent to invoke the residual exception, and yet most courts do not impose such a requirement. While the majority, flexible approach may be preferable on the merits, it is in tension with the rigid approach envisioned by Congress. The Committee may wish to address the disparity between the approach of most courts and the approach envisioned by Congress.

ADVISORY COMMITTEE ON EVIDENCE RULES

Draft Minutes of the Meeting of November 12, 1996

San Francisco, California

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

The following members of the Committee were present:

Hon. Fern M. Smith, Chair

Hon. David C. Norton

Hon. Jerry E. Smith

Hon. James T. Turner

Professor Kenneth S. Broun

Frederic F. Kay, Esq.

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

Roger Pauley, Esq.

Dean James K. Robinson

Professor Daniel J. Capra, Reporter

Hon. Milton I. Shadur, Hon. Ann K. Covington, and Mary F.

Harkenrider, Esq., were unable to attend.

Also present were:

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

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

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

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

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

Professor Rob Aronson, Uniform Rules of Evidence Committee

Joe Cecil, Esq., Federal Judicial Center

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

Opening Business

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

approved by the Committee.

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

Self-Evaluation Report

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

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

2. The Committee has the appropriate amount of work.

3. The size of the Committee is appropriate.

4. The Committee membership is representative.

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

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

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

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

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

Rape Counselor Privilege

Congress, in 42 U.S.C.§ 13942(c) (1996), directed that the Judicial Conference report on whether the Federal Rules of Evidence should be amended to include a privilege for confidential communications from sexual assault victims to their counselors. The Evidence Rules Committee directed the Reporter to prepare a proposed statement of the Committee on this issue. After some discussion, the Committee voted unanimously to adopt the statement, which would recommend to the Standing Committee that the Federal Rules of Evidence not be amended to include such a privilege. The Committee concluded that it would be anomalous to have the rape counselor privilege as the only codified privilege in the Federal Rules of Evidence. Nor would such a codification be necessary, since the Supreme Court, in *Jaffee v. Redmond,* recently established a privilege for statements to psychotherapists and licensed social workers; and it is probable

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

Uniform Rules of Evidence

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

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

that a ruling is final.

2. *Article 3*--The Uniform Rules Committee proposed no change. The concern was that other uniform laws use the term "presumption" in various substantive ways. Professor Aronson noted that it would be useful to have a single rule governing the use of presumptions, but that much of the law of presumptions is based on policy beyond evidence. The Uniform Rules reporter has been instructed to try to draft an all-encompassing rule, but Professor Aronson is not optimistic about its passage.

3. *Rule 404*--Changes were made in this Rule in response to Federal Rules 413-15. The Reporter to the Uniform Rules Committee has been instructed to draft a "lustful disposition" rule of admissibility, such as exists in many states--permitting evidence of prior unlawful sexual conduct directed toward the same victim. Professor Aronson noted that there is overwhelming support in the Uniform Rules Committee for restricting Rule 404b. The Uniform Rules Committee proposal includes an in camera hearing requirement, as well as a requirement of advance notice (with a good cause exception); it requires clear and convincing proof that the opponent committed the bad act before it can be admitted; and it requires that the probative value of the bad act

for its not-for-character purpose must substantially outweigh its prejudicial effect. The Chair asked whether there has been any negative reaction from trial judges as to the proposed in camera requirements. Professor Aronson said that trial judges had been positive about these requirements and that his sense was that trial judges wanted direction in handling evidence of uncharged misconduct.

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

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

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

criminal cases.

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

8. *Rule 609*--A requirement of pretrial notice, parallel to that in Rule 404(b), has been added. Also, when the criminal defendant is the witness, impeachment would not be permitted with non-crimen falsi crimes unless the probative value of the conviction substantially outweighs the prejudice to the defendant.

9. *Bias*--Uniform Rule 616 currently permits impeachment for bias, subject to the 403 test. The Uniform Rules Committee is recommending that this rule be deleted, due to concern that the rule, by negative implication, could have a confining influence

on other methods of impeachment not mentioned in the Rules.

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

Developments in Technology

The proposed change in the term "writings" in the Uniform Rules engendered some discussion about technological advances and their impact on the Federal Rules of Evidence. Judge Stotler pointed out that the problem of electronic data cuts across all the rules, not only the Evidence Rules, as we move toward the "electronic courtroom." The Chair observed that the problems created by technological change are more problems of validity and reliability than definitional. The Chair announced that in response to the challenges created by new technology, Judge Stotler has formed a subcommittee, consisting of one member from

each of the advisory committees, as well as the reporters from each advisory committee. The purpose of this subcommittee is to consider how best to respond to changes in data retrieval and presentation in the federal courts. Judge Turner has been appointed by the Chair and has agreed to serve on the technology subcommittee.

Grants of Certiorari

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

Issues for the Committee to Pursue

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

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

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

required the renewal of an objection unless the "context" instructed otherwise. The Civil Rules Committee thought that wording too ambiguous. It was further suggested in discussion that the Uniform Rules provision should be considered to see if it would be helpful.

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

3. *Rule 615*--The Reporter informed the Committee that the "Victim of Crime Bill of Rights," 42 U.S.C. 10606, passed in 1990, places some limits on Rule 615. Subsection (b) of the statute sets forth seven rights of victims of crimes. Although

the statute is not a model of clarity, paragraph (4) of subsection (b) sets forth the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." It appears that Congress intended to create a limited exception to Rule 615. This exception, which is narrowly tailored to take account of the interests of crime victims and is more recently enacted than the Rule, would take precedence over Rule 615. The relationship between Rule 615 and the Victim of Crime Bill of Rights is currently being tested in the Oklahoma City bombing trial. The Reporter stated that he would report more fully on this issue at the next meeting.

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

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

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

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

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

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

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

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

Professor Coquillette informed the Committee that the reporters of all of the committees are going to get together in January to look at anachronisms and inconsistencies throughout the rules and committee notes. One topic of discussion will be the proper procedure for amending the committee notes where

appropriate. The Reporter will report back on the results of the reporters' meeting at the next Committee meeting.

8. *Circuit Splits*--John Kobayashi suggested that it would be a useful long-term project for the Committee to investigate evidentiary issues on which the circuit courts are split. The Reporter agreed to prepare a memorandum on circuit splits for the next meeting.

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

10. *Automation*--John Kobayashi suggested, as a long-term project, that the Committee investigate whether the Evidence

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

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

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

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

3. *Rule 404b*--Frederic Kay suggested that Rule 404(b) should be amended along the lines of the Uniform Rules proposal, so that uncharged misconduct could not be admitted unless the probative value substantially outweighs the prejudicial effect. While there was much sympathy for this position, the Committee unanimously agreed that the proposal would be rejected by Congress, and therefore decided not to pursue the suggestion at this time.

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

5. *Rule 611*(b)--Dean Robinson suggested that the Committee might consider whether the Rule should be amended so that the scope of cross-examination would not be limited by the subject matter of the direct. But the Committee decided not to proceed on this matter at this time.

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

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

be admitted in favor of a criminal defendant, so the rule as applied was not posing any problems.

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

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

At the meeting, the Reporter summarized the conclusions of these reports. First, as to the notice requirement, there is some disagreement among the courts as to whether the requirement can

be excused for good cause. Also, there is some dispute about whether the proponent must provide notice of a specific intent to invoke the residual exception. Finally, the Reporter pointed out that no consistent approach is taken to the notice requirements found scattered throughout the Evidence Rules.

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

The Committee discussed the issues presented by the Reporter's memoranda. Judge Jerry Smith stated that the current residual exception is a useful tool for trial judges, since the other exceptions are not always well-conceived, and are sometimes underinclusive. John Kobayashi contended that it would be useful

to impose a specific number of days before trial as a date for the pre-trial notice requirement. Roger Pauley argued that there was no reason to conform the notice requirements found throughout the Evidence Rules, contending that each Rule has a reason for a different approach as to notice.

Professor Broun stated his impression that the residual exception is being overused, and that it would be useful to give guidance, either by a more specific and stricter definition of trustworthiness, or by a specific exclusion of "near miss" hearsay. But he acknowledged that the question of overuse is to a large extent a normative question on which people can differ. The Chair expressed the opinion that the role of the Committee is not to reduce the discretion of trial judges, but to determine whether rules are unnecessarily ambiguous, incorrect, or are the subject of conflicting opinions among the circuits. Under this standard, there appeared to be no need at this time to amend the residual exception.

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

10. *Sentencing Proceedings*--Some interest was expressed in

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

Criminal Forfeiture

Roger Pauley reported to the Committee, for information purposes only, on a Justice Department proposal to make criminal forfeiture part of the ancillary proceedings to a criminal trial, rather than a question for the jury. At this time, this proposal has no immediate impact on the Evidence Rules. Judge Stotler expressed the hope that eventually the patchwork of forfeiture provisions will be made into an integrated whole; but she noted that there are no current proposals to change the Federal Rules of Evidence in any way that would bear upon forfeiture proceedings.

Liaison Reports

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

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

Restylized Appellate Rules

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

Evidence Project

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

Next Meeting

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

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

THE SILENCE SPEAKS VOLUMES: A BRIEF REFLECTION ON THE QUESTION OF WHETHER IT IS NECESSARY OR EVEN DESIRABLE TO FILL THE SEEMING GAPS IN ARTICLE VI OF THE FEDERAL RULES OF EVIDENCE, GOVERNING THE ADMISSIBILITY OF EVIDENCE LOGICALLY RELEVANT TO THE WITNESS'S CREDIBILITY

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*Edward J. Imwinkelried**

Article VI of the Federal Rules of Evidence addresses who may be impeached and the methods of impeachment. However, the common law methods of impeachment, such as bias and specific contradiction, are not enumerated in the rules. While some scholars have identified these omissions as gaps that need to be filled, Professor Imwinkelried argues that the rules are designed and work effectively, despite the omissions. By examining the development, purpose, and use of the Federal Rules of Evidence, the impeachment silence may be explained as legislative judgment to shift decision-making power from the appellate to the trial courts. Professor Imwinkelried concludes that there is no need to amend Article VI to fill the "seeming gaps."

"He knew the precise . . . moment when to say nothing."

—Oscar Wilde[1]

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1. THE PICTURE OF DORIAN GRAY, *quoted in* HENRY DAVIDOFF, THE POCKET BOOK OF QUOTATIONS 341 (1959) [hereinafter OSCAR WILDE].

I. INTRODUCTION

The Federal Rules of Evidence took effect as statutes in 1975.[2] In the nearly quarter of a century since their enactment, the Federal Rules have evolved into a largely[3] self-contained evidence code.[4] Although the Supreme Court's approach to the interpretation of the Rules has been criticized,[5] at least until recently[6] the Court has been relatively consistent in employing a textualist approach to interpretation.[7] When the Federal Rules took effect, there was a vast body of common law jurisprudence applying the various exclusionary rules of evidence. One of the primary thrusts of the Court's textualist approach has been that the adoption of the Federal Rules impliedly abolished uncodified exclusionary rules.[8]

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2. *See* RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 16 (4th ed. 1997).

3. To an extent, Rules 301 and 501 create windows to the common law. Rule 301 allows the federal courts to continue to develop presumption and inference doctrine, while Rule 501 authorizes them to develop federal privilege law. However, even these windows are limited. Consider Rule 301. At common law, a court would have the power to decide the effect of a presumption as well as the threshold question of whether the presumption existed. However, Rule 301 limits judicial power by announcing that unless otherwise provided by statute, a presumption shifts only the initial burden of production. Likewise, Rule 501 does not leave the common law judicial power over privileges intact. In the final analysis, Rule 501 is a delegated legislative power *See generally* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§ 5422, 5425 (1980). The other provisions of the statutory scheme arguably require the federal courts to assign predominant value to the search for truth in deciding whether to recognize uncodified privileges. *See* Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 535-42 (1994).

4. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules,* 60 GEO. WASH. L. REV. 857, 864 n.23 (1992); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 784 n.154 (1990); Glenn Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 *passim* (1992).

5. *See generally* Randolph N. Jonakait, *Text, Texts or Ad Hoc Determinations. Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551 (1996); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence,* 44 AM. U. L. REV. 1717, 1759-1816 (1995); Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence· A Call for a Politically Realistic Hermeneutics,* 32 HARV. J. ON LEGIS. 329 (1995); Glenn Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393 (1994).

6. *See* Andrew E. Taslitz, Daubert*'s Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence,* 32 HARV. J. ON LEGIS. 3, 68, 71-73 (1995) (reviewing the most recent Supreme Court decisions construing the Federal Rules of Evidence, Professor Taslitz detects movement toward a more "flexible, pragmatic approach" to statutory construction); *see also* Scallen, *supra* note 5, at 1759 (showing the Court struggling with moderate textualism in recent cases).

7. *See* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence,* 27 IND. L. REV. 267, 270 (1993); Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence,* 75 OR. L. REV. 389, 390 (1996) [hereinafter Imwinkelried, *Moving Beyond*].

8. *See* Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution,* 6 REV. LITIG. 129, 135 (1987).

In 1978, shortly after the Rules became effective, the late Professor Edward Cleary, the reporter for the committee which drafted the Rules, released his famous article about the interpretation of the Rules.[9] In the article, Professor Cleary asserted that "[i]n principle, under the Federal Rules no common law of evidence remains."[10] In the next sentence of the article, Professor Cleary cited Federal Rule of Evidence 402, reading: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."[11] Because Rule 402 makes no mention of case or decisional law, there is a powerful argument that the Rules sweep away any exclusionary rule which has not been reduced to statutory text.[12]

On two occasions, the Supreme Court has approvingly quoted that passage from Professor Cleary's article.[13] The Court's reliance on the article in its 1993 decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[14] is instructive. The *Daubert* case posed the question of whether the *Frye* test had survived the adoption of the Federal Rules of Evidence. The *Frye* decision announced that before an expert witness could base testimony on a purportedly scientific hypothesis, the witness's proponent had to present foundational testimony that the hypothesis had gained general acceptance within the relevant specialty field.[15] The *Frye* decision had a respectable lineage spanning seven decades and dating back to 1923.[16] Moreover, at the time of the adoption of the Federal Rules, *Frye* was "the controlling standard" in the vast majority of federal and state jurisdictions.[17] Yet, the *Daubert* Court ruled that the *Frye* test was no longer good law under the Federal Rules.[18] As support for its ruling, the Court cited Rule 402[19] and Professor Cleary's article.[20] The Court could not find any statutory text that could reasonably be interpreted to codify a general acceptance standard.[21] Although the *Frye* test had held sway for seventy years and was followed in most jurisdictions, it was a creature of case law. Because the drafters had not chosen to incorporate the test into

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9. Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).

10. *Id.* at 915.

11. *Id.* (citing FED. R. EVID. 402).

12. *See* Imwinkelried, *supra* note 8, at 130-38.

13. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587-88 (1993); United States v. Abel, 469 U.S. 45, 51-52 (1984).

14. 509 U.S. 579.

15. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

16. *See Daubert*, 509 U.S. at 585.

17. 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 1-5, at 9 (2d ed. 1993).

18. *See Daubert*, 509 U.S. at 589.

19. *See id.* at 587-88.

20. *See id.*

21. *See id.* at 583.

the wording of the statute, the enactment of the Federal Rules overturned the test.[22]

Decisions such as *Daubert* seem to point to the conclusion that the Federal Rules are generally intended to operate as a self-contained evidence code. However, if that conclusion is correct, Article VI of the Rules is a great embarrassment. That article regulates the admissibility of testimony relevant to the credibility of witnesses.[23] The provisions in the article address such questions as whom a litigant may impeach,[24] which impeachment techniques a litigant may employ,[25] and when a litigant may rehabilitate a witness's credibility after attempted impeachment.[26] However, as Professor John Schmertz, a longtime and perceptive student of the Federal Rules, has repeatedly noted,[27] there are conspicuous gaps in Article VI. For instance, the provisions in Article VI are absolutely silent on such well-settled impeachment techniques as bias[28] and specific contradiction.[29] At first blush these gaps[30] are puzzling and potentially confusing, especially if the Federal Rules are to function as a self-contained code.[31]

These gaps seem particularly unacceptable because a significant percentage of the cases which go to trial are "swearing contest[s]."[32] At these trials, the pivotal question is, "Whom should the jury believe? Someone is lying or mistaken."[33] When the trial develops into

22. Michigan decided to codify the *Frye* rule. The Michigan drafters did so by inserting the adjective "recognized" before the word "scientific" in the text of their version of Rule 702. MICH R. EVID. 702, *quoted in* 2 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 51, at 12 (1988).

23 *See* FED. R. EVID. 601-616 (encompassing Article VI of the Federal Rules of Evidence).

24. *See id.* 607.

25. *See id.* 608-610, 613.

26. *See id.* 608(a)(2).

27. *See, e.g.*, John R. Schmertz, Jr., *The First Decade Under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion,* 30 VILL. L. REV. 1367, 1373-74 (1985); John R. Schmertz, Jr. & Karen S. Czapanskiy, *Bias Impeachment and the Proposed Federal Rules of Evidence,* 61 GEO. L.J. 257, 265-69 (1972); 22 FED. R. EVID. NEWS 91 (1997); 22 FED. R. EVID. NEWS 25 (1997); 21 FED. R. EVID. NEWS 116 (1996); 21 FED. R. EVID. NEWS 91 (1996); 19 FED. R. EVID. NEWS 183 (1994); 19 FED. R. EVID. NEWS 59 (1994); 18 FED. R. EVID. NEWS 171 (1993); 18 FED. R. EVID. NEWS 151 (1993); 18 FED. R. EVID. NEWS 138 (1993); 18 FED. R. EVID. NEWS 83 (1993); 18 FED. R. EVID. NEWS 40 (1993); 17 FED. R. EVID. NEWS 117 (1992); 17 FED. R. EVID. NEWS 39 (1992); 16 FED. R. EVID. NEWS 168 (1991); 16 FED. R. EVID. NEWS 58 (1991); 15 FED. R. EVID. NEWS 59 (1990); 15 FED. R. EVID. NEWS 13 (1990); 14 FED. R. EVID. NEWS 117 (1989); 13 FED. R. EVID. NEWS 183 (1988); 13 FED. R. EVID. NEWS 134 (1988); 12 FED. R. EVID. NEWS 123 (1987); 12 FED. R. EVID. NEWS 25 (1987); 10 FED. R. EVID. NEWS 29 (1985); 10 FED. R. EVID. NEWS 7 (1985); 9 FED. R. EVID. NEWS 103 (1984); 9 FED. R. EVID. NEWS 88 (1984); 9 FED. R. EVID. NEWS 43 (1984); 9 FED. R. EVID. NEWS 31 (1984); 8 FED. R. EVID. NEWS 92 (1983); 6 FED. R. EVID. NEWS 125 (1981).

28. *See* Schmertz & Czapanskiy, *supra* note 27, at 258.

29. *See* 22 FED. R. EVID. NEWS 25 (1997).

30. *See* Schmertz, *supra* note 27, at 1405-06.

31. *See* 21 FED. R. EVID. NEWS 116 (1996).

32. Ronald L. Carlson & Edward J. Imwinkelried, *The Three Types of Closing Arguments,* 18 AM. J. TRIAL ADVOC. 115, 116 (1994).

33. *Id.*

a swearing contest, the outcome can turn on the trial judge's rulings on the admissibility of evidence proffered to attack or support the witness's credibility. The jury might have accepted a plaintiff's witness's testimony but for the judge's decision to admit evidence that the witness had recently suffered a conviction for perjury.[34] Or the jury could have rejected a defense witness's testimony if the judge had not allowed the defense to introduce evidence of the witness's excellent reputation for truthfulness.[35] If "swearing contests" represent a substantial portion of the cases tried, Article VI's silence on many credibility questions is arguably intolerable, as Professor Schmertz has long contended.[36]

Some jurisdictions obviously believe that Professor Schmertz's contention has merit. Before the adoption of the Federal Rules, jurisdictions such as California enacted detailed statutory regulations of credibility evidence.[37] Since the initial proposal of the Rules, thirty-nine states have adopted evidence codes patterned after the Federal Rules.[38] In a number of states, the legislature or supreme court has acted to fill the apparent gaps in Article VI. For example, although Article VI omits any provision governing the admissibility of bias evidence,[39] Utah[40] added such a provision to its version of Article VI. Alaska,[41] Texas,[42] and the Armed Forces[43] have done likewise. New Mexico added a statute governing the admissibility of polygraph evidence proffered for impeachment purposes.[44] The Armed Forces followed suit.[45] Florida added provisions dealing with several impeachment techniques that are not mentioned in Article VI, namely, bias,[46] proof of a witness's defect in the capacity to observe or remember,[47] and specific contradiction.[48]

The numerous state amendments to Article VI raise the question of whether, at long last, Congress should heed Professor Schmertz's urging and fill the gaps in the Federal Rules. The thesis of this brief article is that the question should be answered in the negative. The

34. *See* FED. R. EVID. 609(a)(2).
35. *See id.* 608(a)(2).
36. *See supra* note 27.
37. *See* CAL. EVID. CODE §§ 769-771, 780-783 (West 1995).
38. *See* CARLSON ET AL., *supra* note 2, at 17.
39. *See* Schmertz & Czapanskiy, *supra* note 27, at 258.
40. *See* UTAH R. EVID. 608(c); 1 JOSEPH & SALTZBURG, *supra* note 22, § 42.2, at 2 (1987).
41. *See* ALASKA R. EVID. 613; 2 JOSEPH & SALTZBURG, *supra* note 22, § 47.2, at 1.
42. *See* TEX. R. EVID. 613(b); 2 JOSEPH & SALTZBURG, *supra* note 22, § 47.2, at 1-2; 2 *id.* § 47.3, at 58 (Supp. 1994).
43. *See* MIL. R. EVID. 608(c); DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS 407 (1994).
44. *See* N.M. R. EVID. 11-707.
45. *See* MIL. R. EVID. 707; SCHLUETER ET AL., *supra* note 43, at 129 (Supp. 1997).
46. *See* FLA. EVID. CODE § 90.608(2).
47. *See id.* § 90.608(4).
48. *See id.* § 90.608(5); *see also* MICHAEL H. GRAHAM ET AL., FLORIDA EVIDENTIARY FOUNDATIONS 471 (2d ed. 1997).

second part of the article is descriptive.[49] It compares the common law of credibility evidence with the provisions of Article VI. That comparison unquestionably bears out Professor Schmertz's observation that Article VI is silent on a large number of credibility questions. The third part of the article is evaluative.[50] It grapples with the question of whether it is necessary, or even desirable, to amend Article VI to fill the seeming gaps. The third part draws heavily on Dean Thomas Mengler's work.[51] Dean Mengler has taken the position that, in part, the Federal Rules rest on a legislative judgment that power ought to be shifted from appellate courts to trial judges.[52] In developing his position, Dean Mengler relied primarily on provisions in Article IV of the Federal Rules.[53] The third part of this article argues both that the legislative judgment Dean Mengler identified is sound and that the gaps in Article VI prove Dean Mengler's point even more cogently than the provisions of Article IV. The article concludes that there is little or no need to revise Article VI.[54]

II. A Comparison of the Common Law of Evidence and Article VI of the Federal Rules: A Description of the Gaps

The common law developed an "elaborate system of rules regulating" the admissibility of credibility evidence.[55] The common law recognized three different stages of credibility analysis: bolstering before attempted impeachment,[56] impeachment,[57] and rehabilitation after impeachment.[58] The common law courts formulated restrictions for each stage of analysis.

A. *Bolstering Before Attempted Impeachment*

At common law, a general rule emerged that it is improper for a witness's proponent to endeavor to bolster the witness's credibility before the opponent has impeached the witness.[59] There is always the possibility that the opponent will concede the truth of the witness's testimony or at least refrain from impeaching the witness. In that

49. *See infra* notes 55-89 and accompanying text.

50. *See infra* notes 90-200 and accompanying text.

51. *See* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989).

52. *See id.* at 423.

53. *See id.* at 416.

54. *See infra* notes 201-11 and accompanying text.

55. 1 CHARLES T. MCCORMICK ON EVIDENCE § 33, at 112-13 (John William Strong ed., 4th ed. 1992); *see also* Francis Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence*, 46 OHIO ST. L.J. 595 *passim* (1985).

56. *See* EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE §§ 701-702, at 179, 180 (2d ed. 1993).

57. *See id.* §§ 701, 703-715, at 179, 183-213.

58. *See id.* §§ 701, 716-721, at 179, 213-20.

59. *See id.* § 702, at 180.

event, any time devoted to bolstering the witness's believability would be wasted. The common law courts reasoned that it therefore made more sense to require the proponent to wait until it became clear whether the opponent intended to challenge the witness's credibility.

The common law prohibition on bolstering was a firm rule which admitted few exceptions. For example, in sex offense prosecutions many courts permitted the prosecution to elicit testimony about a fresh complaint during the alleged victim's direct examination.[60] Sex offense prosecutions often degenerate into swearing contests, giving rise to a special need for credibility evidence. Further, the courts assumed that lay jurors would expect the victim of any sex offense to be outraged and complain to the authorities. The courts feared that the jurors would be troubled by the absence of any evidence of a complaint.

A number of jurisdictions carved out another exception to the bolstering prohibition and allowed the introduction of evidence of a pretrial identification during a victim's direct examination.[61] Pretrial identification is closer in time to the relevant event and further removed from the biasing influence of the trial. The pretrial identification's proximity to the event decreases any concerns about the quality of the victim's memory when making the identification, and its distance from the trial reduces concerns about the victim's sincerity. With these two exceptions, though, the common law rigorously enforced a ban on premature bolstering.

Although the general prohibition against bolstering was a well-settled feature of the common law, Article VI does not codify that general rule. There is only an inkling of the general rule in Federal Rule 608(a)(2). That subsection reads: "The credibility of a witness may be . . . supported by evidence in the form of opinion or reputation, but subject to th[is] limitation[ ]: evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."[62] Rather than codifying a general prohibition of bolstering, on its face Rule 608(a)(2) restricts only one method of supporting a witness's credibility, that is, evidence of the witness's truthful character. Moreover, Article VI is absolutely silent on the fresh complaint and pretrial identification exceptions to the common law prohibition.

60. *See id.* § 702, at 181 (defining fresh complaint in a sex offense prosecution as when, in order to bolster the complainant's credibility even before attempted impeachment, the prosecutor may elicit the complainant's testimony that shortly after the alleged offense, she reported the offense to the authorities).

61. *See id.* § 702, at 181-82.

62. FED. R. EVID. 608(a)(2).

B. *Impeachment*

The common law of impeachment is replete with rigid rules. To begin with, the common law includes outright prohibitions of certain types of evidence that are logically relevant for impeachment purposes. For example, at common law many jurisdictions adopted a per se rule forbidding the introduction of polygraph evidence.[63] Indeed, that view is the majority rule.[64] In other cases, the courts imposed hard-and-fast foundational requirements for the admission of impeaching evidence. For instance, in the case of prior inconsistent statements[65] and bias evidence,[66] many jurisdictions mandated that the opponent lay a foundation on cross-examination as a condition precedent to a later proffer of extrinsic evidence. "Extrinsic" evidence included any evidence other than testimony elicited from the witness to be impeached.[67] Thus, before calling witness #2 to testify to witness #1's inconsistent statement, the opponent had to cross-examine witness #1 about the alleged statement. By the same token, if the opponent wanted to call witness #2 to establish the bias of witness #1, during cross-examination of witness #1 the opponent had to confront witness #1 about the alleged bias. If the opponent inexcusably[68] neglected to question witness #1, the extrinsic evidence was automatically inadmissible. At common law, the need for a foundation on cross-examination originated as an "occasional and discretionary"[69] norm, but it eventually "crystallized" into an "almost universally accepted" rule.[70]

In still other cases, the courts imposed a further common law restriction that extrinsic evidence was inadmissible to impeach on a "collateral" fact.[71] Sometimes it was not enough that the opposing attorney was using a recognized impeachment technique and had laid a foundation on cross-examination. The courts extended this restriction to extrinsic evidence of witness #1's untruthful acts[72] and inconsistent statements[73] as well as witness #2's testimony contradicting

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63. *See* 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §§ 14-1.2, 14-1.2.1, at 554-56 (1997).

64. *See id.* § 14-1.2, at 554.

65. *See* 1 MCCORMICK, *supra* note 55, § 37.

66. *See id.* § 39; *see also* Schmertz & Czapanskiy, *supra* note 27, at 265-69.

67. *See* 1 MCCORMICK, *supra* note 55, § 36, at 118.

68. In some cases, the courts recognized excuses for the failure to satisfy the foundational requirement. For instance, assume that the opponent did not learn of the inconsistent statement by witness #1 until after witness #1 had completed testifying and been permanently excused. In that situation, the judge could permit the subsequent introduction of the extrinsic evidence of the inconsistent statement so long as the judge concluded that the opponent's late discovery of the statement was not attributable to negligence. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE § 6.56 (1995).

69. 1 MCCORMICK, *supra* note 55, § 37, at 120.

70. *Id.*

71. *See id.* § 49.

72. *See* IMWINKELRIED ET AL., *supra* note 56, §§ 711, 715, at 203, 209.

73. *See id.* §§ 711, 715, at 201, 209.

witness #1.[74] To justify the introduction of extrinsic evidence of these impeaching facts, the opponent had to demonstrate that the impeaching evidence related to either the historical merits of the case or a linchpin fact that necessarily called into question the accuracy of the witness's testimony on the merits.[75] Compliance with the collateral-fact limitation became a "condition for [the] admissibility" of the extrinsic evidence at common law.[76] The limitation hardened into an "inflexible rule of exclusion"[77] that the courts tended to apply "mechanically."[78]

Compared to the common law, Article VI seems embarrassingly incomplete. The article is silent on the question of whether polygraph results are admissible for purposes of impeachment. As previously stated, several jurisdictions have added such a provision to their version of Article VI.[79] To make matters worse, as Professor Schmertz has underscored,[80] Article VI does not address the propriety of and limitations on such common impeachment techniques as specific contradiction and bias. Moreover, the article does not give the courts any explicit guidance as to whether they are to follow the common law and continue to insist upon a foundation for bias evidence.[81] Finally, although the first sentence of Rule 608(b) prohibits the receipt of "extrinsic evidence" of a witness's untruthful acts,[82] the article is otherwise mum on the status of the collateral-fact limitation.

C. *Rehabilitation After Impeachment*

As in the case of bolstering and impeachment, there are stark differences between the common law treatment of rehabilitation and Article VI. On the one hand, after the opponent endeavored to impeach the witness, the common law allowed the witness's proponent to repair the damage by various techniques, including introducing evidence of the witness's truthful character and prior consistent statements.[83] However, the common law also prescribed relatively categorical limitations. By way of example, the prevailing common law view was that a prior consistent statement was admissible only if it antedated the impeaching inconsistent statement or motive.[84] In its

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74. *See id.* §§ 714-715, at 208.
75. *See id.* § 715, at 211; 1 McCormick, *supra* note 55, § 49.
76. 1 McCormick, *supra* note 55, § 49, at 185.
77. Ronald L. Carlson et al., Evidence in the Nineties 381 (3d ed. 1991) (quoting the California Law Revision Commission's assessment of the collateral fact rule).
78. 1 McCormick, *supra* note 55, § 49, at 187.
79. *See* Mil. R. Evid. 707; N.M. R. Evid. 11-707.
80. *See supra* notes 27-29 and accompanying text.
81. *See* Schmertz & Czapanskiy, *supra* note 27, at 265-69.
82. Fed. R. Evid. 608(b).
83. *See* 1 McCormick, *supra* note 55, § 47.
84. *See* Michael H. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal,* 30 Hastings L.J. 575, 594 (1979); *see also* Edward O.

1995 decision in *Tome v. United States*,[85] the Supreme Court acknowledged the dominance of the temporal priority doctrine. By virtue of the doctrine's timing requirement, any subsequent consistent statement is automatically inadmissible.[86]

Once again, there is a marked contrast between the common law and Article VI. The text of Article VI deals with only one species of rehabilitative evidence. The solitary provision, Rule 608(a), discusses evidence of the witness's character trait for truthfulness.[87] While Rule 801(d)(1)(B) alludes to the admission of prior consistent statements as substantive evidence,[88] Article VI says nothing about the use of such statements for the limited purpose of rehabilitating the witness's credibility.[89]

In sum, at every stage of credibility analysis, Article VI appears incomplete. Whether the topic is bolstering, impeachment, or rehabilitation, the common law seems to furnish far more answers than the Federal Rules of Evidence. If "swearing contests" are common at trial, Article VI seems to cry out for amendment to fill its various gaps. The question is whether, as a matter of policy, legislative or judicial intervention is necessary to eliminate these lacunae. Part III turns to the merits of that question.

III. An Evaluation of the Question of Whether It Is Necessary or Desirable to Close the Gaps

Part II identified the seeming gaps in the coverage of Article VI's provisions dealing with the admissibility of evidence relevant to witnesses' credibility. As the introduction pointed out, respected commentators have called for legislative action to fill these gaps,[90] and many jurisdictions have responded by amending their version of Article VI.[91] The question is whether such amendments are essential or advisable. The thesis of this article is that in the main, it is neither necessary, nor even desirable, to revise Article VI to regulate the topics on which Article VI is presently silent.

Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal,* 1987 BYU L. Rev. 231, 237-38.

85. 513 U.S. 150 (1995).

86. *See* United States v. Miller, 874 F.2d 1255, 1271 (9th Cir. 1989) (stating "rehabilitative prior statements are admissible . . . only if they were made before the witness had a motive to fabricate").

87. *See* Fed. R. Evid. 608(a).

88. *See id.* 801(d)(1)(B).

89. *See* Mueller & Kirkpatrick, *supra* note 68, § 6.67, at 931-32.

90. *See supra* notes 27-29 and accompanying text.

91. *See supra* notes 37-48 and accompanying text.

A. The Supposed Necessity for the Amendments

1. Logical Necessity

There would be a logical necessity for the revisions if the underlying rationale for the restrictions on the admissibility of credibility evidence required the advance enunciation of clear standards. That necessity exists in the case of evidentiary privileges. Dean Wigmore's instrumental theory has been the dominant rationale for privileges.[92] In his treatise, Dean Wigmore argued that legislatures and courts should recognize privileges—and tolerate the consequent obstruction of the search for truth—only when legal protection for confidentiality is "essential to the full and satisfactory maintenance" of a valued social relationship such as that between an attorney and client.[93] In other words, the behavioral assumption is that but for the assurance of confidentiality provided by an evidentiary privilege, the patient or client would be deterred from revealing information that the professional needs to properly advise the patient or client. The privilege is conceived as a necessary instrument or means to the end of promoting the social relationship.

The Supreme Court invoked Wigmore's instrumental rationale in its 1996 decision, *Jaffee v. Redmond*.[94] There the majority fashioned a psychotherapist-patient privilege under Federal Rule 501. The majority not only cited Wigmore; more importantly, it couched its justification in classic Wigmorean terms. Writing for the majority, Justice Stevens declared:

> Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[95]

As the *Jaffee* majority recognized, the instrumental rationale for privileges has an important implication for the phrasing of privilege doc-

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92. *See* Mueller & Kirkpatrick, *supra* note 68, § 5.1. The Court's rationale in *Jaffee v. Redmond*, 518 U.S. 1 (1996), illustrates the dominance of the instrumental rationale. The Court of Appeals for the Seventh Circuit had advanced alternative, instrumental and humanistic arguments for recognizing a psychotherapist privilege. *See also* Jaffee v. Redmond, 51 F.3d 1346, 1354-58 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996); Diane Marie Amann & Edward J. Imwinkelried, *The Supreme Court's Decision to Recognize a Psychotherapist Privilege in* Jaffee v. Redmond, *116 S. Ct. 1923 (1996): The Meaning of "Experience" and the Role of "Reason" Under Federal Rule of Evidence 501*, 65 U. Cin. L. Rev. 1019, 1023-26 (1997).

93. 8 John Henry Wigmore, Evidence in Trials at Common Law § 2285, at 527 (McNaughton ed. 1961).

94. 518 U.S. 1, 9-18 (1996).

95. *Id.* at 10.

trines; the majority added: "[I]f the [instrumental] purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all.'"[96] If the privilege is to achieve the intended instrumental effect, the privilege rules must be worded as bright-line standards. The underlying premise is that patients and clients will be unwilling to make necessary disclosures unless they can be confident that a privilege will shield the information from the public, and they cannot enjoy that confidence unless the privilege itself is stated in advance in clearly defined terms.[97] The patient or client needs a firm[98] assurance of protection. An evidentiary privilege can afford that type of protection only when the limits of the privilege are explicitly[99] and sharply defined.[100]

Given the instrumental rationale for privileges, gaps in the legal rules governing privileges are unacceptable.[101] However, the underlying rationale for the limitations on credibility evidence is quite different. It is true that some of the limitations on the ad hominem impeachment techniques,[102] such as proof of a witness's prior convictions, are inspired by the institutional policy against admitting unduly prejudicial evidence.[103] Particularly when the witness happens to be a party, the admission of impeaching evidence impugning the witness's character can tempt the jury to decide the case on an improper basis. Federal Rule of Evidence 403 enumerates "unfair prejudice" as one of the probative dangers which can warrant the discretionary exclusion of logically relevant evidence.[104] The accompanying advisory committee note explains that in this context "prejudice" denotes the tendency

96. *Id.* at 18 (quoting Upjohn Co. v. United States, 449 U.S. 389, 393 (1981)).

97. *See* M. Brett Fulkerson, Note, *One Step Forward, Two Steps Back: The Recognized But Undefined Federal Psychotherapist-Patient Privilege,* 62 MO. L. REV. 401, 423 (1997).

98. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 118 cmt. d (Tentative Draft No. 1, 1988).

99. *See* 24 WRIGHT & GRAHAM, *supra* note 3, § 5472, at 86 (1986).

100. *See* MODEL CODE OF EVID. 7 (1942).

101. The explanation for Congress's failure to set out explicit standards in Rule 501 is political. Once Congress began its hearings on the draft Federal Rules, it became clear that any comprehensive set of privilege statutes was likely to anger a large number of influential special interest groups. *See* Imwinkelried, *supra* note 3, at 519-23. The House hearings had been chaired by then Representative, now Judge, Hungate. At the beginning of the Senate hearings, Representative Hungate cautioned the Senate committee members that if they "open[ed] up" the topic of a detailed set of privilege rules, "the social workers and piano tuners" will "want a privilege." *Hearing on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong. 6 (1974). Representative Hungate's reference to "social workers" was intended to be humorous. The Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), retroactively made the remark ironic. That decision created a privilege for psychotherapists and extended the privilege to licensed clinical social workers. *See id.* at 10-17. To date, though, no court has recognized a privilege for "piano tuners."

102. *See* IMWINKELRIED ET AL., *supra* note 56, § 706, at 185.

103. *See* Mengler, *supra* note 51, at 446.

104. *See* FED. R. EVID. 403.

of the evidence to prompt the jury to decide the case on an illegitimate basis, such as the jurors' revulsion of the party's past misdeeds.[105]

However, the ad hominem impeachment techniques represent only a small part of the body of law governing the admissibility of credibility evidence. The limitations on bolstering and impeachment techniques, such as specific contradiction, have little or nothing to do with the technical notion of prejudice under Rule 403. In contrast, other

> probative dangers listed in . . . Rule 403 help to explain the limitations. One of the [other] dangers listed in Rule 403 is that evidence will distract the jurors from the central issues in the case. The central issues [at] a [trial] are historical: Who did what to whom? To the extent that the jurors focus on the witnesses' credibility, the jurors might lose sight of the key historical issues in the case. Another danger mentioned in Rule 403 is that the minimal probative value of the particular item of evidence may not warrant the consumption of time needed to present the evidence. The relevance of credibility evidence . . . is merely indirect; the credibility evidence helps the jurors evaluate the witness, and in turn that helps the jurors assess the value of the witness' testimony about the historical merits. Given the minimal, indirect relevance of credibility evidence, the courts understandably attempt to limit the amount of trial time devoted to credibility.[106]

Unlike the privilege rules, the credibility limitations are not derived from conceptions of extrinsic social policy. Quite frankly, they are more or less arbitrary restrictions designed to save courtroom time and keep the jury focused on the principal, historical disputes in the case. The drafters of the Federal Rules understood the nature of the rationale for these restrictions. As previously stated, most of the credibility rules rest on the probative dangers of distraction from the merits and undue time consumption.[107] The text of Rule 403 expressly states that considerations of "confusion of the issues, or misleading the jury, or . . . undue delay, waste of time, or needless presentation of cumulative evidence" can justify the exclusion of undeniably relevant evidence.[108] The advisory committee notes to both Rule 403[109] and several Article VI provisions—in particular, Rules 608,[110] 609,[111] and

105. *See id.* advisory committee's note; *see also* Old Chief v. United States, 519 U.S. 172, 180 (1997) (citing Rule 403 and the advisory committee note, the majority explains that bad character evidence can "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged").

106. IMWINKELRIED ET AL., *supra* note 56, § 701, at 179.

107. *See id.*

108. FED. R. EVID. 403.

109. *Id.* advisory committee's note (stating "waste of time" constitutes a reason for excluding evidence).

110. *Id.* 608 advisory committee's note (stating "waste of time" and "needless consumption of time" are avoided by limitations in Rule 608).

611[112]—reflect the drafters' understanding that these are the primary policies rationalizing the limitations on credibility evidence.

These policies differ markedly from the policies underpinning evidentiary privileges. If a privilege is to achieve the desired instrumental effect, the contours of the privilege must be stated in advance in clearly defined terms. In the process of deciding whether to recognize the privilege, the decisionmaker—the legislature or court—determines beforehand whether, on balance, the extrinsic social policy in question warrants creating an impediment to the search for truth.[113] The decisionmaker then announces its determination to permit patients and clients to shape their conduct accordingly.

In contrast, it is far more difficult to balance in advance the probative worth of a particular item of credibility evidence against the countervailing probative dangers of distraction and time consumption. In these cases, that balance is best struck situationally in an ad hoc manner. It is virtually impossible to strike that balance in advance through a statute or court rule, and the nature of the rationales underlying the credibility limitations does not create any strict necessity for bright lines.[114] It may be unsatisfactory to couch privilege rules in vague terms.[115] However, credibility rules are distinguishable. The application of those rules requires a greater "sensitivity to the complexity and uniqueness of [the] particular case."[116] As Judge Weinstein remarked in *United States v. Obayagbona*,[117] the gaps in Article VI's credibility provisions compel the judge to fall back on the general relevance principles codified in Rules 401 through 403. Those principles provide a better and more flexible framework for balancing the probative value of credibility evidence and any attendant risks.[118]

2. *Practical Necessity*

Even assuming there is no strict logical necessity for amending Article VI, there would be a strong case for doing so if Article VI had generated a good deal of confusion at the trial level. However, that has not occurred. Although the Federal Rules have been in effect for almost a quarter century, no "crisis" has materialized under Article VI.

111. *Id.* 609 advisory committee's note (stating that rule does not contemplate admission of evidence that is too "time-consuming").

112. *Id.* 611 advisory committee's note (stating "needless consumption of time" and "waste of time" are a concern in disposition of cases).

113. *See* Imwinkelried, *supra* note 3, at 541-42 (stating Federal Rule of Evidence 501 codifies the common law principle that the legislature or court should decide whether to recognize a privilege by balancing the competing interests).

114. *See* Mengler, *supra* note 51, at 460-65.

115. *See* Fulkerson *supra* note 97, at 422-23.

116. Mengler, *supra* note 51, at 460.

117. 627 F. Supp. 329 (E.D.N.Y. 1985).

118. *See id.* at 336.

Professor Schmertz is certainly correct in asserting that on occasion, the silence of Article VI on a particular impeachment technique has caused regrettable or unfortunate outcomes.[119] Typically, in those cases, rather than applying the general relevance principles set out in Rules 401 through 403, the court endeavored to discover a solution in an Article VI provision intended to cover a different problem.[120] It is understandable that a judge might go awry if he or she attempted to find a solution to a specific contradiction problem in Rule 608(b) governing evidence of a witness's character trait for untruthfulness[121] or the answer to a bias question in Rule 609 on conviction impeachment.[122] Such attempts can easily lead to the distortion of doctrine[123] and untoward results. One rarely succeeds by putting a square peg in a round hole or finds a satisfactory answer to a question about apples in a treatise on oranges. However, to date, the missteps have been relatively few and far between. More importantly, for the most part they occurred precisely because the courts did not immediately turn to and apply the general relevance provisions in Rules 401 through 403. As courts increasingly come to appreciate the pertinence of those rules,[124] the incidence of missteps should decrease. In short, there is currently no practical necessity for amending Article VI, and, if anything, the argument for amendment should grow weaker in the future.

B. *The Desirability of the Amendments*

Even if the amendment of Article VI is unnecessary, would it be desirable? Part III.A pointed out that the credibility restrictions serve the policies of limiting the amount of courtroom time devoted to the topic of witnesses' believability and thereby curb the risk that the jurors will lose sight of the historical merits. Those policies are weighty ones. The number of civil filings in federal district courts recently rose to a relatively high level.[125] In the five-year period between 1990 and 1995, filings rose twenty-three percent.[126] The number of cases pending at the end of each year—a rough measure of trial court backlog—increased between 1987 and 1995.[127] In its 1996 report,[128] the Court of Appeals for the Ninth Circuit pointed out that the number of filings in its district courts and the number of pending cases at the end of

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119. 9 FED. R. EVID. NEWS 88 (1984).
120. *See id.* (discussing State v. Sonnenberg, 344 N.W.2d 95 (Wis. 1984), and State v. Worley, 676 P.2d 247 (N.M. 1984)).
121. *See id.* (citing *Sonnenberg*, 344 N.W.2d at 96-106).
122. *See id.* (citing *Worley*, 676 P.2d at 249-50).
123. *See id.*
124. *See, e.g.*, United States v. Obayagbona, 627 F. Supp. 329, 336 (E.D.N.Y. 1985).
125. *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 134 (1996).
126. *See id.*
127. *See id.* at 136.
128. *See* UNITED STATES COURTS NINTH CIRCUIT, 1996 ANNUAL REPORT.

1996 had risen from the levels present in 1992.[129] If lower courts are to have ample time to make thoughtful, considered decisions, trial judges must be as vigilant as ever to conserve the precious commodity of time.

1. *Dean Mengler's Thesis*

It would be an error to leap to the conclusion that the best way to ensure the wise expenditure of trial time is to resurrect the common law tradition and revise Article VI to create categorical restrictions on credibility evidence. In his widely cited analysis of the theory of discretion in the Federal Rules of Evidence,[130] Dean Mengler contends that the design of the Federal Rules is inspired by a sound legislative judgment that the appellate courts have failed at the task of developing uniform, sensible evidentiary norms.[131]

One consequence of that judgment is that in doctrinal areas lending themselves to categorical rules, the rules had to be supplied by statute or court rule rather than appellate decision.[132] Despite decades of the appellate courts' best efforts, many of these areas were still beset by splits of authority, and the only way to bring order out of the chaos was legislative intervention. If "bright lines"[133] were needed, the drafters would furnish them rather than waiting in the vain hope that the appellate courts would evolve them by common law methodology.[134]

A second consequence is that in doctrinal areas that largely defy the formulation of hard-and-fast rules, power had to be shifted from appellate courts to trial judges.[135] In these areas, trial judges have to make "decisions on the run"[136] in "the heat and hurry of the trial,"[137] and they need "leeway"[138] to respond to "the complexity and uniqueness of" a specific evidentiary ruling "in a particular case."[139] The

129. *See id.* at 52.
130. *See generally* Mengler, *supra* note 51.
131. *See id.* at 415, 424.
132. *See id.* at 458.
133. *See id.*
134. Congress has continued to police the content of the Federal Rules. *See* Imwinkelried, *Moving Beyond*, *supra* note 7, at 415-16 ("Since the promulgation of the Federal Rules in 1975, Congress has intervened several times to revise them. Even prior to the recent controversy over Federal Rule of Evidence 413 (partially abolishing the prohibition against character evidence), Congress had stepped in. Before this dispute, in 'six substantive changes made to the Federal Rules of Evidence since 1975, Congress initiated three.' The dispute over Rules 413 to 415 is also instructive. The Judicial Conference went on record as opposed to those rules. Yet Congress ignored their opposition in approving the new rules.") (quoting Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 372 (1994)).
135. *See* Mengler, *supra* note 51, at 423, 457.
136. *Id.* at 429.
137. *Id.* at 435.
138. *See id.* at 466.
139. *Id.* at 460.

legislative judgment is that in these areas, trial judges should be subject to only "flexible, loosely textured rules."[140] "[R]igid"[141] rules unduly "constrict[ ]"[142] the trial bench. Trial judges would be asked to apply the general relevance principles set out in Rules 401 through 403,[143] but they would otherwise be left free to rely on common sense and to exercise discretion.[144]

As support for his thesis, Dean Mengler invoked a number of specific provisions in the Federal Rules. For instance, he pointed to the generality of the wording of Rule 102, which declares that the Federal Rules should be interpreted to "secure fairness" and promote the ascertainment of truth.[145] In passing, he also mentioned the provision in Rule 609 empowering a trial judge to exclude an otherwise admissible conviction when, in the judge's opinion, its introduction will trigger probative dangers outweighing its probative worth.[146] However, Dean Mengler relies primarily on Article IV's provisions to develop his line of argument. In particular, he emphasizes that the advisory committee note to Rule 406[147] on habit evidence seems to grant trial judges freedom to situationally "pick and choose"[148] between various conceptions of habit.

2. *The Design of Article VI as Further—Better—Proof of the Validity of Dean Mengler's Thesis*

Although the provisions that Dean Mengler cites lend support to his thesis, he overlooks the most cogent evidence substantiating the thesis, namely, the design of Article VI. The soundness of that design at once proves Dean Mengler's point and demonstrates why Article VI should not be amended to close the seeming gaps in its coverage. Three aspects of Article VI warrant special attention: the selection of the doctrinal areas for the prescription of substantive categorical rules, the advisory committee's defense of its conferral of discretion on trial judges to administer Article VI's procedural provisions, and, most importantly, the silence of Article VI on credibility questions, such as the impeachment techniques of bias and specific contradiction.

Some provisions of Article VI supply relatively hard-and-fast rules for trial judges to apply. For example, Rule 608(a) states that an opponent may impeach a witness by introducing evidence of the witness's character trait for untruthfulness,[149] Rule 608(b) adds that the

140. *Id.*
141. *See id.* at 415.
142. *See id.* at 430.
143 *See id.* at 427, 440-41.
144. *See id.* at 450-51.
145. *See id.* at 438.
146. *See id.* at 450-51.
147. *See id.* at 416-26.
148. *See id.* at 446-48.
149. *See* Fed. R. Evid. 608(a).

opponent may cross-examine a witness about untruthful acts,[150] and Rule 609 provides that the opponent may attack a witness's credibility by establishing that the witness previously suffered a conviction for a crime entailing false statement.[151] In these provisions, the drafters laid down full-fledged rules for impeachment techniques.

In each instance, the impeachment technique at common law had been troubled by a sharp split of authority.[152] In the early 1960s, the Judicial Conference of the United States appointed a committee to study the advisability and feasibility of developing uniform evidentiary rules for the district courts.[153] That committee submitted its report in 1962.[154] The committee found that, in many respects, the federal appellate courts had failed to produce a clear, coherent body of evidence law.[155] The federal common law of evidence was a "grotesque structure,"[156] characterized by "conflicting precedents"[157] on many vital questions. In the committee's judgment, many doctrinal areas were in dire need of the clarification that only a uniform rule could effect.[158] In Rules 608 and 609, the drafters attempted to meet that need. In each case, faced with a division of sentiment among the appellate courts, the drafters provided an explicit rule resolving the judicial split. The drafters' choice of those impeachment techniques for legislative rulemaking in Article VI is one manifestation of their skepticism of appellate rulemaking.[159]

The drafters' legislative provision of substantive standards in Rules 608 and 609 evidences one facet of their dissatisfaction with appellate evidentiary rulemaking. For their part, the procedural provisions in Rule 611 demonstrate the second facet, that is, the drafters' decision to shift power from appellate courts to trial judges.

Rule 611(a) accords the trial judge general discretionary control over the method and sequence of questioning witnesses.[160] The subdivision reads: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation of evidence effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrass-

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150. *See id.* 608(b).
151. *See id.* 609(a)(2).
152. *See* 1 McCormick, *supra* note 55, §§ 40-43.
153. *See* Committee on Rules of Practice & Procedure, U.S. Judicial Conference, A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts v-vi (1962).
154. *See id.* at vii.
155. *See id.* at 25-26, 28, 51.
156. *See id.* at 27 (citing the Supreme Court's 1948 decision, *Michelson v. United States*, 335 U.S. 469, 486).
157. *See id.* at 42.
158. *See id.* at 48.
159. *See* Mengler, *supra* note 51, at 415.
160. *See* Fed. R. Evid. 611(a).

ment."[161] In the accompanying advisory committee note, the drafters explained their decision to grant the trial judge such extensive latitude: "Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible."[162] The drafters expressed their view that the procedural questions falling under 611(a) "can be solved only by the [trial] judge's common sense and fairness in view of the particular circumstances."[163] The drafters specifically stated that in exercising the discretion conferred by 611(a), the trial judge should endeavor to "avoid[ ] . . . needless consumption of time."[164]

Rule 611(b) falls into the same pattern. That subdivision regulates the scope of cross-examination. The first sentence of the subdivision states: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."[165] In their advisory committee note, the drafters elaborated on their choice of the verb "should" in the sentence as opposed to the mandatory verb "shall" in Rule 611(b):

> This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula . . . . It is apparent . . . that the rule of limited cross-examination . . . becomes an aspect of the [trial] judge's general control over the mode and order of interrogating witnesses and presenting evidence . . . . The matter is . . . not one in which involvement at the appellate level is likely to prove fruitful. In view of these considerations, the rule is phrased in terms of a suggestion rather than a mandate to the trial judge.[166]

Rule 611(c) completes the trilogy. That subdivision speaks to the use of leading questions on direct examination. The first sentence declares: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony."[167] Once again, the operative verb is "should" rather than "shall." As in the case of Rule 611(b), the drafters' choice of that weaker verb was deliberate. In the advisory committee note, the drafters explained:

> An almost total unwillingness to reverse for infractions has been manifested by appellate courts. The matter clearly falls within the area of control by the [trial] judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion [to the trial judge] rather than command.[168]

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161. *Id.*
162. *Id.* advisory committee's note.
163. *Id.*
164. *Id.*
165. *Id.* at 611(b).
166. *Id.* advisory committee's note (citations omitted).
167. *Id.* at 611(c).
168. *Id.* advisory committee's note (citations omitted).

In short, like the substantive provisions in Rules 608 and 609, the procedural norms codified in Rule 611 demonstrate the validity of Dean Mengler's insight into the structure of the Federal Rules.

However, most importantly for the present inquiry, the gaps in Article VI—especially its silence on several common law impeachment techniques—validate Dean Mengler's thesis. Professor Schmertz has argued that these gaps are "inexplicable."[169] However, on closer examination, it becomes clear both that the gaps are the result of a conscious decision by the drafters and that the decision was a wise one.

It would be incredible to think that the omissions in Article VI are merely an oversight by the drafters. The composition of the advisory committee makes the thought implausible. The reporter for the committee was the late Professor Edward Cleary.[170] By the time the committee concluded its work and the Supreme Court transmitted the work product to Congress,[171] Professor Cleary had already released the second edition of the McCormick evidence hornbook for which he served as general editor.[172] The scope of the hornbook was comprehensive, surveying the entire law of evidence. More specifically, it contained an entire chapter[173] devoted to credibility, including the various common law impeachment techniques on which Article VI is silent.[174] The committee membership also included Professor Thomas Green and then Professor Jack Weinstein.[175] Both academics were evidence specialists. Moreover, the committee deliberated for several years. The committee was appointed in 1965.[176] The committee released its preliminary draft in March 1969[177] and a revised draft in March 1971.[178] Given the members' expertise in evidence and the length of the members' study of the draft rules, they must have realized that Article VI was silent on many credibility questions addressed in the common law decisions.

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169. *See* 16 FED. R. EVID. NEWS 168 (1991).

170. *See* COMMITTEE ON RULES OF PRACTICE & PROCEDURE, U.S. JUDICIAL CONFERENCE, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES ii (1969).

171. RULES OF EVIDENCE, COMMUNICATION FROM CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING RULES OF EVIDENCE OF THE UNITED STATES COURTS AND MAGISTRATES (Feb. 5, 1973).

172. CHARLES T. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE vii (Edward W. Cleary ed., 2d ed. 1972).

173. *Id.* at ch. 5.

174. *See id* at §§ 40 (bias), 45 (defects of capacity), 46 (polygraph), and 47 (specific contradiction).

175. COMMITTEE ON RULES OF PRACTICE & PROCEDURE, *supra* note 170, at ii.

176. *See id.* at 6.

177. *See id.*

178. *See* COMMITTEE ON RULES OF PRACTICE & PROCEDURE, U.S. JUDICIAL CONFERENCE, REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 2 (1971).

The text of the Rules and the extrinsic legislative history confirm that the drafters were cognizant of the credibility rules on which Article VI is silent. On the one hand, Article VI makes no mention of bias impeachment. On the other hand, on its face Rule 408 refers to "proving bias or prejudice of a witness."[179] Further, as Professor Schmertz himself once noted,[180] the portion of the Senate Judiciary Committee Report discussing Rule 609 mentions specific contradiction impeachment and distinguishes it from conviction impeachment.[181] Thus, the gaps in Article VI are not a product of inadvertence. Rather, as Judge Weinstein has indicated,[182] they are the result of the drafters' decision to require trial judges to analyze these issues under the default provisions, that is, the general relevancy principles codified in Rules 401 through 403.

That decision is eminently sound. Consider bias impeachment. Bias evidence can take the form of testimony about family ties, friendship, romantic involvement, employment, financial ties, enmity, and fear.[183] Simply stated, the kinds of bias evidence are as varied as the sources of human motivation. Likewise, the variety of specific contradiction evidence is as wide as the range of testimony being contradicted.[184] It is wrong-minded to attempt to regulate the admissibility of this type of evidence with "constricting particularity."[185] The same holds true with the collateral fact rule. The admissibility of extrinsic evidence to impeach should not depend on the niceties of an "inflexible rule of exclusion."[186] Instead, admissibility should be determined as an exercise of judicial discretion[187] informed by such practical considerations as whether the witness has testified on a question which is hotly disputed, whether the witness has a starring or merely peripheral role on that question, whether the extrinsic evidence is highly probative on credibility, and how time-consuming the presentation of the evidence will be. In most of the credibility settings on which Article VI is silent, the essential decision is a judgment call between probative value and time consumption. The trial judge is in a far better position to make that judgment call than any appellate court.

The appellate courts themselves have acknowledged that the trial judge is in a superior position to strike the balance between the probative value and the dangers of distraction and undue time consumption.

179. FED. R. EVID. 408.

180. *See* 13 FED. R. EVID. NEWS 133 (1988).

181. FEDERAL RULES OF EVIDENCE 1997-98 EDITION 86 (1997) (quoting S. REP. NO. 93-1277, at 14 (1974)).

182. *See* United States v. Obayagbona, 627 F. Supp. 329, 336 (E.D.N.Y. 1985).

183. *See* IMWINKELRIED ET AL., *supra* note 56, § 713, at 205-06.

184. *See id.* § 714, at 208.

185. *See* Mengler, *supra* note 51, at 430.

186. CARLSON ET AL., *supra* note 77, at 381 (quoting the California Law Revision Commission).

187 *See id*

There is a wealth of appellate case law authority for the proposition that the scope of appellate review of a trial judge's Rule 403 decisions is narrow and highly deferential.[188] It is foolish for an appellate court to micromanage these decisions. An appellate court rarely overturns such decisions "from the vista of a cold appellate record."[189] As the Court of Appeals for the First Circuit has stated, the trial judge is "Johnny-on-the-spot; he has savored the full taste of the fray."[190]

The "on-the-spot,"[191] "hands-on"[192] nature of the judgment is due, in part, to the trial judge's "first-hand exposure"[193] to the testimony. Unless the trial is videotaped,[194] only the trial judge has the benefit of the demeanor of the trial participants. That demeanor can and should play an important role in the ad hoc judgment as to how much bias impeachment evidence to admit. Suppose, for example, that the witness in question is an expert. While the witness testifies on direct examination, the judge observes that the jurors are engrossed, paying rapt attention to every word coming out of the witness's mouth. The judge sees that the jurors are nodding when the witness stresses a particular point. In light of that demeanor, the judge could properly decide to admit more rather than less bias evidence. The expert's testimony is likely to play a major role in the jurors' deliberations. If the expert plays an influential role at trial, the jurors have a heightened need for information to enable them to make an intelligent assessment of the expert's credibility. Rather than restricting the opposing attorney to an inquiry about the reasonableness of the expert's fee in the instant case, the judge might exercise discretion and broaden the scope of inquiry to explore a pattern of past compensation.[195] The judge, for example, could permit the opposing attorney to go farther and elicit the expert's concessions that he or she always testifies for civil plaintiffs and that in the past three years, consulting

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188. *See* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 9:70 (Supp. 1998) (collecting cases).

189. McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 300 (1st Cir. 1998); *see also* United States v. Bello-Perez, 977 F.2d 664, 670 (1st Cir. 1992) (quoting *Freeman v. Package Machine Co.*, 865 F.2d 1331, 1340 (lst Cir. 1988)); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

190. United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989) (quoting *United States v. Tierney*, 760 F.2d 382, 388 (lst Cir. 1985)).

191. *See* United States v. David, 940 F.2d 722, 737 (1st Cir. 1990).

192. *See* Lesko v. Owens, 881 F.2d 44, 52 (3d Cir. 1989).

193. *See* United States v. O'Bryant, 998 F.2d 21, 25 (1st Cir. 1993).

194. *See generally* James L. McCrystal, *The Promise of Pre-Recorded Videotape Trials*, 63 A.B.A. J. 977 (1977); James L. McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DENV. U. L. REV. 463 (1973); Charles E. Stiver, Jr., Note, *Videotape Trials: A Practical Evaluation and a Legal Analyses*, 26 STAN. L. REV. 619 (1974).

195. *See* Michael H. Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 IND. L.J. 35, 46 (1977).

fees for such testimony have accounted for sixty percent of the witness's professional income.[196]

Likewise, the jurors' demeanor can affect the judgment as to how much rehabilitative evidence to receive. Assume that in a rape prosecution, the victim concedes on cross-examination that she delayed reporting the alleged offense for two months. When the victim makes that concession, the judge notes that some jurors' faces register shock and that one juror even gasps. The jurors' demeanor is an important clue that there is a decent likelihood that the delay will cause some jurors to severely discount the victim's credibility. Given that demeanor, the judge should be more inclined to admit rehabilitative expert testimony[197] explaining rape trauma syndrome[198] and detailing the research indicating that rape victims often delay the initial report of the offense.[199]

In both cases, in ruling on the admissibility of credibility evidence, it would be sensible for the trial judge to factor the jurors' demeanor into the decision-making process. The jurors' demeanor is a critical element of the ambiance of the trial, and that demeanor enables the trial judge to more intelligently answer the question of whether the probative value of the proffered evidence is worth the necessary expenditure of trial time. No categorical rule, phrased either by an appellate court or a legislature, could capture that judgment in advance.[200] The best solution is to direct the trial judge to apply the general principles set out in Rules 401 through 403—the precise result compelled by the silence of Article VI on these credibility issues. Those statutes equip the trial judge with all the tools he or she needs to make the necessary judgment.

IV. CONCLUSION

It would be overstated to claim that the amendment of Article VI to close its gaps will necessarily do serious damage to federal evidence law. There is no cause to be alarmist about proposed amendments. In fact, in one instance, an amendment might even be helpful. The federal courts are currently split over the question of whether rehabilitative prior consistent statements must antedate the impeaching fact such as a witness's inconsistent statement or bias.[201] An express

196. *See* EDWARD J. IMWINKELRIED, THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE § 9-7(b), at 255 (3d ed. 1977).

197. *See* IMWINKELRIED ET AL., *supra* note 56, § 721, at 220.

198. *See* 1 GIANNELLI & IMWINKELRIED, *supra* note 17, § 9-4 (describing rape trauma syndrome).

199. *See id.* § 9-4(B).

200. *See also* FED. R. EVID. 1004(4).

201. *See* Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule,* 24 FLA. ST. U. L. REV. 509 (1997). In *Tome v. United States*, 513 U.S. 150 (1995), the Court held that the temporal priority timing requirement applies to prior consistent statements admitted under Rule 801 as substantive evidence. However, the Court did not settle

amendment might well expedite the resolution of that split of authority and could prove useful.

However, as a general proposition, there is little to be gained and much to be lost by initiating the process of revising Article VI. As we have seen, in most cases in which Article VI is silent, the basic decision is whether the probative value of the credibility evidence warrants running the risks of distraction and undue time consumption. The adoption of amendments prescribing rigid rules for the trial judiciary[202] would reduce the trial judge's ability to strike a balance reflecting the uniqueness of the issue,[203] including the jurors' evident reactions to the testimony already admitted. Perhaps recognizing that danger, the Florida drafters amended their version of Article VI but were content with such prosaic revisions as the statement that the opposing attorney may "[s]how[ ] that the witness is biased"[204] and introduce "[p]roof by other witnesses that material facts are not as testified to by the witness being impeached."[205] At this point in the history of the Federal Rules—almost a quarter century after their enactment—it is difficult to believe that there is a single federal district court judge who does not realize that he or she may permit those modes of impeachment. It is a waste of time to amend a statute to state the obvious. The amendments are hardly worth the effort.

Worse still, the amendments could produce mischief. As Dean Mengler convincingly argued, in large part the Federal Rules are a product of dissatisfaction with appellate evidentiary rulemaking.[206] He attempted to construct the case that many of the provisions in the Federal Rules are calculated to shift power from the appellate courts to the trial bench.[207] He rested his case primarily on the basis of the provisions of Article IV.[208] However, as part III[209] demonstrated, Dean Mengler's case is even stronger than he made it out to be. The provisions of Article VI—and the gaps in Article VI—are the most cogent proof of the case. The gaps are not a product of inadvertence or oversight. Quite to the contrary, the drafters left Article VI silent on many credibility questions because they believed that those questions had to be resolved by the trial judge on the basis of a sensitive,[210]

the question of whether the same requirement extends to consistent statements admitted for the limited purpose of rehabilitation. Near the end of the lead opinion, Justice Kennedy stated: "We intimate no view . . . concerning the admissibility of any . . . statements under . . . any other evidentiary principle. Our holding is confined to the requirements for admission under Rule 801(d)(1)(B)." *Id.* at 166-67.

202. *See* Mengler, *supra* note 51, at 415, 430.
203. *See id.* at 460.
204. FLA. EVID. CODE § 90.608(2).
205. *Id.* § 90.608(5).
206. *See* Mengler, *supra* note 51, at 415.
207. *See id.* at 423.
208. *See id.* at 416-25.
209. *See supra* notes 90-200 and accompanying text.
210. *See* Mengler, *supra* note 51, at 460.

ad hoc application of the general principles of Rules 401 through 403. To paraphrase Oscar Wilde, the drafters of Article VI "knew the precise . . . moment when to say nothing."[211]

211. OSCAR WILDE, *supra* note 1, at 341.

V-VII

LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
106th Congress

SENATE BILLS

S. 32 No title

- Introduced by: Thurmond
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - **Criminal Rule 31(a)** is amended by striking "unanimous" and inserting "by five-sixths of the jury."

S. 96 Y2K Act (See H.R. 775) Pub. L. No 106-37.

- Introduced by: McCain
- Date Introduced: January 19, 1999
- Status: Referred to Committee on Commerce; Hearings held on February 9, 1999; Committee reported bill favorably on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Cloture vote not obtain 5/18/99; Text inserted in H. R. 775 as passed Senate (CR S6998) on 6/15/99
- Provisions affecting rules: federalizing class actions and heightened pleading requirements

S. 248 Judicial Improvement Act of 1999

- Introduced by: Hatch (5 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/24/99 Referred to Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Sec. 4. Would amend Section 1292(b) of title 28, and allow for interlocutory appeals of court orders relating to class actions;
  - Sec. 5. Creates original federal jurisdiction based upon minimal diversity in certain single accident cases; and
  - Sec. 10. Clarifies sunset of civil justice expense and delay reduction plans.

S. 250 Federal Prosecutor Ethics Act

- Introduced by: Hatch (3 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules

- Sec. 2 authorizes Attorney General to establish special ethical standards governing federal prosecutors in certain situations. Those standards would override state standards.

S.353 Class Action Fairness Act of 1999
- Introduced by: Grassley (3 co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary 5/4/99 Subcommittee on Oversight and Courts; hearings held on May 4, 1999
- Provisions affecting rules:
  - Sec. 2. Provides for notification of the Attorney General & state attorney generals;
  - Sec. 2. Limits on attorney fees
  - Sec. 3. Minimal diversity requirements;
  - Sec. 4. Allows for removal of class actions to federal court; and
  - Sec. 5. Removes judicial discretion from **Civil Rule 11(c)** in all cases.

S.461 Year 2000 Fairness and Responsibility Act (See S. 96 and H.R. 775)
- Introduced by: Hatch (2 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to Committee on the Judiciary; hearings held on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Judiciary Committee reported favorably on March 25, 1999
  - Sec. 103 establishes special ("fraud-like") pleading requirements
  - Sec. 404 established minimal diversity for class actions

S. 625 *Bankruptcy Reform Act of 1999*
- Introduced by: Grassley (5 co-sponsors)
- Date Introduced: March 16, 1999
- Status: Referred to the Committee on Judiciary; Letter sent by Director to Hatch 3/23/99; Ordered to be reported with amendments favorably Apr 27, 1999; Committee on Judiciary reported to Senate with amendments. (Report No. 106-49 May 11, 1999.) Placed on Senate Legislative Calendar.
- Provisions affecting rules:
  - Section 702 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 319, and 425 would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

S. 721 No title (See *H.R. 1281*)
- Introduced by: Grassley (6 co-sponsors)
- Date Introduced: March 25, 1999

- Status:
- Provisions affecting rules:
    - Section 1 states that the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safeguards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
    - Section 3 provides a 3-year sunset of section 1.

S. 755 No title
- Introduced by: Hatch (14 co-sponsors)
- Date Introduced: March 25, 1999
- Status: April 12 read the second time, placed on the calendar
- Provisions affecting rules: Delays effective date of the "McDade" provision on Rule 4.2 contacts with represented parties

S. 758 Fairness in Asbestos Compensation Act of 1999
- Introduced by: Ashcroft (13 co-sponsors)
- Date Introduced: March 25, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
    - Section 208 gives exclusive jurisdiction, regardless of the amount in controversy or citizenship of parties, to federal courts;
    - Section 301 requires the board of the Asbestos Resolution Corporation to establish procedures for ADR;
    - Section 307(j) creates an penalty for an inadequate offer; and
    - Section 402 bars class actions in asbestos cases without the consent of each defendant, and governs removal.

S. 855 Professional Standards for Government Attorneys Act of 1999
- Introduced by: Leahy (7 co-sponsors)
- Date Introduced: April 21, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
    - Requires the Judicial Conference to submit to the Chief Justice a report that includes recommendations with respect to amending the Federal Rules of Civil and Criminal Procedure to provide for such a uniform national rules governing conduct of government attorneys. Directs the Judicial Conference, in developing recommendations, to consider: (1) the needs and circumstances of multi-forum and multi-jurisdictional litigation; (2) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil

law; and (3) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

S. 899 21st Century Justice Act of 1999

- Introduced by: Hatch (7 co-sponsors)
- Date Introduced: April 28, 1999
- Status: Referred to the Committee on Judiciary. May 18, 1999 partially incorporated into S. 254
- Provisions affecting rules:
  - Sections 5103-08 provide victims of crime with allocution rights; **Criminal Rule 11** is amended
  - Section 5224 amends **Evidence Rule 404** to permit consideration of evidence showing disposition of defendant
  - Section 6515 amends **Criminal Rule 43(c)** to permit videoconferncing of several types of proceedings n criminal cases, including sentencing
  - Section 6703 amends **Criminal Rule 46** governing criterion for forfeiture of a bail bond
  - Section 7101 amends **Criminal Rule 24** to equalize the number of peremptory challenges
  - Section 7102 amends **Criminal Rule 23** to permit a jury of 6 in a criminal case
  - Section 7105 amends the **Rules Enabling Act** and would restructure the composition of the rules committees to include more prosecution-oriented members
  - Section 7321 sets up ethical standards governing attorney conduct
  - Section 7477 permits disclosure of grand jury information to government attorneys not involved in the original prosecution

S. 934 Crime Victims Assistance Act

- Introduced by: Leahy (5 co-sponsors)
- Date Introduced: April 30, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 121 would amend **Criminal Rule 11** to require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing on entering a plea of guilty or nolo contendere, and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard on the plea.
  - Section 122 would amend **Criminal Rule 32** detailing the contents of the Victim Impact Statement; give the victim an opportunity to submit a written or oral statement, or an audio or videotaped statement; require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any sentencing hearing and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.
  - Section 123 would amend **Criminal Rule 32.1** require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of

any hearing to revoke or modify sentence and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.

- Section 131 would amend **Evidence Rule 615** to allow the victim of a crime of violence to be present unless the court finds the testimony of that person will be material affected by hearing the testimony of other witnesses or there are too many victims. [Note: It appears the amendments are based on the old version of Evidence Rule 615 (i.e do not account for the 2/98 amendment)]

S. 957 Sunshine in Litigation Act of 1999

- Introduced by: Kohl (No co-sponsors)
- Date Introduced: May 4, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
    - section 1 would amend chapter 111 of title 28, U.S.C. to require a court to make particularized findings of fact prior to entering a protective order; the proponent of the protective order has the burden of proof; stipulated protective orders would be unenforceable

S. 1360 Secret Service Protection Privilege Act of 1999

- Introduced by: Leahy (0 co-sponsors)
- Date Introduced: July 13, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
    - Section 3 amends title 18 to establish a secret service privilege (EV501)

S. 1437 Thomas Jefferson Researcher's Privilege Act of 1999

- Introduced by: Moynihan (0 co-sponsors)
- Date Introduced: July 26, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
    - Section 3 would amend CV45 to allow a court to quash a subpoena requiring disclosure of information relating to study or research of academic, commercial, scientific, or technical issues
    - Section 4 adds EV502 which would create a privilege for information relating to study or research of academic, commercial, scientific, or technical issues

HOUSE BILLS

H.R . 461 Prisoners Frivolous Lawsuit Prevention Act of 1999

- Introduced by: Gallegly (27 co-sponsors)
- Date Introduced: February 2, 1999
- Status: Referred to the Committee on Judiciary; 2/25/ 99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:

- Sec. 2 would amend **Civil Rule 11** creating special sanction rules for prisoner litigation.

H.R . 522 Parent-Child Privilege Act of 1999

- Introduced by: Andrews (No co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary; 2/25/99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would create new **Evidence Rule 502** providing for a parent/child privilege.

H.R. 771 No title

- Introduced by: Coble (15 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter from Judge Niemeyer to Hyde 3/22/99
- Provisions affecting rules:
  - Amends **Civil Rule 30** to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

H.R. 775 Year 2000 Readiness and Responsibility Act; Small Business Year 2000 Readiness Act (See S. 96 and S. 461) Public Law: 106-37 (07/20/99)

- Introduced by: Honorable W. Eugene Davis (62 co-sponsors)
- Date Introduced: February 23, 1999; ordered report 5/4/99
- Status: Referred to the Committee on Judiciary; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; hearing 4/13; Passed by House of Representatives on May 12, 1999; Signed by President on 7/20/99
- Provisions affecting rules:
  - Section 103 establishes special ("fraud-like") pleading requirements
  - Section 404 establishes federal jurisdiction of class actions over $1 million

H.R. 833 Bankruptcy Reform Act of 1999

- Introduced by: Gekas (105 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to the Committee on Judiciary; Forwarded by Subcommittee to Full Committee in the Nature of a Substitute by the Yeas and Nays: 5 - 3; letter sent by Director to Hyde on 3/23/99; Passed(313 - 108) 05/05/99; Read twice in the Senate 5/12/99;
- Provisions affecting rules:
  - Section 802 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 403, 607, and 816(e) would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

H.R. 967 Multiparty, Multiforum Jurisdiction Act of 1999

- Introduced by: Sensenbrenner (1 co-sponsor)
- Date Introduced: March 3,1999
- Status: Referred to the Committee on Judiciary; Mar 16, 1999: Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Minimal diversity for class actions

H.R. 1281 No title (See S. 721)

- Introduced by: Grassley (43 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/98 Referred to the House Committee on the Judiciary; referred to the Subcommittee on Courts and Intellectual Property 4/7/99;
- Provisions affecting rules:
  - Section 1 states the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
  - Section 3 provides a 3-year sunset of section 1.

H.R. 1658 Civil Asset Forfeiture Reform Act

- Introduced by: Hyde (29 co-sponsors)
- Date Introduced: May 4, 1999
- Status: 5/4/99 Referred to the House Committee on the Judiciary; Measure passed House on June 24, 1999, received in the Senate June 28, 1999

H.R. 1852 Multidistrict Trial Jurisdiction Act of 1999 (See H.R. 2112)

- Introduced by: Sensenbrenner (2 co-sponsors)
- Date Introduced: May 18, 1999
- Status: 5/19/99 Referred to the Subcommittee on Courts and Intellectual Property. 5/20/99 Subcommittee Consideration and Mark-up Session Held; 5/20/99 Forwarded by Subcommittee to Full Committee by Voice Vote.
  - Addresses Lexecon issue.
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H.R. 1875 Interstate Class Action Jurisdiction Act of 1999

- Introduced by: Goodlatte (37 co-sponsor)
- Date Introduced: May 19, 1999
- Status: Referred to the Committee on Judiciary; Hearings Held on July 21, 1999, Mark-up held July 27, 1999 and August 3, 1999; Ordered to be Reported (Amended) by the Yeas and Nays: 15 - 12.; letter from Executive Committee generally stating Judiciary's opposition more detailed letter to follow.
- Provisions affecting rules: None directly; general class action considerations

H.R. 2112 Multidistrict; Multiparty, Multiforum Trial Jurisdiction Act of 1999 (See H.R. 1852)

- Introduced by: Sensenbrenner (2 co-sponsors)
- Date Introduced: June 9, 1999
- Status: 9/13/99 Measure passed House; 9/14/99 referred to the Senate Committee on Judiciary.
- Provisions affecting rules
    - Addresses Lexecon issue and choice of law issues for single event mass torts.

JOINT RESOLUTIONS

S. J. RES. 3; *A joint resolution proposing an amendment to the Constitution of the United States to protect the rights of crime victims.*

- Introduced by: Kyl (33 Co-sponsors) Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary. Hearings held.
- Provisions affecting rules
    - Calls for a Constitutional Amendments enumerating victim's rights.