ADVISORY COMMITTEE
ON
EVIDENCE RULES

Washington, D.C.
April 19-20, 2001

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
Washington, D.C.
April 19, 2001

I. Opening Remarks of the Chair

Including welcoming new members; approval of the minutes of the April, 2000 meeting; and a report on the January 2001 meeting of the Standing Committee. The Draft minutes of the April 2000 meeting and this Committee's report to the Standing Committee are included in the agenda book.

II. Consideration of Evidence Rules

A. Rule 608(b)

The Reporter's memorandum concerning the extrinsic evidence limitation in the Rule, and a possible amendment to the Rule, is included in the agenda book.

B. Rule 804(b)(3)

The Reporter's memorandum concerning the corroboration requirement of Rule 804(b)(3), and a possible amendment to the Rule, is included in the agenda book.

C. Rule 1101

A memorandum from Roger Pauley and Laird Kirkpatrick suggesting an amendment to Rule 1101 is included in the agenda book. The Reporter's memorandum providing background for the proposal is also included.

III. Privileges

The agenda book includes the Privileges Subcommittee's discussion drafts and supporting memoranda on five possible Rules: 1) a new Rule 501; 2) a lawyer-client privilege; 3) a rule on waiver, 4) an interspousal privilege against giving adverse testimony, and 5) a privilege for confidential interspousal communications.

IV. Docket Sheet on Status of Rules Changes

V. Information Items

The agenda book includes two items for the Committee's information:

1. A recent article from the Connecticut Law Review providing favorable commentary on the amendment to Rule 702.

2. An article on the Federal Judicial Center's study on expert testimony after *Daubert*.

VI. New Business

VII. Next Meeting

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ADVISORY COMMITTEE ON EVIDENCE RULES

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Judge Milton I. Shadur, (*ex officio*)
Judge Ronald L. Buckwalter
David S. Maring, Esquire
Roger A. Pauley, Esquire
Professor Kenneth S. Broun, Consultant

March 7, 2001
Projects

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Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 17th, 2000

Chicago, Illinois.

The Advisory Committee on the Federal Rules of Evidence met on April 17th in Room 2544 of the Federal Courthouse in Chicago, Illinois.

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Jerry E. Smith
Hon. David C. Norton
Hon. Jeffrey Amestoy
Laird Kirkpatrick, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. Richard Kyle, Liaison to the Civil Rules Committee
Professor Kenneth Broun, Consultant to the Subcommittee on Privileges
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
Jennifer Evans Marsh, Esq., Federal Judicial Center
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee

Opening Business

Judge Shadur opened the meeting by asking for approval of the minutes of the October, 1999 Evidence Rules Committee meeting. The minutes were unanimously approved. Judge Shadur informed the Committee that the Supreme Court has approved all of the Committee's proposed amendments to the Evidence Rules--Rules 103, 404(a), 701, 702, 703, 803(6) and 902.

Judge Shadur then asked John Rabiej to report on a proposal to encourage all courts to place local rules on the internet. Mr. Rabiej noted that concern has been expressed by some courts that if local rules are placed on one internet web site, it will make it easy to compare the rules, to the embarrassment of some of the courts. He noted that the current proposal simply encourages that the district courts place local rules on the internet--the proposal does not purport to mandate anything. The Evidence Rules Committee approved the proposal in principle. Committee members expressed concern, however, that a listing of a particular rule as "effective" on a certain date might be misleading if the date was simply the date on which the rule was last reviewed for publication on the web site. The Committee suggested that the web site specify an "as of" date, indicating when the rules were last reviewed, together with an effective date indicating when the rule first became effective. A Committee member expressed his opinion that standing orders should be placed on the internet as well. Mr. Rabiej informed the Committee that such a proposal is currently under consideration.

Judge Shadur then reported on the Standing Committee's January meeting. The Evidence Rules Committee did not propose any action items at that meeting. Judge Shadur noted, however, that the Evidence Rules Committee does have input into two ongoing Standing Committee projects. One is the proposal of a Civil Rule concerning financial disclosure. Materials on this matter were included in the agenda book. The proposal currently before the Standing Committee is patterned on Appellate Rule 26.1. Judge Shadur noted that the Evidence Rules Committee does not have primary responsibility for rulemaking on financial disclosure, but that the Evidence Rules Committee will be kept apprised of developments. A second Standing Committee project involves the ongoing study of possible Federal Rules of Attorney Conduct. The Standing Committee's subcommittee on attorney conduct held an invitational conference, including members from bar associations, academia, and disciplinary counsel. The current draft model, requiring dynamic conformity with state rules of professional responsibility, has been revised in light of comments made at the February meeting. The Standing Committee plans to hold another invitational conference this Summer, in an effort to determine whether there is really a problem that is worth addressing through a federal rule of attorney conduct. Judge Shadur noted that no action is required from the Evidence Rules Committee at this point.

Consideration of Evidence Rules

Judge Shadur noted that the Evidence Rules Committee is not contemplating formal recommendation of any rule changes to the Standing Committee at this time. At the October, 1999 meeting, several issues were raised concerning possible rule changes, and the Reporter was directed to prepare a memorandum on each of these issues. The Reporter also prepared a memorandum in response to a request by Judge Grady to consider a proposed amendment to Evidence Rule 803(18). The issue for the Committee was whether any of the proposed rule changes are worth considering for further investigation, with a view to a possible proposal to the Standing Committee at its January, 2001 meeting.

Rule 902

The suggestion that Rule 902 might be amended involved two different matters: 1) A proposal from the Department of Justice to consider amending Rule 902(2) to provide for self-authentication of public documents by way of certification, i.e., providing an alternative to the requirement of a seal; and 2) a proposal to consider amending Rule 902(6) to provide for self-authentication of regular online reports. Committee members noted that it was important to proceed with caution before deciding to amend a rule as to which another amendment is currently pending before Congress.

Sealing Requirement

The question raised by the Committee was whether the sealing requirement is creating a substantial problem in practice, rendering it necessary to provide for an alternative form of self-authentication of public documents. Mr. Pauley stated that there is anecdotal evidence of difficulty in getting states to provide a sealed document. This is because many states no longer mandate the sealing of their public documents. Committee members expressed concern that an amendment would be proposed on the basis of some anecdotal evidence. Mr. Pauley stated that a survey of United States Attorneys would be conducted to try to find out whether the sealing requirement is imposing substantial problems for government attorneys. He agreed to report back to the Committee at the October meeting. The Committee agreed that it would consider a proposed amendment to the sealing requirement if a substantial problem exists in practice. But Committee members noted that the hardships of the sealing requirement are to a large extent alleviated by the current Rule 902(2), which provides for self-authentication of unsealed documents if an official affixes a seal to a certification that the document is genuine. The Rule 902(2) sealing requirement does not mandate a government seal; a notary seal or the like is sufficient. The Committee agreed that if the Rule is to be amended, the reference in Rule 902(1) to the Panama Canal Zone and the Trust Territory of the Pacific Islands should be deleted as those references are no longer relevant.

Online Materials

As to a proposed amendment to Rule 902(6), Committee members expressed the view that online materials might be more easily forged than hardcopy. Therefore it did not make sense at this point to provide for self-authentication of online materials. The consequence of not including online materials under Rule 902 is simply that they must be authenticated under the circumstances, as provided in Rule 901. The question is: which party should have the burden on the question of authenticity? Given the fact that technological advances have increased the risk of forgery, the Committee determined that it was generally appropriate to leave the burden of showing authenticity to the proponent of the evidence. Close questions should be called in favor of an actual showing of authenticity under Rule 901, rather than providing for self-authentication under Rule 902. Thus the Committee concluded that it was not appropriate at this time to amend Rule 902(6).

One Committee member argued that the risk of forging any document or picture has increased due to technological advances. He suggested that the Evidence Rules should be amended to protect against this heightened risk. Committee members agreed that the potential for forgery has increased, and that this increased potential counsels against increasing the scope of the Rule 902 grounds for self-authentication. Committee members, however, generally rejected the proposition that concern over the increasing potential for forgery should lead to any amendment of an Evidence Rule. The problem of forgery can be handled adequately by the principles of Rule 901--the possibility that a computerized document or picture might be forged is simply a factor that a court takes into account in determining whether the evidence is what the proponent says it is under Rule 901.

In sum, the Committee resolved not to proceed with an amendment to Rule 902(6). It reserved the question whether to proceed with an amendment to Rule 902(2), making Committee consideration dependent on a showing by the Department of Justice that the current Rule is posing a substantial problem in practice for United States Attorneys.

Rule 608(b)

At the October, 1999 meeting of the Evidence Rules Committee, the Reporter had been directed to prepare a report on whether the extrinsic evidence limitation of Rule 608(b) should be amended. The problem perceived is that as written, Rule 608(b) prohibits extrinsic evidence when used to impeach a witness' "credibility". Read literally, this would mean that extrinsic evidence could never be offered to prove any aspect of a witness' credibility. But the Supreme Court has made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness." So if the proponent is using the extrinsic evidence for impeachment on any ground other than an attack on character (specifically, to show bias, prior inconsistent statement, contradiction, or lack of capacity), the extrinsic evidence limitation of Rule 608(b) is not

applicable. The Reporter was directed to provide a background memorandum on whether the use of the overbroad term "credibility" in Rule 608(b) has created a problem for the courts.

The first question for the Committee was whether the fundamental approach that was intended to be embodied in the Federal Rules (as indicated by *Abel*) is indeed the correct approach to the admissibility of extrinsic evidence offered for impeachment. That approach distinguishes a character attack (as to which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403). Why distinguish an attack on the witness' character from other forms of attack? The Committee unanimously agreed that the basic approach of the Federal Rules–the distinction between an attack on the witness' character and other forms of impeachment–is correct and should not be changed. An attack on a witness' character for truthfulness can be overbroad and extraneous to the issues in the case; extrinsic proof of bad acts will almost always result in a waste of time and confusion of the jury on a collateral matter. It makes sense, therefore, to employ a categorical rule of exclusion of extrinsic evidence when offered to attack a witness' character for truthfulness. Extrinsic evidence of other forms of impeachment might well be more central to the issues in the case (e.g., contradiction of a material fact, or an inconsistency in a prior statement that is material to the witness' testimony), and so it makes sense to take a case by case approach under Rule 403.

The next question for the Committee was whether Rule 608(b) should be amended to accord with what the Rule is supposed to mean--i.e., that extrinsic evidence is absolutely prohibited when offered to prove a witness' character for truthfulness, and that Rule 403 governs use of extrinsic evidence for all other forms of impeachment. The Committee noted that many of the reported appellate cases apply the Rule correctly, even though the Rule uses the overbroad term "credibility". The fact remains, however, that court opinions can be found that misapply the Rule by invoking it to preclude extrinsic evidence offered for non-character forms of impeachment. Committee members also expressed concern that litigants are misapplying the Rule at the trial level, and that many litigants do not proffer extrinsic evidence for non-character impeachment because they think that the Rule on its face prohibits it. A motion was made to recommend some kind of an amendment to Rule 608(b) to carry out the original purpose of the rule, i.e., that the limitation on extrinsic evidence applies only to an attack on the witness' character for truthfulness, and that admissibility of extrinsic evidence for other forms of impeachment is governed by Rule 403. That motion passed unanimously.

The question then shifted to how the Rule should be amended to best accomplish its original purpose. The Committee considered three alternatives. One alternative would simply substitute the term "character for truthfulness" for the word "credibility" in Rule 608(b); the Committee Note to this alternative would specify that the use of extrinsic evidence to prove prior inconsistent statement, bias, contradiction and lack of capacity is governed by Rules 402 and 403. The second alternative would substitute "character for truthfulness" for "credibility" and would also add a new subdivision specifying that subject to Rule 403, extrinsic evidence could be used to prove prior inconsistent statement, bias, contradiction or lack of capacity. The third

alternative would combine either of the first two alternatives with a provision that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly. This proposed language is intended to prevent an abusive practice by which parties seek to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct (e.g., that the witness had been suspended or disciplined for the underlying misconduct).

Some Committee members were favorably disposed to the alternative that would specifically mention the other forms of impeachment in the text of the Rule. But most Committee members expressed reservations about this proposal. These members were concerned that by specifically mentioning the basic forms of impeachment, the drafters might inadvertently leave out other forms of impeachment, creating confusion for courts and litigants. These members believed that the better approach was to mention the standard non-character forms of impeachment in the Committee Note, and to specify that the admissibility of extrinsic evidence for these forms of impeachment is governed by Rules 402 and 403, not by Rule 608(b). All Committee members believed that if Rule 608(b) is going to be amended, it would be good policy to specify that extrinsic evidence cannot be used, either directly or indirectly, when offered to impeach the witness' character. Permitting the cross-examiner to refer to the consequences of a witness' misconduct, such as suspension, results in an impermissible end-run around the extrinsic evidence limitation, and also brings inadmissible hearsay before the factfinder.

A vote was taken on which alternative to propose for further consideration at the October, 2000 meeting. Alternative 3 (substituting the phrase "character for truthfulness" for the word "credibility"; specifying in the Committee Note that extrinsic evidence offered for non-character impeachment is governed by Rules 402 and 403; and providing that extrinsic evidence cannot be referred to when the impeachment is for character) was approved by a 5 to 3 vote (the three "nays" favoring the more detailed alternative including the other forms of impeachment in the text of the Rule). The Reporter was directed to prepare a draft proposed amendment to Rule 608(b) and draft committee note, taking the approach tentatively agreed to by the Committee.

Rule 803(18)

The Committee considered a proposal by District Judge Grady of the Northern District of Illinois, to delete or amend the last sentence of Evidence Rule 803(18) to permit the jury to take a learned treatise into the jury room. Judge Shadur noted that the current Rule states that a learned treatise can be read into evidence but cannot be admitted as an exhibit. Judge Shadur stated that one of the reasons often mentioned for preventing learned treatises from being admitted as an exhibit is that the jury might rummage through the treatise in the jury room, without proper guidance. He and other Committee members noted, however, that any risk of rummaging could be alleviated by redacting those portions of the treatise that have not been admitted. One Committee member pointed out that the point of any amendment would be to permit the jury to review the learned treatise in the jury room. However, it would be

inappropriate for an Evidence Rule to specify how a piece of evidence should be handled in the jury room, since that is a question of trial practice, not admissibility.

Judge Shadur and other members pointed out that the most important reason for the second sentence of the Rule is that learned treatises may be given undue weight if they are admitted as trial exhibits. For example, the jury is not ordinarily permitted to bring the transcript of an expert's testimony into the jury room, since the testimony is not an exhibit. Since learned treatises essentially operate as expert testimony, it would be inappropriate for the jury to be allowed to bring a treatise into the jury room–the treatise might receive more weight than the equivalent expert witness testimony. It might even occur that a learned treatise offered to impeach an expert witness would receive greater attention from the jury than the expert's testimony itself. An even greater danger might be posed by allowing learned treatises to be considered by the jury without the benefit of contemporaneous explanation by an expert.

Judge Shadur asked whether any Committee member was prepared to offer a motion to propose an amendment to Rule 803(18) that would permit learned treatises to be submitted to the jury. No such motion was made.

The Committee then considered whether Rule 803(18) should be amended to specify that the hearsay exception covers authoritative materials in non-book form. The Reporter informed the Committee that the Second Circuit recently encountered the problem of a videotape offered as a "learned treatise". The opponent of the evidence argued that the tape could not be admitted because Rule 803(18) specifies only hardcopy published material for admissibility. The Second Circuit held that the tape was admissible under Rule 803(18) even though the text of the Rule did not so specify.

Committee members recognized that the Rule as written does not cover learned treatises in non-book form. However, the Committee determined that the courts are not having a problem with the textual limitations in the Rule--as indicated by the Second Circuit opinion. The Committee unanimously agreed that it was unnecessary to propose an amendment to Rule 803(18) at this time.

Rule 804(b)(3)

Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. In criminal cases, the Rule as written states that an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement. This requirement does not, by the terms of the Rule, apply to government-proffered declarations against penal interest. Nor does the corroborating circumstances requirement apply on its face in civil cases. At the October,

1999 Evidence Rules Committee meeting, the Reporter had been directed to prepare a memorandum on whether Rule 804(b)(3) should be amended to extend the corroborating circumstances requirement to government-proffered hearsay and to civil cases.

Judge Shadur noted that the one-way corroboration requirement resulted from misconceptions in Congress about the scope of Rule 804(b)(3). Members of Congress apparently believed that inculpatory declarations against penal interest could not be admitted against criminal defendants due to the rule of *Bruton v. United States*. Therefore the corroboration requirement was written to apply only against accused-proffered hearsay. But it is clear that government-proffered declarations against penal interest can be and are often admitted against criminal defendants. Thus the one-way corroboration requirement was not justified at its inception; and as commentators and courts have noted, there is no justification for the one-way corroboration requirement today. Committee members recognized that most courts in fact apply the corroborating circumstances requirement to government-proffered declarations against penal interest (contrary to the text of the Rule). But some do not, and it is possible that criminal defense counsel do not demand corroboration of government-proffered statements because a look at the text of the Rule indicates that the requirement is inapplicable.

Judge Shadur polled the Committee on whether it would be appropriate to amend Rule 804(b)(3) to provide for two-way corroboration in criminal cases. The Committee unanimously agreed in principle that it is appropriate and necessary to prepare a proposal to amend Rule 804(b)(3) to require the prosecution to provide corroborating circumstances as a condition to admitting inculpatory declarations against penal interest.

Another question posed by the Reporter was whether the Rule should be amended to lower the threshold of corroborating circumstances required to support admissibility under Rule 804(b)(3). The Rule currently requires a showing that corroborating circumstances "clearly" indicate the trustworthiness of the statement. Some judges and commentators have argued that this standard is too stringent. One possibility is to delete the word "clearly" from the Rule. Committee members noted, however, that deletion of the word "clearly", in light of the extensive case law on the subject, might send out the wrong signal and would be disruptive to the courts. Deletion of "clearly" might also lead to unreliable hearsay being admitted against criminal defendants and other litigants. The Committee resolved unanimously to retain the word "clearly" in Rule 804(b)(3)

The Committee next considered whether the corroborating circumstances requirement should be extended to civil cases. Committee members noted that the question of application to civil cases would have to be addressed in any proposed amendment. That is, the corroborating circumstances requirement would have to be either specifically applied to or specifically excepted from civil cases. The Committee could find no justification for excepting civil cases from the corroborating circumstances requirement. To the contrary, Committee members recognized that it would make sense to have a unitary approach for all declarations against penal interest.

The next issue considered by the Committee was whether the factors pertinent to the corroborating circumstances requirement should be explicated in the text of the Rule. The Committee resolved that any such explication would be problematic because it would create a risk that some pertinent factors might not be included. On the other hand, the Committee recognized that courts are in dispute over the meaning of "corroborating circumstances." For example, some courts have held that in determining whether corroborating circumstances exist, the court must take into account whether the witness who relates the declaration against penal interest in court is reliable; other courts have held that the reliability of the witness is irrelevant to whether the declarant's statement is supported by corroborating circumstances. In light of the conflicts in the case law, the Committee resolved that it would be helpful for any amendment to Rule 804(b)(3) to set forth a non-exclusive list of factors that are pertinent to the determination of corroborating circumstances. The Committee agreed, however, that such a list would be better placed in the Committee Note than in the text of the Rule.

The Committee tentatively agreed to propose an amendment to Rule 804(b)(3) that would apply the corroborating circumstances requirement to all proffered declarations against penal interest, together with a Committee Note that would provide a non-exclusive list of factors that courts should take into account in determining whether the corroborating circumstances requirement is met. The Reporter was directed to prepare a proposed amendment for consideration at the next Committee meeting.

Privileges

Judge Smith, the Chair of the Subcommittee on Privileges, reported on a meeting of the Subcommittee and sought input from the Committee. The Subcommittee has prepared a preliminary draft of three privilege rules: 1) a catchall provision, providing that the state law of privilege applies in diversity cases and containing a provision to govern application of privileges not specifically established in the Rules; 2) a rule governing waiver; and 3) a rule covering the lawyer-client privilege. Judge Smith emphasized that the privileges project is a long-term project and that no decision to propose new privilege rules has yet been made. He noted that the Subcommittee had incorporated most of the suggested changes of the Style Subcommittee of the Standing Committee.

Committee members reviewed the Subcommittee drafts, and discussion covered the following points:

1. The draft provides that privileges are granted only by the Constitution, statute, or Supreme Court-initiated Rule. A Committee member pointed out that certain federal regulations exempt some government agents from pretrial discovery in criminal cases. Committee members responded that any such privilege really results from a judicial construction of Criminal Rule 16–therefore the proposal would not change the law with respect to protection of these

government agents. Committee members suggested that this problem be mentioned in a Committee Note should an amendment ever be proposed.

2. The draft catchall provision states (as does current Rule 501) that the "State" law of privilege controls where the rule of decision is based on state law. Committee members questioned whether the language would cover the law of the District of Columbia, Puerto Rico, etc. A suggestion was made that the word "jurisdiction" be substituted for the word "State." But this could mean that foreign privilege law would apply whenever foreign law supplied the rule of decision. Some Committee members thought that a federal court should have the option, at least in some cases, to apply federal privilege law even where foreign law supplies the substantive rules of decision. Another problem is that Evidence Rules 302 and 601 also refer to "State law", so any attempt to take a different approach in the privilege rules might be confusing. The Subcommittee agreed to do further research on this subject and to report back to the Committee at the next meeting.

3. One Committee member suggested that privileges in federal court should always be controlled by federal law. That is the position to which Congress took exception when privilege rules were proposed by the original Advisory Committee on Evidence Rules. Committee members generally opposed the view that the federal rules of privilege should apply even in diversity cases. They noted *Erie* and forum-shopping concerns, and were reluctant to change well-established law.

4. The catch-all provision in the Subcommittee draft proposed that "new" privileges could be established, subject to a balancing of public and private benefits and the cost of the loss of probative evidence. A Committee member raised the possibility that if privilege rules were proposed, Congress might accept some privileges and not others. This could leave privileges well-established in the common law, and yet not "new". The Committee resolved that the catch-all provision should encompass privileges established under the common law that might not be adopted in any codification of the privilege rules. The Subcommittee agreed to reconsider whether the balancing test set forth in the draft was broad enough to accomodate "public" privileges (e.g., the state secrets privilege) as well as private ones.

5. Judge Smith informed the Committee that the Subcommittee had chosen the term "lawyer-client" privilege, rather than "attorney-client" privilege, because "lawyer-client" was chosen both by the original Advisory Committee and by the drafters of the new Uniform Rules. Questions were raised about the scope of the term "client" in the draft–specifically whether the definition was broad enough to cover all potential clients. The Subcommittee agreed to study this question and report back to the Committee.

6. Questions were also raised about the definition of "lawyer" in the draft, specifically whether it was broad enough to cover people in foreign countries who perform legal services, such as notaries. The Subcommittee agreed to research this question and report back to the Committee.

7. The Committee discussed whether the draft's definition of "privileged persons" might lead to unwarranted protection of communications between two clients where a lawyer was not present. Federal courts have rejected the privilege in such circumstances. The Subcommittee agreed to consider this question further and to report back to the Committee.

8. The question was raised whether the crime-fraud exception to the lawyer-client privilege should be expanded to preclude the privilege when the client is communicating to the lawyer for the purpose of committing tortious conduct. The Committee believed that this would make the exception too broad, and that there was insufficient support for this expansion in the case law.

9. The draft rule on lawyer-client privilege contains an exception for cases in which it is necessary for the lawyer to defend herself by using privileged communications (most commonly in malpractice cases). The consultant to the Privileges Subcommittee observed that this exception may not be broad enough to cover in-house lawyers who are fired for whistleblowing and who sue for retaliatory discharge. He stated that he would research this question and report back to the Committee.

10. The Committee unanimously agreed that the "fiduciary" exception to the lawyer-client privilege, established in *Garner v. Wolfinbarger*, should be retained in any proposed codification of the privilege.

11. The draft rule on waiver contains a provision permitting a party who receives inadvertently privileged information to use the fruits of that information. The justification for the provision is that otherwise the party receiving the inadvertently disclosed information would be placed in the unfair position of having to establish that other information was not derived in any way from the privileged material. Committee members pointed out, however, that the proper solution to this possible unfairness is to shift the burden to the party who disclosed the privileged information, to show that other information was in fact derived from the material inadvertently disclosed. The Subcommittee agreed to draft a burden-shifting provision and present it for the Committee's consideration at the next meeting.

Case Law Divergence Report

At the direction of the Committee, the Reporter prepared a report designed to highlight for lawyers and judges the existence of case law that diverges from the text of the Federal Rules of Evidence. Judge Shadur noted that the report is basically in final draft form. The suggestion was made that the report could be published by the Federal Judicial Center and placed on the Federal Judicial Center website. The Committee agreed that publication by the FJC would be a wise and useful option. Judge Shadur noted that other possible means of distributing the report

will be looked into as well.

The Committee discussed what the goal of the report should be. Should it simply be a "red flag" report, alerting lawyers and judges to the fact that some case law diverges from the text of a rule, and encouraging further research on the matter? Or should the report be a complete compendium of all the case law, equivalent to a treatise, on every rule in which some case has diverged from the text? A strong majority of the Committee was of the view that the report should be a "red flag" report. While the Committee could perform a valuable service by drawing attention to case law divergence from the text of the Rules, it was not in the business of treatise-writing. The Committee agreed that the report should emphasize that it is operating only as a triggering mechanism–highlighting the fact that some case law diverges from certain specific rules, and emphasizing that the report does not purport to provide a thorough description of all of the reported cases discussing a particular Evidence Rule.

It will of course be made clear that the report is not an official Committee Note. The report is to be published by the Reporter at the direction of the Committee. It is not an official Committee report.

After discussion, the Reporter was directed to add some law review citations to the report where appropriate, and to address the fact that the rule of *Luce v. United States* is not covered by the text of Evidence Rule 103.

At the end of the discussion, the Committee unanimously agreed that the report, with some modifications, would provide an important service to lawyers, and that the Committee should ask the Standing Committee for its views as to appropriate publication of the report.

New Matters

Pending DNA Legislation–John Rabiej informed the Committee that a bill is pending in Congress that authorizes a court to order DNA testing on evidence in certain circumstances where a defendant claims that he was wrongly convicted. The bill was presented for information purposes only, as it has no direct bearing on the Federal Rules of Evidence.

Committee Business

Judge Shadur noted that the terms of Committee members Judge Smith and John Kobayashi are ending this year. On behalf of the Committee, he thanked them both for their excellent and dedicated service. He expressed the hope that Judge Smith might be able to continue to serve as the Chair of the Subcommittee on Privileges.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for October 30th, 2000, in Washington, D.C..

The meeting was adjourned at 2:45 p.m., Monday, April 17th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

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

FROM: **Honorable Milton I. Shadur, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2000**

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

I. Introduction

The Advisory Committee on Evidence Rules did not hold a Fall 2000 meeting. The Advisory Committee is working on a number of long-term projects, but none of them required immediate consideration by the Committee. This memorandum reports on the status of those long-term projects.

II. Action Items

No Action Items

III. Information Items

A. Consideration of Evidence Rules

At its April 2001 meeting the Committee will consider the possibility of proposing amendments to two Evidence Rules–Rules 608(b) and 804(b)(3).

1. Rule 608(b) — Evidence Rule 608(b) prohibits the admission of extrinsic evidence when used to impeach a witness' "credibility". Read literally, this would mean that extrinsic evidence could never be offered to prove any aspect of a witness' credibility. But the Supreme Court made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness." Impeachment on non-character grounds, such as for bias, is not covered by the extrinsic evidence limitation of Rule 608(b). *Abel* basically distinguishes a character attack (as to which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403).

After an extensive review of the case law, the Committee determined that a fair number of reported cases misapply current Rule 608(b) by invoking it to preclude extrinsic evidence offered for non-character forms of impeachment. Litigants also appear to be misinterpreting the Rule at the trial level, and many litigants apparently do not proffer extrinsic evidence for non-character impeachment because they believe that the Rule on its face prohibits it.

After discussion and deliberation at its April 2000 meeting, the Evidence Rules Committee directed the Reporter to prepare a draft amendment that would: 1) substitute the term "character for truthfulness" for the word "credibility" in Rule 608(b); 2) add language to the Rule to provide that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly (in order to prevent an abusive practice by which a party impeaching a witness' character will try to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct); and 3) include language in the Committee Note specifying that the admissibility of extrinsic evidence offered to impeach the witness on grounds of contradiction, prior inconsistent statement, bias or lack of capacity is governed by Rules 402 and 403, not by Rule 608(b).

The proposed amendment to Evidence Rule 608(b) will be considered at the April 2001 meeting of the Evidence Rules Committee, with a view to proposing to the Standing Committee its release for public comment in 2001.

2. Rule 804(b)(3) — Evidence Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. The Rule as written states that in criminal cases an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement before it can be admitted as a declaration against penal interest in the accused's favor. This corroborating-circumstances requirement does not, by the terms of the Rule, apply to

government-proffered declarations against penal interest. Nor does the corroborating-circumstances requirement apply on its face to civil cases. The Evidence Rules Committee has considered whether Rule 804(b)(3) should be amended to extend the corroborating-circumstances requirement to government-proffered hearsay and to civil cases. The Committee noted that the current one-way corroboration requirement has never been justified; that it resulted from an oversight during the legislative process; and that it has been criticized and rejected by many courts. The Committee has unanimously agreed that a unitary approach to the admissibility of declarations against penal interest would result in both fairness and efficiency in the administration of the Rule.

The Committee also determined that there is some dispute in the courts over the meaning of "corroborating circumstances." The Rule leaves the term undefined, and the term is not used anywhere else in the Evidence Rules. The Committee therefore unanimously agreed that it would be useful to provide some guidance on the meaning of "corroborating circumstances" in a Committee Note.

After substantial discussion at the April 2000 meeting, the Reporter was directed to draft a proposed amendment and Committee Note to Rule 804(b)(3). That proposed amendment would: 1) apply the corroborating-circumstances requirement to all proffered declarations against penal interest, and 2) include in the Committee Note a non-exclusive list of factors that courts should take into account in determining whether the corroborating-circumstances requirement is met. The proposed amendment will be considered at the April 2001 meeting of the Evidence Rules Committee, with a view to proposing to the Standing Committee its release for public comment in 2001.

3. Rule 902 — The Committee has reviewed a Justice Department proposal to amend Rule 902 to provide for self-authentication of public documents by way of certification (to provide an alternative to the requirement of a seal). The Committee has made a preliminary determination that the costs of an amendment would not be justified unless the Justice Department can show that the requirement of a seal imposes a substantial problem in practice. Any hardship imposed by a sealing requirement is minimized by the current Rule 902(2), which provides for self-authentication of unsealed documents if an official affixes a seal to a certification that the document is genuine. The Rule 902(2) certification sealing requirement does not mandate a government seal; a certification would be sufficient if it bore a notary seal or the like. Therefore the Committee did not find a substantial need to proceed with an amendment to Rule 902 at this time. The Committee agreed to reconsider the proposed amendment if a survey conducted by the Department of Justice indicates that DOJ attorneys are having substantial problems in authenticating public records due to the sealing requirements of Rule 902.

B. Committee Report on Case Law Divergence From Rules or Notes

I am pleased to report that the Reporter's article on Case Law Divergence from the Federal Rules of Evidence has been published by the Federal Judicial Center and is being widely distributed to judges and lawyers. The article was prepared by the Reporter at the direction of the Evidence Rules Committee, and was reviewed by the Committee before it was submitted for publication. The article highlights for lawyers and judges the existence of case law under the Evidence Rules that diverges materially from the text of a particular Rule, or from the accompanying Committee Note, or both. The article will be published in West's Federal Rules Decisions, and West has also included the article as a special appendix to all of its statutory publications of the Federal Rules of Evidence.

C. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. The Subcommittee on Privileges is working on draft rules for consideration by the Committee at the April, 2001 meeting. Those rules would codify: 1) the lawyer-client privilege; 2) rules on waiver; and 3) a catch-all provision similar to current Rule 501, that would permit further development of privileges. The Committee is aware that the Civil Rules Committee is also working on the subject of privilege waiver, and it looks forward to conferring with the Civil Rules Committee on this important project.

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March 1, 2001

Enclosed are the materials for the agenda book for the Evidence Rules Committee meeting in April. The materials are enclosed in the order in which they should be placed in the agenda book, and I indicate where to put the tabs. The only thing you have to add is the minutes from the last Standing Committee meeting. If there is any more extraneous material that needs to be added, please do so, and simply amend the agenda accordingly.

By e-mail, I am sending you electronic files of all of the memoranda that I have prepared for this agenda book.

Thanks very much for your help. See you soon.

Very truly yours,

Daniel J. Capra
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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Evidence Rule 608(b)
Date: March 1, 2001

At its last meeting the Advisory Committee tentatively agreed on an amendment to Rule 608(b). This amendment would clarify that the Rule's exclusion on extrinsic evidence would apply only when that evidence is offered to prove a witness' character for truthfulness. The Committee also agreed on language to be added to the Rule that would prohibit parties from referring to sanctions suffered by the witness, as opposed to the underlying bad acts committed by the witness.

This memorandum is in five parts. Part One describes the problems raised by the current Rule. Part Two provides a description of how the Committee reached its decision to propose an amendment to the Rule. Part Three sets forth the proposed amendment and Committee Note approved in principle by the Committee at the April, 2000 meeting. Part Four analyzes the current case law on Rule 608(b). Part Five sets forth an alternative amendment to the Rule that was considered and rejected by a majority of the Committee at the April, 2000 meeting.

I. Introduction

Rule 608 provides as follows:

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — **Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.** They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

It is the first sentence of Rule 608(b), set forth above in bold, that the Committee found in need of amendment. That sentence prohibits the use of extrinsic evidence when offered for a certain kind of impeachment. (Extrinsic evidence is generally defined as that evidence "which is offered through documents or other witnesses, rather than through cross-examination of the witness himself or herself." *Weinstein's Evidence* § 608.20.).

The Rule is intended to preclude extrinsic evidence when it is offered to prove that a witness has a bad character for veracity–that is, where it is offered to prove that a person has a propensity to lie. The original Advisory Committee note refers to the need for a "conformity" with Rule 405, "which forecloses use of evidence of specific incidents as proof in chief of character."

The justification for exclusion of extrinsic evidence when offered to prove a witness' character is that it would "entail an undue consumption of trial time." McCormick on Evidence at 156 (5th ed.). See also Mueller and Kirkpatrick, 3 Federal Evidence at 180 (the Rule "helps keep the focus on substance and matters bearing immediately on credibility by keeping trials from being sidetracked on peripheral issues."). For example, assume a murder case where a witness is asked on cross-examination whether he ever forged a check. If the witness denies having forged a

check, it might take a good deal of time and effort to prove that the check was actually forged and that the witness actually committed the forgery–indeed it may give rise to proof by both sides on a matter that is pertinent only to whether the witness is credible; the fact of forgery is not pertinent to any substantive issue in the case. As McCormick puts it, the extrinsic proof is a waste of time because it goes to a "collateral matter."

The Advisory Committee Note makes fairly clear that Rule 608(b)'s exclusion of extrinsic evidence is applicable only if the opponent's goal is to attack the witness' character for veracity. Other forms of impeachment–such as for bias, prior inconsistent statements, contradiction and capacity–are not intended to be covered by the absolute exclusion on extrinsic proof in Rule 608(b).

The problem giving rise to the need for amendment is that the text of the Rule by its terms prohibits extrinsic evidence when offered to address the witness' "credibility." Professor Schmertz, in *Emerging Problems Under the Federal Rules of Evidence* at 161, explains as follows in the context of a discussion on impeachment by contradiction:

> Rule 608(b) clearly confines itself to matters of veracity character. The want of a Rule dealing with specific contradiction impeachment may have misled some courts into relying on Rule 608(b) since it also deals with "extrinsic" evidence. Another factor may have been the mistaken use of the overbroad term "credibility" at the outset of Rule 608(b). Read literally, the first sentence of (b) could bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility.

As indicated in Part Four, below, most courts do read Rule 608(b) to apply only where the extrinsic evidence is offered to prove the witness' character for veracity. But there are many decisions applying the Rule more broadly to mean what it appears to say – that extrinsic evidence is completely prohibited whenever offered on any aspect of the witness' credibility.

II. Committee Decision at April, 2000 Meeting

The first question considered by the Committee at the April, 2000 meeting was whether Rule 608(b) as originally intended is indeed the correct approach to the admissibility of extrinsic evidence offered for impeachment. That approach distinguishes a character attack (as to which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403). The Committee unanimously agreed that the basic approach of the Federal Rules–distinguishing between an attack on the witness' character and other forms of impeachment–is correct and should not be changed. An attack on a witness' character for truthfulness can be overbroad and extraneous to the issues in the case; extrinsic proof of bad acts will almost always result in a waste of time and confusion of the jury on a collateral matter. It makes sense, therefore, to employ a categorical rule of exclusion of extrinsic evidence when offered to attack a witness' character for truthfulness. Extrinsic evidence of other forms of impeachment might well be more central to the issues in the case (e.g., contradiction of a material fact, or an inconsistency in a prior statement that is material to the witness' testimony), and so it makes sense to take a case by case approach under Rule 403.

The next question for the Committee was whether Rule 608(b) should be amended to accord with what the Rule is supposed to mean--i.e., that extrinsic evidence is absolutely prohibited when offered to prove a witness' character for truthfulness, and that Rule 403 governs use of extrinsic evidence for all other forms of impeachment. The Committee noted that many of the reported appellate cases apply the Rule correctly, even though the Rule uses the overbroad term "credibility". The fact remains, however, that court opinions can be found that misapply the Rule by invoking it to preclude extrinsic evidence offered for non-character forms of impeachment. Committee members also expressed concern that litigants are misapplying the Rule at the trial level, and that many litigants do not proffer extrinsic evidence for non-character impeachment because they think that the Rule on its face prohibits it. A motion was made to recommend some kind of an amendment to Rule 608(b) to carry out the original purpose of the rule, i.e., that the limitation on extrinsic evidence applies only to an attack on the witness' character for truthfulness, and that admissibility of extrinsic evidence for other forms of impeachment is governed by Rule 403. That motion passed unanimously.

The question then shifted to how the Rule should be amended to best accomplish its original purpose. The Committee considered three alternatives. One alternative would simply substitute the term "character for truthfulness" for the word "credibility" in Rule 608(b); the Committee Note to this alternative would specify that the use of extrinsic evidence to prove prior inconsistent statement, bias, contradiction and lack of capacity is governed by Rules 402 and 403. The second alternative would substitute "character for truthfulness" for "credibility" and would also add a new subdivision to the text of the Rule. That new subdivision would specify that extrinsic evidence could be used to prove prior inconsistent statement, bias, contradiction or lack of capacity, subject to Rule 403. The third alternative would combine either of the first two alternatives with a provision that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly. This proposed language is intended to prevent an abusive practice by which

parties seek to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct (e.g., that the witness had been suspended or disciplined for the underlying misconduct).

Some Committee members were favorably disposed to the alternative that would specifically mention the other forms of impeachment in the text of the Rule. But most Committee members expressed reservations about this proposal. These members were concerned that by specifically mentioning the basic forms of impeachment, the drafters might inadvertently leave out other forms of impeachment, creating confusion for courts and litigants. Moreover, mentioning the basic forms of impeachment would add little, because both courts and litigants are obviously aware that impeachment by prior inconsistent statement, contradiction, etc., are permissible subject to Rule 403. The majority of Committee members believed that the better approach was to mention the standard non-character forms of impeachment in the Committee Note, and to specify that the admissibility of extrinsic evidence for these forms of impeachment is governed by Rules 402 and 403, not by Rule 608(b).

All Committee members believed that if Rule 608(b) is going to be amended, it would be good policy to specify that extrinsic evidence cannot be used, either directly or indirectly, when offered to impeach the witness' character. Adding such language would clarify that the cross-examiner is not permitted to refer to consequences suffered by the witness as a result of his alleged misconduct. Permitting the cross-examiner to refer to the consequences of a witness' misconduct, such as suspension from a job or revocation of a license, results in an impermissible end-run around the extrinsic evidence limitation, and also brings inadmissible hearsay before the factfinder.

A vote was taken on the alternatives. Alternative 3 (substituting the phrase "character for truthfulness" for the word "credibility"; specifying in the Committee Note that extrinsic evidence offered for non-character impeachment is governed by Rules 402 and 403; and providing that extrinsic evidence cannot be referred to when the impeachment is for character) was approved by a 5 to 3 vote. The three "nay" votes favored the more detailed alternative including the non-character forms of impeachment in the text of the Rule. The next part of this memorandum sets forth the amendment and Committee Note tentatively approved by the Committee. For informational purposes the rejected alternative (specifying the non-character forms of impeachment in the text of the Rule) is set forth at the end of this memorandum.

III. Proposed Amendment to Rule 608(b), Tentatively Approved by the Advisory Committee

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by reference to or introduction of extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

* * *

Proposed Committee Note

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack the witness' character for truthfulness. See *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). The Rule's use of the overbroad term "credibility" was subject to being read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment restores the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if it was offered to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n

conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence, § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

The amendment also clarifies that the Rule's extrinsic evidence prohibition applies not only to the actual introduction of testimony or a document, but also to any direct or indirect reference to such evidence in the course of examining the witness. For example, the Rule bars any reference to the fact that a witness was suspended or disciplined for the conduct that is the subject of impeachment. *See United States v. Davis,* 183 F.3d 231, 257, n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character as a witness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident and that "the government needs to limit its cross-examination to the facts underlying those events"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

IV. Federal Case Law

What follows is a discussion of case law applying the language barring extrinsic evidence in Rule 608(b). The discussion is divided into case law properly applying the Rule in accordance with its original intent, and case law that has created problematic interpretations of the Rule.

A. Extrinsic Evidence Exclusion Applies Only When Offered To Prove Character

1. Abel

A discussion of case law applying Rule 608(b) begins with the Supreme Court's decision in *United States v. Abel. Abel* is discussed in this excerpt from the Federal Rules of Evidence Manual:

> Rule 608(b) prohibits the introduction of extrinsic evidence to prove specific instances of conduct of a witness when the purpose of introducing these acts is to impeach the witness' character for veracity. Therefore, although a witness can be questioned about a particular event – subject to the Trial Court's balancing of probative value, prejudicial effect and delay under Rule 403 – the examiner must accept the witness' affirmation or denial of the event.[1] The purpose of the ban on extrinsic evidence is "to avoid holding mini-trials on irrelevant or collateral matters."[2]
>
> The exclusionary principle of Rule 608(b) applies only if the sole purpose of the specific act is to impeach the witness' character for veracity. If extrinsic evidence of the specific act is offered to impeach the witness on other grounds, then the absolute preclusion of extrinsic evidence is inapplicable. This point was made clear by the Supreme Court in *United States v. Abel,* 469 U.S. 45 (1984). Abel was charged with bank

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[1]See, e.g., United States v. Brooke, 4 F.3d 1480 (9th Cir. 1993) (defendant in murder trial was accused of having feigned terminal cancer; extrinsic evidence of "cancer fraud" could not be introduced if its only purpose was to attack the defendant's character for veracity: "Under this explicit rule [Rule 608(b)], the government was stuck with whatever response Brooke gave about her cancer; the government could attempt on further cross-examination to elicit a response contradicting her prior testimony, but it could not improperly impeach Brooke through extrinsic evidence.").

[2] Deary v. City of Gloucester, 9 F.3d 191, 197 (1st Cir. 1993) (calling witness to the stand to rebut the denial by a previous witness of a bad act "was an unnecessary foray, resulting in a waste of the court's time," and was prohibited by Rule 608(b)).

robbery, and called Mills to testify on his behalf. The prosecution sought to impeach Mills with the fact that both he and Abel were members of the Aryan Brotherhood, a secret prison gang that was sworn to perjury when needed to protect fellow members. When Mills denied his membership in the prison gang, the Trial Court permitted the prosecution to rebut the denial with testimony from another witness. Abel objected that this violated the Rule 608(b) limitation on extrinsic evidence. But the Court unanimously rejected Abel's argument in the following analysis:

> It seems clear to us that the proffered testimony with respect to Mills' membership in the Aryan Brotherhood sufficed to show potential bias in favor of [Abel]; because of the tenets of the organization described, it might also impeach his veracity directly. But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.

Thus, if Mills were simply an unaffiliated fact witness in a personal injury case, his Aryan Brotherhood membership could be the subject of inquiry (because he joined an organization sworn to perjury); but extrinsic proof would be prohibited by Rule 608(b) since the only purpose for the evidence would be to show that Mills had a character trait for lying. But because the Aryan Brotherhood membership showed that Mills had a specific motive to falsify testimony on behalf of a fellow member, the Rule 608(b) limitation was found inapplicable.

While *Abel* dealt with impeachment for bias, the federal courts have applied its rationale to hold that the Rule 608(b) exclusion does not apply to any form of impeachment other than an attack on a witness' bad character for veracity. So, for example, the Rule 608(b) limitation on extrinsic proof is inapplicable if the witness denies having made a prior inconsistent statement.[3] This is because impeachment by way of inconsistent statement is not an attack on the witness' character: it may be that the witness has a strong character for truthfulness, but the fact remains that the witness has made inconsistent statements about the subject matter to which he has testified.

All this does not mean, however, that extrinsic impeachment evidence must always be admitted when it is offered for a purpose other than proving the witness' character for veracity. Rule 403 may be used to exclude extrinsic evidence where it is

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[3]See, e.g., Kasuri v. St. Elizabeth Hosp. Med. Center, 897 F.2d 845 (6th Cir. 1990) (extrinsic evidence of inconsistent statement is not prohibited by Rule 608(b)). See also United States v. Laughlin, 772 F.2d 1382 (7th Cir. 1985) (extrinsic evidence offered for purposes of contradiction is not prohibited).

unduly prejudicial, confusing, or time-consuming.[4]

2. Case Law in the Circuits Holding That the Extrinsic Evidence Bar Applies Only to Impeachment for Character:

Besides the cases set forth in the footnotes from the Federal Rules of Evidence Manual excerpt, there are many circuit court cases that apply Rule 608(b) "correctly", i.e. that apply the extrinsic evidence exclusion to character impeachment only, and use Rule 403 to regulate extrinsic evidence offered for other types of impeachment. What follows is a short synopsis of some representative cases with correct results. Problematic cases are discussed thereafter.

D.C. Circuit

United States v. Smith, 232 F.3d 236 (D.C. Cir. 2000): The Court held it was not plain error to admit extrinsic evidence of past acts of truthful cooperation by a government witness. The past acts were offered to rebut allegations of the witness' bias. The Court analyzed Rule 608(b) as follows:

> [T]he threshold question under Rule 608(b) is: For what purpose has the prosecution offered the extrinsic evidence? If offered solely "in order to bolster the informant's credibility" (*United States v. Taylor,* 900 F.2d 779, 781 (4th Cir. 1990)) the Rule 608(b) bars admission lest one of the exceptions applies. But, if offered for a different and legitimate reason, such as "to justify a cooperation agreement or rebut allegations of bias" (*United States v. Lochmondy* 890 F.2d 817, 821 (6th Cir. 1989)) the evidence falls outside Rule 608(b)'s narrow confines.

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[4]See, e.g., United States v. Phillips, 888 F.2d 38 (6th Cir. 1989) (Trial Court did not err in prohibiting extrinsic evidence of bias where "the only bias defendant can point to is a desire by the government witnesses to save their jobs by allegedly lying on cross-examination about a remote matter as opposed to lying about a fact material to the case."); United States v. Soundingsides, 825 F.2d 1468 (10th Cir. 1987) (extrinsic evidence of prior inconsistent statement is not admissible where the witness admits having made the statement: "since the substance of the statements had already been repeated before the jury and acknowledged, the overkill of testimony by the Agents again repeating the statements, with its prejudicial risk of use as substantive evidence, was error.").

First Circuit:

United States v. Winchenbach, 197 F.3d 548 (1st Cir. 1999): This case contains an excellent discussion of the difference between impeachment of character and impeachment by prior inconsistent statement under Rule 613(b), and properly applies Rule 608(b) only to the former and not to the latter. Defense witness Flint testified that the defendant was not at his home during a drug transaction that occurred at the home. On cross-examination, Flint denied telling a police officer at the scene that the officers had missed several ounces of cocaine that were buried in the yard outside the defendant's home. The prosecution then called the officer to whom Flint had spoken. That officer testified that Flint had indeed made the statement about the buried cocaine. The court first rejected the defendant's argument that the extrinsic evidence should not have been admitted because *one* purpose for the evidence was to impeach the witness' character through evidence of prior drug use. The court stated that the defendant's contention was "an overbroad generalization which, among its other vices, contradicts the time-honored tenet that prior inconsistent statements ordinarily may be used to impeach a witness's credibility. In the bargain, this interpretation of Rule 608(b) leaves no room at all for the admission of extrinsic impeachment evidence under the auspices of Rule 613(b). Thus, we reject it."

The *Winchenbach* court set forth "a principled distinction between the types of evidence covered by the two rules." Specifically:

> Rule 613(b) applies when two statements, one made at trial and one made previously, are irreconcilably at odds. In such an event, the cross-examiner is permitted to show the discrepancy by extrinsic evidence if necessary--not to demonstrate which of the two is true but, rather, to show that the two do not jibe (thus calling the declarant's credibility into question). [citations omitted] In short, comparison and contradiction are the hallmarks of Rule 613(b).
>
> In contrast, Rule 608(b) addresses situations in which a witness's prior activity, whether exemplified by conduct or by a statement, in and of itself casts significant doubt upon his veracity. [citation omitted] Thus, Rule 608(b) applies to, and bars the introduction of, extrinsic evidence of specific instances of a witness's *misconduct* if offered to impugn his credibility. McCormick on Evidence at 138. So viewed, Rule 608(b) applies to a statement, as long as the statement in and of itself stands as an independent means of impeachment without any need to compare it to contradictory trial testimony. [citations omitted]

Applying this analysis to the facts, the court found that the officer's testimony about the defense witness' statement was covered by Rule 613(b)–and therefore the extrinsic evidence was not absolutely prohibited. The witness' denial of a prior statement about the location of drugs clearly presented an inconsistency. Rule 608(b) would apply only if the prior statement concerning the drugs, standing alone and without any reference to the witness' trial testimony, was pertinent to the witness' character for veracity. The court stated that the evidence of the prior

statement failed that test because "the appellant does not squarely argue that the mere assertion that the officers missed some buried jars of cocaine during their search of the premises, offered in an effort to cooperate with law enforcement, sinks to the level of an affirmative example of Flint's misconduct such as would significantly affect Flint's credibility, and such an argument, if made, would be unconvincing. It is only the comparison of the earlier statement with Flint's trial testimony that imbues the evidence with probative value for impeachment purposes."

The *Winchenbach* court noted that extrinsic evidence of a prior inconsistent statement, while not controlled by Rule 608(b), was still subject to the balancing test of Rule 403. The court found no abuse of discretion in admitting the extrinsic evidence. It reasoned that Flint was an important alibi witness, and that the inconsistency was clearly probative of the witness' credibility.

United States v. Perez-Perez, 72 F.3d 224 (1st Cir. 1995): The government witness, a police officer, was asked about previous acts of misconduct. He denied them. The court found that the trial court properly excluded extrinsic evidence. To the extent that the acts were offered to show that the witness had a bad character, extrinsic evidence was absolutely excluded by Rule 608(b). "The notion underlying the rule is that while certain prior good or bad acts of a witness may constitute character evidence bearing on veracity, they are not evidence of enough force to justify the detour of extrinsic proof. Thus, Rule 608(b) barred Hernandez' testimony insofar as it was offered to show that Nieves had a propensity to lie." The court recognized that impeachment by contradiction is a recognized form of impeachment not governed by Rule 608(b). "But, again largely for reasons of efficiency, extrinsic evidence to impeach is only admissible for contradiction where the prior testimony being contradicted was itself material to the case at hand. Here, Nieves' alleged misconduct was not material to Perez' guilt or innocence." Essentially the Court applied a Rule 403 analysis to the extent the evidence was offered for contradiction.

United States v. Gomes, 177 F.3d 76 (1st Cir. 1999): Appealing from drug trafficking convictions, the defendants argued that the trial court erred in excluding extrinsic evidence on three matters pertinent to the testimony of a cooperating government witness: 1) that the witness purchased cocaine for himself while cooperating with the government; 2) that the witness had boasted of torturing another drug dealer; and 3) that the witness had threatened a person with bodily harm. The Court noted that Rule 608(b)'s preclusion of extrinsic evidence is inapplicable if the evidence is offered to show bias. The defendants argued that evidence of all these events would be relevant to show bias. The Court found that the evidence of the cocaine purchase might show bias, since it might be inferred that the government might want to revoke the witness' cooperation agreement, thus giving the witness an even greater incentive to slant his testimony in favor of the government. But the Court found that the trial court was within its discretion "to exclude such an excursion into extrinsic evidence that would distract from the main issues and in this case would add little of practical value to the defense." As to the other matters, the Court

found their connection with bias was "remote" and held extrinsic evidence on these matters to be properly excluded. Thus, the Court properly read Rule 608(b) to cover only impeachment for bad character, and Rule 403 to cover extrinsic evidence of bias.

United States v. Whiting, 28 F.3d 1296 (1st Cir. 1994): "Rule 608(b) . . . does not forbid evidence that happens to show good character but is offered for another legitimate purpose." [Citing *Abel*]

United States v. Beauchamp, 986 F.2d 1 (1st Cir. 1993): This case is a perfect example of a proper application of Rule 608(b), and the proper use of Rule 403 as a default rule when evidence is offered to impeach by way of contradiction. The defendant was charged with uttering and publishing a forged Treasury check. The government witness testified that he resided at a certain address, and the defendant offered extrinsic evidence that the witness did not in fact reside at that address. The court held that the extrinsic evidence was properly excluded, reasoning as follows:

> Defendant contends the district court abused its discretion when it precluded Mrs. Amaral from taking the stand to contradict Massey's testimony that he lived at 101 Carpenter Street. * * * Defendant concedes, as he must, that the district court permitted him to cross-examine Massey on his address. Defendant contends, however, that the value of his right to ask Massey where he lives for the purpose of "exposing falsehood" is vastly diminished if defendant cannot also present extrinsic evidence demonstrating that Massey has lied.* * *
>
> It is well established that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter. *United States v. Pisari*, 636 F.2d 855, 859 (1st Cir.1981); 1 McCormick on Evidence § 45, at 169 (4th ed. 1992). Thus, it is often said that when a witness testifies to a collateral matter, the examiner "must take [the] answer," i.e., the examiner may not disprove it by extrinsic evidence. *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992); *United States v. Young*, 952 F.2d 1252, 1259 (10th Cir.1991); 1 McCormick on Evidence § 45, at 170. A matter is considered collateral if "the matter itself is not relevant in the litigation to establish a fact of consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness." 1 McCormack on Evidence § 45, at 169. Stated another way, extrinsic evidence to disprove a fact testified to by a witness is admissible when it satisfies the Rule 403 balancing test and is not barred by any other rule of evidence. See *United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C.Cir. 1988) ("The 'specific contradiction' rule ... is a particular instance of the trial court's general power under Fed.R.Evid. 403 to exclude evidence 'if its probative value is substantially outweighed ... by considerations of undue delay, [or] waste of time.' "); *Pisari*, 636 F.2d at 858; 3 Weinstein's Evidence, 607[5], at 607-79, -80 (1992). To the extent Mrs. Amaral's testimony merely went to Massey's credibility by demonstrating a contradiction on an

immaterial matter, it was clearly excludible.

In a footnote, the *Beauchamp* court explained that the government's reliance on Rule 608(b) was misplaced because the attack on the witness was not on general character grounds:

> The government argues that Mrs. Amaral's testimony is barred by Rule 608(b) of the Federal Rules of Evidence, which expressly precludes the use of extrinsic evidence solely to impeach a witness's credibility. * * * Like the general rule barring the use of extrinsic evidence to impeach a witness on a collateral matter through contradiction, the purpose of Rule 608(b)'s prohibition of extrinsic evidence is to avoid holding mini-trials on irrelevant or collateral matters. *United States v. Ciampaglia*, 628 F.2d 632, 641-42 (1st Cir.1980); *United States v. Martz*, 964 F.2d 787, 789 (8th Cir.1992). In the present context, however, it is difficult to conceptualize the actual location of Massey's residence as being a "specific instance of conduct" within the meaning of Rule 608(b). See *United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C.Cir. 1988) (Rule 608(b) addresses conduct indicative of untruthfulness, such as fraudulent and dishonest behavior); *United States v. Opager*, 589 F.2d 799, 801 (5th Cir.1979) (same). Like the district court, we think guidance is to be found in the more general rule as to collateral matters.

Second Circuit:

United States v. Garcia, 900 F.2d 571 (2d Cir. 1990): Drug activity was not admissible to impeach the defendant's general character for veracity. However, when the defendant took the stand and made a sweeping denial of any contact with narcotics, the trial court did not abuse its discretion in admitting extrinsic evidence of his drug activity. After such a sweeping denial, impeachment by extrinsic evidence contradicting the testimony is permissible under Rule 403. See the more extensive discussion in *United States v. Castillo,* a Ninth Circuit case, below.

United States v. James, 609 F.2d 36 (2d Cir. 1979): Extrinsic evidence was offered to prove bias, rather than the witness' character for veracity, therefore Rule 608(b) was not applicable.

Third Circuit:

United States v. Universal Rehabilitation Services, 205 F.3d 657 (3rd Cir. 2000) (en banc): The government introduced plea agreements of its cooperating witnesses. The defendants argued that this violated the extrinsic evidence bar of Rule 608(b). The Court responded that Rule 608(b) prohibits

> the introduction of conduct only if it is being used to either attack or bolster the witness's character (i.e., one's general disposition, see *United States v. Doe,* 149 F.3d 634 (7th Cir. 1988)) for truthfulness. *See, e.g., United States v. Pope,* 132 F.3d 684, 688 (11th Cir. 1998). Because the government did not introduce [the witnesses'] guilty pleas to prove that [they] *generally* spoke and/or acted truthfully, Federal Rule 608(b) is inapposite.

The Court held that the plea agreements were properly admitted under Rule 403.

Fourth Circuit:

United States v. Grover, 85 F.3d 617 (4th Cir. 1996): The court notes that extrinsic evidence is not admissible to attack a witness' character for veracity, but it is admissible for impeachment by way of contradiction, subject to Rule 403. The defendant proffered evidence that the witness who identified him as a drug dealer actually knew another person to be the drug dealer, and got drugs from that person. The witness denied the accusation. Extrinsic evidence to disprove the denial could not be admitted solely for the purpose of attacking the character of the witness. While it might have been admitted to contradict the witness, the court held that the trial court did not abuse its discretion in excluding the evidence under Rule 403. Evidence that the witness was involved with another drug dealer was not "collateral", but the asserted transactions were remote in time. (Note that the court specifically refuses to use the common-law "collateral contradiction" rule and applies a Rule 403 balancing test instead. The possibly problematic use of the common-law collateral contradiction rule will be discussed below.).

United States v. Bynum, 3 F.3d 769 (4th Cir. 1993): Extrinsic evidence of a witness' drug use was properly excluded. The only possible use for impeachment purposes was to attack the witness' character for veracity. "The purpose of this rule is to prohibit things from getting too far afield–to prevent the proverbial trial within a trial."

Fifth Circuit:

United States v. Fusco, 748 F.2d 996 (5th Cir. 1984): In a drug case, a DEA agent was permitted to testify that the government informant had been instrumental in the seizure of large amounts of drugs in other investigations, and that he had been paid for his services. The defendant argued that this was an impermissible use of extrinsic evidence under Rule 608(b). But the court disagreed. It noted that the defendant's challenge "relies on evidentiary principles that use 'credibility' as a shorthand expression for a witness's general truthfulness. These principles, embodied in Federal Rule of Evidence 608 * * * limit the use of evidence designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se." The court declared that the DEA agent's testimony was not offered to prove the informant's truthfulness "in the abstract" but rather to shed light on whether the circumstances of his participation in other investigations "biased him in favor of the government in this particular trial." Thus, the evidence pertinent to bias was not precluded by Rule 608(b); and the court implicitly found that the evidence was properly admitted under Rule 403.

Sixth Circuit:

United States v. Meyer, 803 F.3d 246 (6th Cir. 1986): In a drug case, the defendants wanted to show that the government informant had previously gone to great lengths to persuade others to commit criminal acts. They proffered witnesses to testify that they (the witnesses) had been entrapped by the informant on other occasions. This evidence was properly excluded under Rule 608(b) to the extent it was offered to prove the informant's bad character for veracity. The evidence was also properly excluded insofar as offered to prove bias, because it was only "remotely relevant" on that point. Thus the Court employed a Rule 403 analysis where the extrinsic evidence was offered to prove bias.

United States v. Curtsinger, 9 F.3d 110 (6th Cir. 1993): Rule 608(b) prohibits extrinsic evidence offered to prove that a prosecution witness robbed a gas station. This was simply a general attack on the witness' character for veracity.

Seventh Circuit:

United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996): The Court affirmed a defendant's conviction for wire fraud in a scheme arising out of a conspiracy to kill horses and collect on insurance. It held that where the defendant suggested that a witness falsely implicated him to obtain a plea agreement, the government was properly permitted to prove that the witness

cooperated against a number of other people. Such evidence tended to rebut the suggestion that the witness's testimony was a lie he told in his own self-interest. The court concluded: "The admissibility of evidence regarding a witness's bias, diminished capacity, and contradictions in his testimony is not specifically addressed by the Rules and thus admissibility is limited only by the relevance standard of Rule 402. Therefore, because the attack at issue was on Burns' bias, and not on his character for truthfulness in general, Lindenmann's contention that the limitations of Rule 608 should have applied is incorrect. Moreover, because bias is not a collateral issue, it was permissible for evidence on this issue to be extrinsic in form."

United States v. Jimenez, 51 F.3d 276 (7th Cir. 1995): Extrinsic evidence of fear of retaliation properly admitted on the basis of bias; Rule 608(b) is inapplicable.

Eighth Circuit:

United States v. Williams, 194 F.3d 886 (8th Cir. 1999): It was error to prohibit proof that a prosecution witness was subject to misdemeanor charges. The evidence could not have been admitted to impeach the witness' character, but it could have served as a basis to contend that the witness' status influenced him to testify for the prosecution.

Ninth Circuit:

United States v. Castillo, 181 F.3d 1129 (9th Cir. 1999): This case deals with the difference between character impeachment and impeachment by contradiction. In a drug smuggling prosecution, the defendant testified that he had never used drugs, would not touch drugs, and was an anti-drug counselor who taught kids to stay away from drugs. The government was allowed to rebut with extrinsic evidence of the defendant's prior drug activity. The defendant argued that Rule 608(b) "expressly excludes admission of all extrinsic evidence used to attack a witness' credibility." The government argued that Rule 608(b) "is limited to attacks on character for veracity–that is, situations where the evidence's only relevance is to impeach a witness' general credibility by showing specific instances of misconduct–and does not exclude extrinsic evidence used to impeach a witness' testimony by contradiction of facts asserted in that testimony." The court properly agreed with the government. It noted that impeachment by contradiction is not governed by Rule 608(b). It quoted Weinstein for the proposition that "counsel and courts sometimes have difficulty distinguishing between Rule 608 impeachment and impeachment by contradiction." But this court had no such problem. The court set forth the relationship between Rule 608(b) and impeachment by contradiction in the following passage:

> Rule 608(b) prohibits the use of extrinsic evidence of conduct to impeach a witness' credibility in terms of his general veracity. In contrast, the concept of impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence.

The court declared that contradiction evidence is analyzed under Rule 403, not Rule 608(b). It held that evidence of the defendant's prior drug activity was properly admitted under Rule 403 to contradict the defendant's "expansive and unequivocal denial of involvement with drugs on direct examination."

The *Castillo* court noted two prior cases in the circuit which, "broadly read", could mean that Rule 608(b) prohibited extrinsic evidence of impeachment by contradiction. See *United States v. Bosley,* 615 F.2d 1274 (9th Cir. 1980) (when defendant on cross-examination testified that he had ever delivered drugs to anyone, extrinsic evidence of prior deliveries was not permissible); *United States v. Green,* 648 F.2d 587 (9th Cir. 1981) (prejudicial error to admit extrinsic evidence of drug activity to impeach testimony given on cross-examination). The court stated that it did not "read *Bosley* and *Green* to require exclusion of extrinsic evidence offered to impeach a witness in all circumstances. Rather, we read those cases to hold that extrinsic evidence may not be admitted to impeach testimony invited by questions posed during cross-examination. This is a significant distinction recognized by many authorities. Courts are more willing to permit, and commentators more willing to endorse, impeachment by contradiction where, as occurred in this case, testimony is volunteered on direct examination." Thus, these prior cases were reformulated as having undertaken a Rule 403 balancing approach. Where a witness volunteers sweeping denials, contradictory evidence is more probative of credibility than when a witness is trapped into a denial on cross-examination.

United States v. Collins, 90 F.3d 1420 (9th Cir. 1996): A witness' prior drug activity was not admissible to attack his character; such an attack with extrinsic evidence is precluded by Rule 608(b). Rule 608(b) does not prohibit extrinsic evidence when offered to prove bias; but here, defense counsel established no connection between the witness' drug activity and any claim of bias, so the extrinsic evidence was properly excluded.

Tenth Circuit:

United States v. Keys, 899 F.2d 983 (10th Cir. 1990): Extrinsic evidence was properly admitted to explain why prosecution witnesses might fear the defendant. Proof of bias is not covered by Rule 608(b), and the trial court did not abuse its discretion under Rule 403 in admitting the bias evidence.

United States v. Patterson, 20 F.3d 809 (10th Cir. 1994): The defendant was charged with air piracy. On cross-examination the prosecutor asked the defendant about an unrelated incident in which he allegedly hijacked another plane. When the defendant denied the allegation, the government called a witness to prove that it occurred. The court agreed with the defendant that extrinsic proof was improper if the prior hijacking was offered solely to attack the defendant's character for veracity. But in this case the evidence was properly admitted for substantive purposes, under Rule 404(b), to prove intent and identity.

Bennett v. Longacre, 774 F.2d 1024 (10th Cir. 1985): In an accident case, evidence that one of the drivers had on other occasions used drugs and alcohol could not be offered to impeach that driver as a witness. The evidence was offered only to prove that the driver was not a truthful person, therefore extrinsic evidence was prohibited by Rule 608(b).

Eleventh Circuit:

United States v. Mathews, 188 F.3d 1234 (11th Cir. 1999): The government witness denied having stolen a vehicle. The trial court properly excluded extrinsic evidence to prove the theft. The extrinsic evidence would only have proved the witness' character for untruthfulness. Evidence of the vehicle theft was not probative of bias, because there was no indication that the witness was testifying to get a deal for any charge of vehicle theft.

United States v. Reed, 700 F.2d 638 (11th Cir. 1983): In a mail fraud case, it was error to offer extrinsic evidence of the defendant's marijuana use. Such evidence, if probative at all for impeachment purposes, was probative only in attacking the witness' character for veracity. Rule 608(b) precludes extrinsic evidence when offered for character.

B. Possibly Problematic Cases

There are three kinds of cases that are cited as possible misapplications of Rule 608(b) and that could be regulated by an amendment of the Rule. The three misapplications are:

1. Prohibiting extrinsic evidence by citing Rule 608(b), when in fact the evidence is offered for a non-character form of impeachment, such as for contradiction or to show bias.

2. Permitting extrinsic evidence to be referred to even though it is offered solely to attack the witness' character for veracity.

3. Prohibiting extrinsic evidence offered for contradiction on the ground that it is "collateral", rather than determining whether it should be admitted under Rule 403.

Each of these problems shall be discussed in light of the cases often cited as problematic.

1. Prohibiting Extrinsic Evidence Even Though Offered for a Non-Character Purpose:

An example of an overbroad application of the exclusionary language of Rule 608(b) recently arose in *Becker v. ARCO Chemical Co.*, 207 F.3d 176 (3rd Cir. 2000). In an age discrimination suit, the plaintiff sought to admit evidence of an incident in which he was asked to provide critical comments about Seaver, one of the employees under the plaintiff's supervision, and the plaintiff refused. The plaintiff contended that the defendants had tried to get him to lie about the matter. The trial court found evidence of this incident admissible under Rule 608(b) to impeach the testimony of the supervisor. The court of appeals reversed. It declared:

> Rule 608(b) does not provide a basis for admitting this testimony, inasmuch as the plain language of the first sentence of the Rule prohibits the introduction of extrinsic evidence of a witness' conduct for the purpose of attacking the witness' credibility. The Seaver evidence clearly qualifies as extrinsic evidence, whether we assume that Becker introduced it to contradict Victor's testimony concerning the events which allegedly transpired . . . or alternatively, to impeach ARCO's suggestion through its witnesses that it retained its older workers. In either event, Rule 608(b) does not support the admission of the testimony . . . .

Professor Schmertz, in his Federal Rules of Evidence Newsletter (Vol. 25, #5, May,

2000), notes the error in the court's Rule 608(b) analysis, and attributes the problem to the language of the Rule itself:

> Here is another example of the dozens of instances where the framers use of the cosmic term "credibility" rather than the specific phrase "character for truthfulness" or the more old-fashioned "veracity character" has sired much devilment. Since the Court itself treats the Seaver incident as "specific contradiction," Wigmore's test for extrinsic evidence is *relevance apart from impeachment.*

Another example of an incorrect result under Rule 608(b) is *United States v. Bussey,* 942 F.2d 1241 (8th Cir. 1991). Bussey was charged with filing false tax returns. He claimed that his accountant failed to inform him of certain important information. The government called the accountant who stated that he imparted the information to Bussey. Bussey tried to call an expert who would have testified, on the basis of documents, that it is standard operating procedure to check off certain matters if they are imparted to the client, and that no relevant check off existed in the subject documents. The trial court held the expert testimony inadmissible. The court found no error. It reasoned that the expert testimony was extrinsic evidence, and declared as follows:

> Bussey's offer of proof at trial unquestionably shows that Conway's testimony was intended to show that Steiner did not tell Bussey to get the K-1 amended. By addressing this specific instance of Steiner's conduct, Bussey obviously sought to use Conway to attack Steiner's credibility. Rule 608(b)'s plain language prohibits the use of extrinsic evidence for such purposes.

It is true that Rule 608(b)'s "plain language" bars all extrinsic evidence impeaching credibility. But that is not the way that the Rule is to be applied. In *Bussey,* the extrinsic evidence was offered to contradict the accountant's testimony; it was not offered as a general character attack. Moreover, the contradiction went to a critical issue in the case–whether the accountant had imparted material information to the defendant. So it should have been admitted under Rule 403. The error in *Bussey* was apparently caused by the court's applying literally Rule 608(b)'s reference to "credibility." Such an error would be corrected by the proposed amendment.

In some cases, the Court misapplies Rule 608(b) to non-character forms of impeachment, but ends up muddling to the right result. An example is *United States v. Miller*, 159 F.3d 1106 (7th Cir. 1998). A witness in an interstate theft case, named Morris, testified that he saw the defendant dig a hole with a backhoe, in which some of the stolen property was later found. The defendant asked Morris on cross-examination whether he had ever spoken to a person named Love. Morris said that he never had. The defendant wanted to call Love to contradict Morris' testimony that Morris had not spoken to him. His theory was that if Morris lied about speaking to Love, then he might also have lied about having seen the defendant dig the hole. The court held that the trial court was correct in refusing to let the defendant call Love. The court stated that

this was "precisely the type of collateral impeachment testimony expressly prohibited" by Rule 608(b). It stated: "Though contradiction is a valid method of impeachment, 'one may not contradict for the sake of contradiction; the evidence must have an independent purpose and an independent ground for admission. *United States v. Kozinski*, 16 F.3d 795, 806 (7th Cir.1994).'"

The *Miller* court improperly relied on Rule 608(b), since that Rule does not deal at all with impeachment by contradiction. Nor did the court cite Rule 403, the only Rule that *does* regulate impeachment by contradiction. Still, the court got it right–the contradicted fact (whether Morris had spoken with Love) had nothing to do with the case. Rule 403 precludes time-consuming extrinsic proof on such trivial matters of contradiction that have nothing to do with the facts of the case. But the misapplication of Rule 608(b) is arguably cause for concern. See also Mueller and Kirkpatrick, 3 Federal Evidence at 190, n.10, for a "sampling of cases that might be justified by proper application of rules relating to contradiction, but wrongly citing FRE 608 as controlling."

Another case along the line of "wrong legal statement/right result" is *United States v. Turner,* 104 F.3d 217 (8th Cir. 1997). Bradford, an informant, testified in Turner's drug trial that during the course of his undercover investigation of Turner he became concerned for his safety because he had been previously beaten up and hospitalized due to his participation in a separate investigation. Turner tried to introduce extrinsic evidence that the hospitalization Bradford referred to actually occurred after, and not before, the investigation of Turner. The apparent purpose of this proof was to undermine, by way of contradiction, Bradford's statement that he had a reason based on experience to be concerned for his safety. The court held that the hospitalization evidence was properly excluded. The court's entire analysis is as follows:

> The only relevance of the hospital documents is to impeach Bradford. Under Federal Rule of Evidence 608(b), specific instances of conduct for the purpose of attacking a witness' credibility cannot be proven by extrinsic evidence. Therefore, the district court did not err by refusing to admit the extrinsic evidence, the medical records, to attack Bradford's credibility.

This is an improper citation of Rule 608(b). Turner was not attacking Bradford's character for veracity. He was trying to contradict Bradford's account of his experience as providing a basis for concern about being found out as an informant. Nor did the court cite the Evidence Rule that really is applicable, Rule 403. Nonetheless, the result in *Turner* is probably right. The probative value of contradicting Bradford as to a prior hospitalization completely unrelated to the facts of the case is minimal. That minimal probative value is probably substantially outweighed by the time consumption and distraction that would result from introducing the extrinsic evidence. Nonetheless, the case creates mischief because it applies the wrong rule to the impeachment evidence.

United States v. Graham, 856 F.2d 756 (6th Cir. 1988), is an example of at least an arguably wrong result due to a literal interpretation of Rule 608(b)'s reference to "credibility." The defendant proffered extrinsic evidence that one of the government witnesses had been involved in a murder plot. The court held that the extrinsic evidence was properly excluded because Rule 608(b) "specifically prohibits a party from introducing extrinsic evidence to prove specific instances of conduct of a witness for the purpose of attacking or supporting his credibility." The problem with this reasoning is that the attack on the witness was not (or at least not only) that his involvement in a murder plot was probative of bad character for veracity. Rather, the defendant was arguing that the witness' involvement in a murder plot gave him a motive to cooperate with the prosecution by testifying against the defendant. The basic attack was for bias, not character; and countless cases, including *Abel*, hold that Rule 608(b) does not apply to impeachment for bias.

It is possible in *Graham* that the extrinsic evidence of a murder plot, even if offered for bias, was properly excluded, because it did not appear that the defendant had established any connection between the murder plot and the decision of the witness to testify. There was no showing, for example, that the witness had been arrested, or even that the police knew about the murder plot. Thus, exclusion of the extrinsic evidence when offered for bias may have been justified under Rule 403. The fact remains, however, that the court did not refer to Rule 403–it simply relied on a literal interpretation of the term "credibility" in Rule 608(b).

2. Permitting Extrinsic Evidence To Be Referred To Even Though It Is Offered Solely To Attack A Witness' Character For Veracity.

Rule 608(b) does not define the term "extrinsic evidence." Some confusion in the decisions has arisen about the meaning of "extrinsic evidence" in one particular fact situation. Suppose the witness has been suspended from law practice because he stole money from clients. The underlying conduct is certainly probative of character for veracity, and the trial court in its discretion could permit the adversary to ask on cross-examination whether the witness had stolen money from clients. But can he ask the witness whether he has been *suspended from practice* for stealing money from clients? Relatedly, if the witness were asked about the underlying conduct and denied it, could the adversary ask: "Isn't it true that you were suspended from law practice for the conduct that you now deny?"

This cross-examination could arguably be permissible under Rule 608(b) since the adversary is not trying to introduce a document or witness testimony to prove a fact. Thus, the adversary who refers to consequences suffered to a witness for committing a bad act has arguably not sought to introduce "extrinsic evidence" within Weinstein's definition, quoted above. The contrary argument is that the adversary is violating the extrinsic evidence bar because he is

referring to outside sources (in this hypothetical, the disciplinary authority) to support his allegations that the impeaching fact actually occurred.

As stated above, there is some dispute in the courts about whether an oral reference to outside sources to disprove a denial is permitted under Rule 608(b). *United States v. Davis,* 183 F.3d 231 (3d Cir. 1999), is a case prohibiting this practice. A transit police officer on trial for witness tampering was asked on cross-examination about a forty-four-day suspension that he had received for misappropriating departmental gasoline for use in his personal vehicle and putting a false name in a gas log. He was also asked about an incident in which he was found by Internal Affairs to have lied about taking a subway pass away from a young man and ripping it up. In response to the prosecutor's questions, Davis gave exculpatory accounts of his acts in those three instances. The case was remanded for a new trial on other grounds, and Judge Becker gave the following instruction for the court on remand:

> This does not suggest that the government may introduce either reports or evidence that Davis was suspended for forty-four days, or documentation of the Internal Affairs determination that Davis lied about the subway-pass incident. Such evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b). More precisely, the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about the subway-pass incident. The government needs to limit its cross-examination to the facts underlying those events. To impugn Davis's credibility, the government properly can question Davis about misappropriating departmental gasoline for personal use and putting a false name in a gas log, and it may question Davis about lying to an Internal Affairs officer about ripping up an individual's subway pass. If he denies that such events took place, however, the government cannot put before the jury evidence that he was suspended or deemed a liar by Internal Affairs. As Professor Saltzburg aptly warns, "counsel should not be permitted to circumvent the no-extrinsic-evidence provision [in Rule 608(b)(1)] by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act." Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence.* 7 CRIM. JUST. 28. 31 (Winter 1993). Allowing such a line of questioning not only puts hearsay statements before the jury, it injects the views of a third person into the case to contradict the witness. This injection of extrinsic evidence not only runs afoul of Rule 608(b), but also sets the stage for a mini-trial regarding a tangential issue of dubious probative value that is laden with potential undue prejudice.

Thus, the *Davis* court held that a reference in cross-examination to consequences flowing from a bad act is an attempt to introduce extrinsic evidence, prohibited by Rule 608(b); the extrinsic evidence bar is triggered even though the cross-examiner does not attempt to call a witness or introduce a document. The reasoning in *Davis* is supported by the commentators. See the article by Steve Saltzburg cited in *Davis*, as well as 1 McCormick on Evidence at 155 ("It is improper to inquire whether the witness was 'fired', 'disciplined' or 'demoted' for the alleged act– those

terms smuggle into the record implied hearsay statements by third parties who may lack personal knowledge."). See also *United States v. Morrison,* 98 F.3d 619 (D.C. Cir. 1996) (in a drug case, the trial court properly prohibited defense counsel from asking the prosecution witness whether a complaint was filed against her; this was a reference to extrinsic evidence and it was offered only to prove her bad character for veracity).

There are some cases, however, that permit reference to the extrinsic consequences flowing from bad acts that are offered to impeach a witness' character for veracity. Professor Schmertz, in *Emerging Problems Under the Federal Rules of Evidence* at 162, notes as a "disturbing trend" that "[s]ome courts have permitted counsel to ask witnesses who have already denied the bad conduct whether third parties have expressed their belief that the witness had engaged in the bad acts." He cites *United States v. Whitehead,* 618 F.2d 523 (4th Cir. 1980), which held it permissible to question the defendant about his suspension from the practice of law. See also *United States v. DeSantis*, 134 F.3d 760 (6th Cir. 1998) (defendant could be asked about administrative agency findings concerning underlying conduct, but could not be required to read the findings into the record).

At the April, 2000 meeting, the Committee determined that the risk of abuse of the extrinsic evidence limitation by referring to consequences of bad acts was serious enough that the Rule should be amended to prevent this practice. The proposed amendment to the Rule, set forth in Part II, above, addresses the risk of abuse by prohibiting "reference to or introduction of" extrinsic evidence.

3. Prohibiting Extrinsic Evidence Offered For Contradiction On The Ground That It Is "Collateral", Rather Than Determining Its Admissibility Under Rule 403.

As discussed above, most courts are in agreement that impeachment by contradiction is not covered by Rule 608(b). But there is some dispute about what rules such impeachment is governed by. A reading of the cases indicates that many courts apply the common-law "collateral contradiction" rule, prohibiting extrinsic evidence offered in contradiction if it goes only to a "collateral" matter. Contradiction evidence is termed "collateral" under the common-law rule when it is probative for no purpose other than impeaching the witness; put another way, contradiction evidence is *not* collateral if it is also relevant to a substantive issue in the case. See Capra et. al., *Evidence: The Objection Method* at 817.

United States v. Kozinski, 16 F.3d 795 (7th Cir. 1994), is a representative example of a court applying the collateral contradiction rule. The defendants sought to introduce extrinsic evidence to contradict a cooperating witness in a drug case. The witness had been a leader of the drug ring. The court set forth its view of impeachment by contradiction in the following passage:

> The appellants now argue that the testimony the witnesses were to offer amounted to eyewitness accounts of activities charged in count one (conspiracy) of the indictment that were different than the accounts the government's witnesses provided. Therefore, they argue, it is "impeachment by contradiction" and permissible. Impeachment by contradiction is a valid method of impeachment and "simply involves presenting evidence that part or all of a witness' testimony is incorrect." *Simmons, Inc. v. Pinkerton's, Inc.*, 762 F.2d 591, 604 (7th Cir.1985). Admittedly this is precisely what the appellants were attempting. Nonetheless, one may not impeach by contradiction regarding "collateral or irrelevant matters." Id. Our inquiry therefore returns to whether the proffered testimony relates to collateral matters. Something is collateral if it "could not have been introduced into evidence for any purpose other than contradiction." *United States v. Jarrett*, 705 F.2d 198, 207 (7th Cir.1983). In other words, one may not contradict for the sake of contradiction; the evidence must have an independent purpose and an independent ground for admission. Moreover, the question of what is a collateral matter is squarely within the discretion of the trial court. *Taylor v. National R.R. Passenger Corp.*, 920 F.2d 1372 (7th Cir.1990) ("Our standard of review in determining whether the district court committed reversible error in either the admission or exclusion of evidence is abuse of discretion."). We therefore consider whether the district court abused its discretion by concluding that the proffered testimony of the three witnesses related to collateral matters.

The court found that all of the extrinsic evidence went to collateral matters. Specifically, evidence that one witness owed another a debt had nothing to do with the crimes for which the defendants were charged. Testimony from one witness that he began purchasing cocaine from another government witness in a certain year could not be impeached by extrinsic evidence that the transactions occurred in a different year, because the date of those purchases was "irrelevant to any of the issues of guilt or innocence of the appellants." And testimony that the cooperating witness had acted wildly with a gun during another drug transaction was also "collateral" because it had nothing to do with the substantive issues in the defendant's case.

See also *United States v. Perez-Perez,* 72 F.3d 224 (1st Cir. 1995) (applying the collateral contradiction rule to hold that extrinsic evidence was properly excluded); Mueller & Kirkpatrick, 3 Federal Evidence at 455, n. 1 (citing a number of similar cases invoking the "collateral matter concept" to prohibit extrinsic evidence offered for impeachment by contradiction).

What is the problem with using the collateral contradiction rule to preclude extrinsic evidence? The problem is that the collateral contradiction rule is a common-law doctrine; the Supreme Court held in *Abel* that Rules 402 and 403 provide the default rules for impeachment not specifically covered by Article VI.. Thus, since impeachment by contradiction is not specifically treated in Article VI, it should be governed by Rules 402 and 403, not by a pre-Rules principle of common law. Moreover, the use of an absolute rule of exclusion (i.e., evidence is automatically excluded if it is offered only to impeach a witness on a collateral matter) is

inconsistent with the case-by case approach mandated by the Federal Rules generally and by Rule 403 in particular. See Weinstein's Evidence, § 607.06 (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

Two points should be made about the continued reliance by some courts on the collateral contradiction rule. First, many of these courts, while paying lip service to the collateral contradiction rule, explicitly recognize that the admissibility of extrinsic evidence of contradiction is in fact governed by Rules 402 and 403. An example is *United States v. Beauchamp,* 986 F.2d 1 (1st Cir. 1993), discussed above, where the court held that evidence contradicting the witness' testimony that he lived at a certain address was properly excluded. The court cited the collateral contradiction rule, but pointedly stated that "extrinsic evidence to disprove a fact testified to by a witness is admissible when it satisfies the Rule 403 balancing test and is not barred by any other rule of evidence." See also *United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C.Cir. 1988) ("The 'specific contradiction' rule ... is a particular instance of the trial court's general power under Fed.R.Evid. 403 to exclude evidence 'if its probative value is substantially outweighed ... by considerations of undue delay, [or] waste of time.' "). In essence, these courts are simply saying that the collateral contradiction rule is now embodied in the Rule 403 balancing process: if extrinsic evidence is offered to contradict a witness where the fact to be contradicted has nothing to do with the substantive issues in the case, then the probative value of the evidence for impeachment purposes is substantially outweighed by the risks of prejudice, confusion and delay.

Other courts have gone one step further and specifically eschewed *any* reliance on the collateral contradiction rule. See *United States v. Grover,* 85 F.3d 617 (4th Cir. 1996) (discussed above; the court specifically refuses to use the common-law "collateral contradiction" rule and applies a Rule 403 balancing test instead, to hold that extrinsic evidence of a "remote" fact was properly prohibited); *United States v. Castillo,* 181 F.3d 1129 (9th Cir. 1999)(discussed above; stating that contradiction evidence is analyzed under Rule 403, not Rule 608(b)); *United States v. Solomon,* 686 F.2d 863 (11th Cir. 1982) (extrinsic evidence offered solely to contradict a witness' account on an unimportant detail was properly excluded under Rule 403).

A second response to the problem of continued reliance on the collateral contradiction rule is that the courts who so rely without even mentioning Rule 403 are possibly conducting a Rule 403 balancing test *sub silentio.* They appear to be holding, or at least assuming, that extrinsic evidence offered solely to impeach a witness on a collateral matter is by definition inadmissible under Rule 403. For example, in *Kozinski*, the court spoke in terms of the "collateral contradiction" rule, and held that extrinsic evidence proving such things as whether one witness owed another a debt was properly excluded. All of this evidence went to "collateral" facts in the sense that the facts to be proven had nothing to do with the merits of the case. By holding the evidence properly excluded as collateral, the *Kozinski* court was arguably applying Rule 403. It was reasoning that proving the facts would be only marginally probative; it would do nothing other than create an inference that because the witness might have lied about one matter unimportant to the case, he also might have lied about matters important to the case. Against this

minimal probative value is balanced (again *sub silentio*) the risk of confusion, prejudice and delay that will be created by proving up the extrinsic evidence.

The case for amending Article VI to replace the collateral contradiction rule with a Rule 403 test is made stronger if there is a situation in which extrinsic evidence offered on a collateral matter would in fact be excluded by the common-law rule but *admissible* under Rule 403.[5] If that were the case, then the collateral contradiction rule would be overly exclusive. Professor McMunigal comes up with the following hypothetical in an attempt to prove the point that the collateral contradiction rule and Rule 403 can lead to different results:

> The defendant is charged with robbing a bank in Cleveland on May 1, 1999. The defendant offers an alibi defense claiming he was in Manhattan all of May 1, 1999. In support of his alibi, the defendant calls a witness who testifies she spent the entire day of May 1 in Manhattan with the defendant. The witness also testifies that she remembers the day because of the unusual late snow which fell in Manhattan on that day which she observed when she and the defendant spent several hours walking in Central Park. The prosecution then seeks to call a meteorologist to impeach the witness' testimony with weather reports which show that it was sunny and in the 70's on May 1, 1999 in Manhattan.
>
> The weather conditions in Manhattan on May 1, 1999 would not be relevant on the merits of the bank robbery charge. Nor do the weather conditions in Manhattan on that day tend to show bias or lack of capacity on the part of the witness. The weather conditions are relevant because, as McCormick puts it, as a matter of human experience, the witness would not have been mistaken about snow in Manhattan on May 1 if her story were true. In other words, it is an instance in which the "transitive inaccuracy" theory barred by the collateral contradiction rule happens to have high probative value.

Thus, it would appear that cases could arise in which extrinsic evidence would go to a "collateral" fact but impeachment for contradiction would be so important in assessing the witness' credibility that a trial court should have discretion to admit it under Rule 403.

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[5] The opposite result–extrinsic evidence that is not collateral but is nonetheless *excluded* by Rule 403–presents no problem at all. The collateral evidence rule is a rule of exclusion, not admission, i.e., it means that if the contradicted fact is collateral, the extrinsic evidence is not admissible. Under the common law, courts had discretion to exclude extrinsic evidence of contradiction even if the contradicted fact was not collateral; this same exclusionary power resides in Rule 403 and has been applied by the courts. See 3 Mueller & Kirkpatrick at 455 ("Courts recognize what might be called a hard-edged limit on impeachment by contradiction, drawn from common-law tradition and captured in the notion that contradiction on 'collateral matters' is improper. Courts also recognize a soft-edged limit based on balancing relevancy against conditions of prejudice and confusion as required by FRE 403.").

At the April meeting, the Committee decided that it was unnecessary to refer to impeachment by contradiction, or to any of the other non-character forms of impeachment, in the text of Rule 608. The Committee agreed, however to include in the Committee Note a provision that Rule 403 governs the admission of extrinsic evidence offered for impeachment on grounds other than character for veracity. The proposed Committee Note also states that the common-law collateral contradiction rule is displaced by Rules 402 and 403. The proposed amendment and Committee Note are set forth in Part Threeof this memorandum.

V. Alternative Draft of Proposed Amendment to Rule 608

As discussed in Part Two, above, the Committee at the April, 2000 meeting unanimously agreed that Rule 608 should be amended, but divided over which alternative to propose. Five members voted in favor of the alternative set forth in Part Three, above. Three members thought it would be useful to add to the text of the Rule a reference to the non-character forms of impeachment and a specific reminder that Rule 403 controls the admissibility of these other types of impeachment.

In the interest of completeness, the alternative favored by a minority of the Committee at the April, 2000 meeting is set forth immediately below:

Rule 608. Evidence of Character and Conduct of Witness; Other Forms of Impeachment

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by reference to or introduction of extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) Other forms of impeachment. – Subject to Rule 403, extrinsic evidence is admissible

(i) to contradict a witness,

(ii) to prove that the witness is or is not biased,

(iii) to prove that the witness made a statement inconsistent with the witness' trial testimony, or

(iv) where pertinent to the capacity of the witness to testify.

Proposed Committee Note For This Alternative

The rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack the witness' character for truthfulness. See *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). The Rule's use of the overbroad term "credibility" was subject to being read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* 161 (3d ed. 1998).

The amendment makes clear that extrinsic evidence offered for purposes other than proving a witness' character (such as contradiction, prior inconsistent statement, bias and mental capacity) is admissible, subject to Rule 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (impeachment with proof of prior inconsistent statement subject to balancing process under Rule 403); *United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C.Cir. 1988) (admissibility of extrinsic evidence to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rule 403 displaces the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence, § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

The amendment also clarifies that the Rule's extrinsic evidence prohibition applies not only to the actual introduction of testimony or a document, but also to any direct or indirect reference to such evidence in the course of examining the witness. For example, the Rule bars any reference to the fact that a witness was suspended or disciplined for the conduct that is the subject of impeachment. *See United States v. Davis,* 183 F.3d 231, 257, n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character as a witness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident and that "the government needs to limit its cross-examination to the facts underlying those events"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

II-B

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Evidence Rule 804(b)(3)
Date: March 1, 2001

At its last meeting the Advisory Committee on Evidence Rules approved in principle an amendment to Evidence Rule 804(b)(3). In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases. The amendment tentatively approved by the Committee would extend the corroborating circumstances requirement to all proffered declarations against penal interest.

This memorandum is in five parts. Part One describes the problems raised by the current Rule. Part Two provides a description of how the Committee reached its decision to propose the amendment to the Rule. Part Three sets forth the proposed amendment and Committee Note approved in principle by the Committee at the April, 2000 meeting. Part Four analyzes the current case law on Rule 804(b)(3). Part Five sets forth, solely for informational purposes, the drafting alternatives rejected by the Committee at the April, 2000 meeting.

I. Introduction

A. The One-Way Corroboration Requirement

Rule 804(b)(3) provides that the following is not excluded by the hearsay rule:

> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

On its face, the corroborating circumstances requirement applies only to statements offered by the accused in exculpation. There is no similar requirement for inculpatory statements offered by the prosecution. Nor is there a corroborating circumstances requirement for declarations against penal interest when they are offered in civil cases.

B. Legislative History

The legislative history of the second sentence of Rule804(b)(3) indicates that the merits of a one-way corroborating circumstances requirement were never seriously considered or debated. Professor Tague has done an exhaustive search of the Advisory Committee proceedings, Standing Committee proceedings, and Congressional proceedings on Rule 804(b)(3). See Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Georgetown L.J. 851 (1981). His research indicates the following:

1) The initial Advisory Committee proposal had no corroboration requirement at all. To the contrary, the proposal contained a sentence referred to as "the *Bruton* sentence". This sentence provided that "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused", was not admissible under the exception. (This language was adopted in several state versions of the Rule). Thus, the initial proposal was basically a one-way rule of admissibility *in favor* of criminal defendants. No consideration was given to the applicability of the corroboration requirement in civil cases.

2) Senator McClellan vigorously opposed the proposed Rule. This opposition threatened to scuttle all of the proposed Evidence Rules, and the Advisory Committee thought that it might even lead to Congressional change of the Rules process itself. Senator McClellan was concerned

that defendants would get unsavory characters to claim out of court that they and not the defendant did the crime charged--then these unsavory characters would simply declare the privilege and refuse to testify at the defendant's trial. He suggested a corroboration requirement. The Advisory Committee saw no problem with a corroboration requirement because Professor Cleary, the Reporter, believed that it was already inherent in the "against penal interest" requirement. Cleary also reasoned that any corroboration requirement would be automatically met by a simple declaration from the defendant that he was innocent. So essentially, the Advisory Committee saw no harm in throwing Senator McClellan a bone. As a result, the Advisory Committee added the following sentence to the proposed Rule:

> "Statements tending to expose the declarant to criminal liability and offered to exculpate the accused must, in addition, be corroborated."

3) Apparently the Committee saw no need to consider the application of a corroboration requirement to statements offered by the prosecution, because under its proposal, declarations against penal interest could not even be offered by the prosecution due to the *Bruton* sentence. But Senator McClellan was not satisfied. He demanded that the Committee delete the *Bruton* sentence. He convinced the Committee that the *Bruton* sentence was overbroad "because not every statement made by a declarant implicating the accused is an attempt to curry favor with the authorities." The Committee decided to delete the *Bruton* sentence from the rule and to change the note to state that a court should determine the penal interest effect of an inculpatory statement in each case. But the Committee never addressed or recognized the disparity it then created by imposing a corroboration requirement on the accused but not on the prosecution. This seems simply to have been an oversight due to the sequencing of the changes--first the addition of a corroboration requirement at a time when inculpatory statements were inadmissible under the rule; then a change to the rule to permit some admissibility of inculpatory statements, without thinking about how the two changes would fit together. The Standing Committee approved the Advisory Committee's amendments, again without focusing on the anomaly of a one-way corroboration requirement.

4) The Department of Justice opposed the exception as it was sent to the Supreme Court. Apparently DOJ was of the view that the exception could be used only by criminal defendants. DOJ saw a risk of unreliable confederates trying to get their friends acquitted through hearsay. It believed that the simple corroboration requirement set forth in the proposal was not enough protection against unreliable hearsay; DOJ was of the opinion that the corroboration requirement could be met by a defendant's simple protestation of innocence. DOJ complained to the Supreme Court. Chief Justice Burger responded by returning the proposed Rule 804(b)(3) to the Standing Committee for reconsideration. The Standing Committee, upon reconsideration, rejected the arguments of DOJ, specifically stating that the corroboration requirement could not be met by a simple protestation by the defendant that he was innocent, and that trial judges could be trusted to exclude statements of confederates if they were not disserving in context. The Standing Committee made no changes in the proposal and it was sent back to the Supreme Court. The Supreme Court approved the proposal as well, and the proposed Rule 804(b)(3) was then

reviewed by the House Subcommittee on Criminal Justice.

5) The House Subcommittee decided to beef up the corroboration requirement--apparently unconvinced that the Advisory Committee version would prevent the accused from corroborating by a simple protestation of his own innocence. The Subcommittee changed the second sentence of the rule to provide that "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The House Subcommittee also decided to put the "*Bruton* sentence" back into the Rule, apparently because the Subcommittee thought it would violate the confrontation clause to admit accomplice hearsay against an accused.

6) The Advisory and Standing Committees suggested to the House Subcommittee that the word "clearly" be taken out of the redrafted corroboration requirement. That word would, in the Committees' view, impose "a burden beyond those ordinarily attending the admissibility of evidence, particularly statements offered by defendants in criminal cases." Neither the House Subcommittee nor the Judiciary Committee responded to this suggestion. The rule as proposed by the House Subcommittee (including the "*Bruton* sentence") passed the House without discussion.

7) The Senate Judiciary Committee accepted the House's version of the rule and the corroboration requirement, but deleted the *Bruton* sentence. The Senate passed this version of the rule without discussion. The Senate's position on the *Bruton* sentence prevailed in Conference. The rationale for deleting the *Bruton* sentence was that the Evidence Rules should avoid trying to codify constitutional doctrine. No thought was given to the evidentiary question of whether the Rule would permit uncorroborated declarations against penal interest when offered by the prosecution.

8) Only one person in the entire legislative process flagged the anomaly of the one-way corroboration requirement. During a markup session in the House Subcommittee, Representative Holtzman asked why the corroboration requirement should not be imposed on the government. Associate counsel to the subcommittee responded that a corroboration requirement imposed on the government would be superfluous "because *Bruton* created a confrontation clause bar to all government offered penal interest statements by an unavailable declarant." Thus, the Subcommittee was (mis)informed that inculpatory penal interest statements would *never* be admissible as a constitutional matter, rendering a corroboration requirement for such statements unnecessary. Clearly, *Bruton* does not extend so far as to exclude all against-penal-interest statements offered against the accused.

Conclusion on Legislative History

It is fair to state that the one-way corroboration requirement for declarations against penal interest did not result from a considered decision by anybody involved in the process. Rather, it is

a product of mistaken assumptions and oversight. Thus, an amendment changing the language of the corroborating circumstances requirement would not be contrary to the legislative history.

C. Criticism of the One-Way Corroboration Requirement

Commentators are unanimous in their view that the one-way corroboration requirement set forth in Rule 804(b)(3) is unfair, unwarranted, and possibly unconstitutional. For example, Professor Tague, supra, argues that the Rule as written violates a defendant's right to a fair trial because it imposes an evidentiary burden on the defendant that is not imposed on the prosecution. He cites *Washington v. Texas,* 388 U.S. 14 (1967), in which the Court invalidated a Texas statute that prohibited accomplices from testifying *in favor* of a defendant, but permitted accomplices to testify *against* a defendant.

Professor Jonakait, in *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 1992 Utah Law Review 67, has this to say about the Rule 804(b)(3) corroboration requirement:

> Rule 804(b)(3) imposes a corroboration requirement on an accused seeking to admit a statement against penal interest, but not on the prosecution introducing such hearsay. Commentators have denounced the assymetric corroboration requirement as "constitutionally suspect," and a number of courts have responded by, in effect, rewriting the rule and creating a corroboration requirement for the prosecution as well.

Professor Jonakait urges amendment of the rule, but argues that in the absence of an amendment, the courts have the power "to disregard the literal language" of the rule and thereby "produce neutrality in the present version of Rule 804(b)(3)."

D. State Variations

Five states explicitly impose a two-way corroboration requirement on against penal interest statements–meaning that the prosecution as well as the accused must set forth corroborating circumstances clearly indicating the trustworthiness of the statement. These states vary on application of the corroboration requirement to civil cases.

Six states contain a provision substantially limiting the use of declarations against penal interest when offered to inculpate the accused, by providing that such statements are inadmissible when they implicate both the declarant and the accused. Two states eliminate the corroboration requirement entirely. One state retains the one-way corroboration requirement but lessens the defendant's burden by requiring only that the circumstances "show" rather than "clearly indicate" trustworthiness.

II. Committee Decision at April, 2000 Meeting

At the April, 2000 meeting Judge Shadur polled the Committee on whether it would be appropriate to amend Rule 804(b)(3) to provide for two-way corroboration in criminal cases. The Committee unanimously agreed in principle that it is fair, appropriate and necessary to propose an amendment to Rule 804(b)(3) that would require the prosecution to provide corroborating circumstances as a condition to admitting inculpatory declarations against penal interest. As the next section of this memorandum indicates, such a change accords with most of the existing case law.

The Committee next considered whether the Rule should be amended to lower the threshold of corroborating circumstances required to support admissibility under Rule 804(b)(3). The Rule currently requires a showing that corroborating circumstances "clearly" indicate the trustworthiness of the statement. Some judges and commentators have argued that this standard is too stringent. One possibility is to delete the word "clearly" from the Rule. Committee members noted, however, that deletion of the word "clearly", in light of the extensive case law on the subject, might send out the wrong signal and would be disruptive to the courts. Deletion of "clearly" might also lead to unreliable hearsay being admitted against criminal defendants and other litigants. The Committee resolved unanimously to retain the word "clearly" in Rule 804(b)(3).

The Committee next considered whether the corroborating circumstances requirement should be extended to civil cases. Committee members observed that the question of applicability to civil cases would have to be addressed in any proposed amendment to Rule 804(b)(3). That is, the corroborating circumstances requirement would have to be either specifically applied to or specifically excepted from civil cases. An amendment that said nothing about the application of the corroborating circumstances requirement to civil cases would invite confusion and unnecessary litigation.

The Committee could find no justification for excepting civil cases from the corroborating circumstances requirement. To the contrary, Committee members recognized that it would make sense to have a unitary approach for all declarations against penal interest.

The next issue considered by the Committee was whether the factors pertinent to the corroborating circumstances requirement should be explicated in the text of the Rule. The Committee resolved that any such explication would be problematic because it would create a risk that some pertinent factors might not be included. On the other hand, the Committee recognized that courts are in dispute over the meaning of "corroborating circumstances." For example, some courts have held that in determining whether corroborating circumstances exist, the court must take into account whether the witness who relates the declaration against penal interest in court is reliable; other courts have held that the reliability of the witness is irrelevant to whether the declarant's statement is supported by corroborating circumstances. In light of the conflicts in the case law in this and other respects, the Committee resolved that it would be

helpful for any amendment to Rule 804(b)(3) to set forth a non-exclusive list of factors that are pertinent to the determination of corroborating circumstances. The Committee agreed, however, that such a list would be better placed in the Committee Note than in the text of the Rule.

The Committee tentatively agreed on a proposed amendment to Rule 804(b)(3) that would apply the corroborating circumstances requirement to all proffered declarations against penal interest, together with a Committee Note that would provide a non-exclusive list of factors that courts should take into account in determining whether the corroborating circumstances requirement is met.

III. Proposed Amendment to Rule 804(b)(3) Tentatively Approved by the Advisory Committee

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Proposed Committee Note

The second sentence of the Rule has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). A unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

Committee Note to Rule 804(b)(3) (cont.)

The Committee notes that there has been confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain, and is not much clarified by either legislative history or the cases"). For example, some courts have held that in assessing corroborating circumstances, the court must consider whether the witness who heard the statement is a credible person. *See United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (requiring an assessment of the "probable veracity of the in-court witness"). Other courts prohibit such an inquiry on the ground that it would usurp the role of the jury in assessing witness credibility. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985). Some courts look to whether extrinsic evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because extrinsic evidence contradicts the declarant's account). Other courts hold that extrinsic evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The weight of the case law indicates that there are six factors that **[must always] [should?]** be considered in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors are:

(1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for matters related in the statement;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made (recognizing, for example, that statements made to police personnel after a declarant's arrest may not be as reliable as statements made to the declarant's trusted friend);

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Committee Note to Rule 804(b)(3) (cont.)

See United States v. Bumpass, 60 F.3d 1099, 1102 (4th Cir. 1995) (setting forth these factors). Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985).

Reporter's Note: The Committee should consider whether the list of factors set forth in the Note as pertinent to "corroborating circumstances" should be permissive or mandatory. See the bracketed language in the proposed Committee Note.

IV. Federal Case Law

There is extensive federal case law on the Rule 804(b)(3) corroborating circumstances requirement. But before discussing that case law, it is appropriate to summarize the Supreme Court's decision in *Williamson v. United States*. While *Williamson* did not deal with the corroborating circumstances requirement, it sets forth some standards for applying the "against penal interest" requirement that are relevant to whether the corroborating circumstances requirement should be changed.

A. Williamson

In *Williamson v. United States*, 512 U.S. 594 (1994), the declarant, Harris, was stopped and arrested for possessing a large quantity of cocaine in his rental car. In two interviews with a DEA agent, Harris said that he got the cocaine from an unidentified Cuban in Fort Lauderdale; that the cocaine belonged to Williamson; and that it was to be delivered that night to a particular dumpster. The agent then took steps to arrange Harris' controlled delivery of the cocaine, but Harris demurred, saying that he had lied about the Cuban and the dumpster, and that the real story was that he had been transporting the cocaine to Atlanta, with Williamson traveling in front of him in another rental car. Harris added that after his car was stopped, Williamson turned around and drove past the location of the stop, where he could see Harris' car with its trunk open. Harris therefore asserted that a controlled delivery would be fruitless because Williamson had been tipped off. Harris told the agent that he had lied about the source of the drugs because he was afraid of Williamson. Though Harris freely implicated himself, he did not want his story to be recorded, and he refused to sign a written version of the statement. The agent promised to report any cooperation by Harris to the Assistant United States Attorney, but Harris was not promised any reward or other benefit for cooperating. Harris refused to testify at Williamson's trial. The District Court then ruled that, under Rule 804(b)(3), the agent could relate all of what Harris had said to him. The Court of Appeals affirmed.

The Supreme Court unanimously vacated and remanded the decision, on the ground that the lower courts had not properly applied Rule 804(b)(3). However, there was substantial dispute among the Justices as to the meaning of the Rule. Justice O'Connor, writing for six members of the Court on this point, held that the Rule covers statements only to the extent that they could tend to be, in the context they are given, disserving to the declarant. This means that neutral or self-serving aspects of a broader declaration are not admissible under the Rule--only the specific statements that tend to incriminate the declarant are potentially admissible. Justice O'Connor elaborated as follows:

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. * * * The fact that a

person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

In this respect, it is telling that the non-self-inculpatory things Harris said in his first statement actually proved to be false, as Harris himself admitted . * * * And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

* * *

In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Justice O'Connor spent considerable time refuting the proposition that a narrow construction of the hearsay exception would render the declaration against interest exception devoid of practical effect. She gave the following illustrations of the Rule's application:

Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.

For instance, a declarant's squarely self-inculpatory confession — "yes, I killed X" — will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a co-conspirator liability theory. Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an accomplice's self-inculpatory statement can inculpate the defendant directly: "I was robbing the bank on Friday morning," coupled with someone's testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.

Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest. "I hid the gun in Joe's apartment" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. "Sam and I went to Joe's

> house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest. The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.

Justice O'Connor, writing only for herself and Justice Scalia on this point, declared that "[s]ome of Harris' confession would clearly have been admissible under Rule 804(b)(3); for instance, when he said he knew there was cocaine in the suitcase, he essentially forfeited his only possible defense to a charge of cocaine possession, lack of knowledge." On the other hand, the parts of the confession that implicated Williamson directly by name "did little to subject Harris himself to criminal liability. A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes." Since the District Court failed to make a searching, fact-intensive inquiry as to whether each of Harris' statements was self-inculpatory, Justice O'Connor concluded that a remand was required. (There are no reported decisions on remand. However, Williamson did appeal from the subsequent judgment in the district court, and the Court of Appeals affirmed the district court).

Justice Ginsburg, joined by Justices Blackmun, Stevens, and Souter, agreed that Rule 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." Unlike Justice O'Connor, however, Justice Ginsburg concluded that none of the statements made by Harris were inculpatory in any sense, because "Harris' arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy." She contended that Harris' statements projected "an image of a person acting not against his penal interest, but striving mightily to shift principal responsibility to someone else." Thus, Justice Ginsburg was much more skeptical about whether any part of a post-custodial statement to a police officer could ever be self-inculpatory to the extent it implicated any person other than the declarant. Justice Ginsburg concluded that the case should be remanded, but only to determine whether the admission of Harris' statements constituted harmless error.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, argued for a broader construction of the exception. He contended that Rule 804(b)(3) "contemplates exclusion of a collateral self-serving statement, but admission of a collateral neutral statement."

While there certainly was disagreement among the Justices in *Williamson*, it is clear that the majority of the Court has taken a cautious and narrow approach to statements offered under Rule 804(b)(3), especially when they are post-custodial statements that specifically name the

defendant as a criminal. The majority makes clear that an entire declaration will not be admissible simply because parts of it are disserving. The courts are required after *Williamson* to employ a statement-by-statement approach. No "collateral" statements are admissible under the Rule. Thus, a statement like "Joe and I robbed the bank" will present difficulty in light of *Williamson* when it is offered to implicate Joe; this is because, while the declarant's admission of his own part in the crime may be disserving, his implication of another is arguably neutral. While a case-by-case approach is required, a fair reading of *Williamson* is that while admitting to the bank robbery is inculpatory, there is often no disserving factor in identifying Joe. The proponent will have to show that in context the identification of Joe was in fact inculpatory as to the declarant — perhaps by revealing the declarant's breadth of knowledge about the crime in a context where such a revelation could be more inculpatory than simply admitting to the crime, or perhaps by admitting to conspiratorial liability. Compare *United States v. Mendoza,* 85 F.3d 1347 (8th Cir. 1996) (statement made while accomplice in custody, specifically identifying the defendant as a coperpetrator, is not against the declarant's interest and therefore was improperly admitted under Rule 804(b)(3)), with *United States v. Moses,* 148 F.3d 277 (3rd Cir. 1998) (statement by declarant that he was paying kickbacks to the defendant was sufficiently disserving to be admissible under Rule 804(b)(3): by naming Moses as the payee, the declarant "provided self-inculpatory information that might have enabled the authorities to better investigate his wrongdoing.").

On its face the *Williamson* Court's narrow construction of Rule 804(b)(3) seems equally applicable to inculpatory and exculpatory statements. So a statement that "I robbed the bank and Joe did not" runs into similar problems under *Williamson* when it is offered by Joe. It does not follow, however, that *Williamson* mandates exclusion of statements that directly exculpate the defendant, in the same way that it mandates exclusion of most statements that directly inculpate the defendant. Clearly, one of the things that all the Justices were concerned about in *Williamson* was that a declarant could inculpate a person in a custodial confession in an attempt to curry favor with the authorities. This danger generally does not arise with respect to statements that exculpate another, so there is some basis for applying the *Williamson* standard more flexibly for exculpatory statements — especially given the criminal defendant's constitutional right to an effective defense. *See, e.g., United States v. Nagib,* 56 F.3d 798 (7th Cir. 1995) (statements exculpating the defendant, made by the declarant at sentencing, were all sufficiently against the declarant's penal interest: "[T]here is no indication in the record that [the declarant] attempted to curry favor with the authorities when making his statement at sentencing. There is no record of any plea agreement or downward departure for cooperation.").

The Ninth Circuit, in *United States v. Paguio*, 114 F.3d 928, 933-35 (9th Cir. 1997), specifically holds that after *Williamson*, exculpatory statements are to be admitted more liberally than inculpatory statements against interest:

> When the prosecution attempts to take advantage of the rule, as in *Williamson*, the statement is typically in the form, "I did it, but X is guiltier than I am." As a matter of common sense, that is less likely to be true of X than "I did it alone, and not with X."

That is because the part of the statement touching on X's participation is an attempt to avoid responsibility or curry favor in the former, but to accept undiluted responsibility in the latter.

Prosecution use of an unavailable declarant's accusation of the defendant, as in *Williamson*, raises different concerns from a defendant's use of an unavailable declarant's confession which exonerates him. ... The Constitution gives the "accused," not the government, the right of confrontation. ... The accused's right to present witnesses in his own defense may be implicated where an absent declarant's testimony is improperly excluded from evidence. ... We raise the constitutional asymmetry because it helps explain why application of the rule of evidence is to some extent asymmetrical between defense and prosecution.

Accordingly, after *Williamson*, *inculpatory* declarations against interest should be strictly construed, especially when the statement is made while the declarant is in custody; while *exculpatory* declarations against interest should receive a somewhat more permissive treatmen — so long as an exculpatory statement would tend to disserve the declarant's interest, and is supported by some corroborating circumstances, the statement should be admitted.

The assymetry between inculpatory and exculpatory declarations after *Williamson* runs counter to the assymetry of the corroboration requirement in the text of the Rule. Under the text, inculpatory statements are treated more permissively than exculpatory statements, since the latter require corroboration while the former do not. *Williamson* gives support to the Committee's decision to propose an amendment that will abrogate the bias in favor of the prosecution that currently exists in the text of the Rule.

B. Case Law Construing the One-Way Corroboration Requirement

Most of the Circuits have not read the corroboration requirement the way it is written. The majority view is to impose a corroborating circumstances requirement on the government as well as the accused. There are two reasons generally given for this divergence from the text of the Rule (to the extent the matter is discussed at all): 1) a showing of corroborating circumstances is required to protect the accused's right to confrontation; and 2) it makes no sense and is unfair to impose a corroboration burden on the accused, but not on the prosecution.

Here is a short summary of case law in the circuits imposing a corroboration requirement on the prosecution:

First Circuit:

United States v. Barone, 114 F.3d 1284 (1st Cir. 1997) ("Although this court has not expressly extended the corroboration requirement to statements that inculpate the accused, we have applied the rule as if corroboration were required for such statements.").

Fifth Circuit:

United States v. Alvarez, 584 F.2d 694 (5thCir. 1978): This is the most influential decision on the corroboration requirement as applied to government-offered statements. Most cases imposing a corroboration requirement on such statements simply do so by citing *Alvarez.* The *Alvarez* court interpreted the legislative history on the one-way corroboration requirement as leaving it to the case law to develop corroboration requirements for inculpatory statements, in accordance with the requirements of the confrontation clause. The court reasoned that a corroboration requirement was essential to comply with the confrontation clause's "mandate for reliability." By imposing a corroboration requirement on the government, the court sought to "avoid the constitutional difficulties that Congress acknowledged but deferred to judicial resolution." The court also reasoned that "by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)."

Sixth Circuit:

Harrison v. Chandler, 1998 WL 786900 (6th Cir. 1998) (holding that an inculpatory statement should have been excluded for failing to meet the corroboration requirement; dissenting opinion notes that imposing a corroboration requirement on the government is contrary to the text of the Rule).

Seventh Circuit:

United States v. Shukri, 207 F.3d 412 (7th Cir. 2000) ("For the Rule 804(b)(3) exception to apply, the proponent of an inculpatory statement must show that * * * corroborating circumstances bolster the statement's trustworthiness.").

Eighth Circuit:

United States v. Rasmussen, 790 F.2d 55 (8th Cir. 1986) (applying corroboration requirement to government-offered statements; noting the defendant's right to confrontation).

Eleventh Circuit:

United States v. Taggart, 944 F.2d 837 (11th Cir. 1991): (requiring corroborating circumstances for prosecution-offered statements; no analysis given).

Some Circuits have not decided whether to impose a corroboration requirement on statements offered by the government:

D.C. Circuit:

No discussion found.

Third Circuit:

United States v. Palumbo, 639 F.2d 123 (3d Cir. 1981) (post-custodial statement implicating defendant was not sufficiently disserving to be admissible; concurring opinion urges that prosecution be required to provide corroborating circumstances clearly indicating trustworthiness).

Ninth Circuit:

United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995): In a prosecution arising out of arson of a home, the Court declined to decide whether corroborating circumstances are required when a declaration against interest is offered to inculpate an accused. The Court found that, even if such circumstances are required, they existed in this case.

Two Circuits have case law going both ways:

Second Circuit:

United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989) ("this Circuit requires corroborating circumstances even when the statement is offered, as here, to inculpate the accused.").

United States v. Bakhtiar, 994 F.2d 970 (2d Cir. 1993) (noting that corroboration is required only if the statement is offered to exculpate the accused: "here, of course, it was offered by the government" so the statement could be admitted without a showing of corroborating circumstances).

Fourth Circuit:

United States v. Workman, 860 F.2d 140 (4th Cir. 1988) ("The statement by Davis subjected him to criminal liability under the first sentence of the rule. It did not exculpate an accused, so it is not subject to the second sentence of the rule.").

United States v. Carvalho, 742 F.2d 146 (4th Cir. 1984) (inculpatory statement excluded because the government presented no corroborating evidence indicating the trustworthiness of the statement).

C. Applicability of the Corroboration Requirement to Civil Cases

In *American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999), the court considered whether the corroborating circumstances requirement applied to declarations against penal interest offered in civil cases. Favia, an employee of American, was discovered by the company to have written checks to fictional accounts. When confronted, he admitted that he cashed the checks for his own benefit, receiving payment for the checks from Fishman, who took a fee for the service. American sued Fishman to recover the funds, arguing that Fishman was in on the fraud. Favia's statements to his employer were offered as declarations against Favia's penal interest. The magistrate judge found that American had not met its burden of showing that the statements were supported by corroborating circumstances clearly indicating their trustworthiness; summary judgment was granted for Fishman.

On appeal, American argued that it was not necessary to provide corroborating circumstances for declarations against interest in civil cases. It noted that the second sentence of Rule 804(b)(3) does not by its terms apply to civil cases. It recognized that the Seventh Circuit has, like most circuits, read the Rule beyond its terms to apply to inculpatory declarations offered in criminal cases. But American found two reasons to distinguish that extension from an extension to civil cases. First, the extension of the corroborating circumstances requirement to statements offered against an accused had been justified by a concern over the accused's right to confrontation–that right is inapplicable in civil cases. Second, the Supreme Court's decision in *Williamson* rendered it unnecessary to extend the corroborating circumstances requirement to civil cases. This was assertedly because, after *Williamson*, each statement offered must be "truly self-inculpatory." The significant protection rendered by *Williamson*, American argued, meant that an additional requirement of corroboration would be excessive, if not in all cases, at least in civil cases.

The *Fishman* court rejected these arguments and held that the corroborating circumstances requirement applied to declarations against interest offered in civil cases. It made two major points:

> 1. It is important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered.
>
> 2. Nothing in *Williamson* prevents an across-the-board application of the corroborating circumstances requirement. *Williamson* simply emphasized that "the Rule 804(b)(3) inquiry must be fact-intensive." That is what the corroboration sentence of the Rule requires as well.

The Court's analysis in *Fishman* supports the Committee's decision to propose an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to civil cases.

V. Previously Rejected Drafting Alternatives

In the interest of completeness, this section of the memorandum sets forth the drafting alternatives that were rejected by the Committee at its April, 2000 meeting. Including them herein does not suggest that any of them should be reconsidered. The rejected drafts are for included simply for background purposes, especially for new Committee members.

Alternative 1: Deletion of the Corroboration Requirement

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.~~

Draft Committee Note to this Alternative

The corroborating circumstances requirement of the Rule has been deleted. See Ind.R.Evid. 804(b)(3); Tenn.R.Evid. 804(b)(3). The corroborating circumstances requirement has created confusion among the courts on at least two subjects. First, courts have disagreed on whether the requirement applied only to statements offered by an accused, or whether it also applied (in the absence of statutory language) to statements offered by the prosecution. *Compare United States v. Casamento,* 887 F.2d 1141 (2d Cir. 1989) ("this Circuit requires corroborating circumstances even when the statement is offered, as here, to inculpate the accused."), *with United States v. Bakhtiar,* 994 F.2d 970 (2d Cir. 1993) (noting that corroborating circumstances are required only if the statement is offered to exculpate the accused: "here, of course, it was offered by the government" so the statement could be admitted without a showing of corroboration). *See also United States v. Workman,* 860 F.2d 140 (4th Cir. 1988) ("The statement by Davis subjected him to criminal liability under the first sentence of the rule. It did not exculpate an accused, so it is not subject to the second sentence of the rule."); *United States v. Carvalho,* 742 F.2d 146 (4th Cir. 1984) (inculpatory statement excluded because the government presented no corroborating evidence indicating the trustworthiness of the statement). Second, the courts have disagreed on what factors are relevant to a showing of corroborating circumstances. See *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1989) ("the precise meaning of the corroboration requirement in Rule 804(b)(3) is uncertain, and is not much

clarified by either legislative history or the cases"). For example, some courts have held that in assessing corroborating circumstances, the court had to consider whether the witness who heard the statement was a credible person. *See United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (requiring an assessment of the "probable veracity of the in-court witness). Other courts prohibited such an inquiry on the ground that it would usurp the role of the jury in assessing witness credibility. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985); *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000). Some courts have looked to whether extrinsic evidence supported or contradicted the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because extrinsic evidence contradicts the declarant's account). Other courts have held that extrinsic evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The Committee believes that deletion of the corroborating circumstances requirement will bring uniformity to the law without sacrificing the interest in excluding unreliable hearsay. Under *Williamson v. United States,* 512 U.S. 594 (1994), a declaration against penal interest must be "truly inculpatory" to the declarant's interest, given the circumstances under which the statement was made, before it can be admitted. The *Williamson* Court's construction of the first sentence of Rule 804(b)(3) assures that any statement offered under the exception must have substantial guarantees of trustworthiness.

Reporter's Note:

As discussed in Part Two, supra, this alternative was rejected by the Committee because of two concerns: 1) deleting the corroborating circumstances requirement would upset a significant body of existing case law; and 2) despite the reliability guarantees set forth in *Williamson*, there is a substantial risk that deletion of the corroborating circumstances requirement would mean that dubious hearsay from unreliable declarants will be admitted.

Alternative 2: A Two-way Corroboration Requirement for Criminal Cases

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Proposed Committee Note for this Alternative:

The second sentence of the Rule has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. See Pa.R.Evid. 804(b)(3); Ohio R.Evid. 804(b)(3). Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

Reporter's Note: This alternative was rejected because the Committee agreed that the corroborating circumstances requirement should apply to both civil and criminal cases.

Alternative 3: Across-the-Board Corroboration Requirement, With Statutory Elaboration of Relevant Corroboration Factors.

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. In assessing corroborating circumstances, the court must consider (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for matters related in the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the person or persons to whom the statement was made, (5) the relationship between the declarant and the opponent of the evidence, and (6) the nature and strength of any independent evidence relevant to the conduct in question.

Proposed Committee Note for this Alternative:

The second sentence of the Rule has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). A unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

A third sentence has been added to the Rule to clarify the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain, and is not much clarified by either legislative history or the cases"). The corroborating circumstances requirement has created confusion and dissension among the courts. For example, some have held that in assessing corroborating circumstances, the court must consider whether the witness who heard the statement is a credible person. *See United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (requiring an assessment of the "probable veracity of the in-court witness). Other courts prohibit such an inquiry on the ground that it would usurp the role of the jury in assessing witness credibility. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985). Some courts look to whether extrinsic evidence supports or contradicts the declarant's statement. See, e.g., *United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because extrinsic evidence contradicts the declarant's account). Other courts hold that extrinsic evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The sentence added to the Rule sets forth factors that are always pertinent to the reliability of a declaration against penal interest. *See United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995) (setting forth these factors). Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider. To do so would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985).

Reporter's Note:

The Committee rejected this proposal because it was thought that including corroborating circumstances factors in the text of the Rule might do more harm than good. There is a risk that by including some mandatory factors in the text, other factors might be left out. The Committee determined that the existing confusion over appropriate corroborating circumstances factors could best be treated by discussing these factors in the Committee Note.

Alternative 4: Across-the-Board Corroboration Requirement With the Corroboration Requirement Reduced:

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances ~~clearly~~ indicate the trustworthiness of the statement.

Committee Note for This Proposal:

The second sentence of the Rule is amended in two respects. The Rule now makes clear that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). A unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

The amendment also reduces the standard that the proponent must meet to satisfy the corroborating circumstances requirement. See Fla.Stat.Ann. § 90.902. A number of cases have appeared to set the corroborating circumstances so high as to render the exception of little utility. *See, e.g., United States v. Amerson,* 185 F.3d 676 (7th Cir. 1999); *United States v. McDonald,* 688 F.2d 224 (4th Cir. 1982). By requiring that corroborating circumstances "indicate" rather than "clearly indicate" the trustworthiness of the statement, the amendment provides a reasonable measure of protection against the admission of unreliable hearsay statements without being unduly exclusive.

Reporter's Note:

The Committee rejected this proposal because of the extensive pre-existing case law construing the requirement that corroborating circumstances "clearly" indicate the trustworthiness of the statement against penal interest. The Committee was concerned that deletion of the word "clearly" might send out the wrong signal and would be disruptive to the courts. Deletion of "clearly" might also lead to unreliable hearsay being admitted against criminal defendants and other litigants.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Evidence Rule 1101— Proceedings In Which the Evidence Rules Do Not Apply
Date: March 1, 2001

At the April, 1998 meeting of the Evidence Rules Committee, the suggestion was made that the Committee might consider whether Evidence Rule 1101 should be amended to clarify the matters to which the Evidence Rules are applicable and the matters to which they are not. The Reporter prepared an extensive memorandum discussing the case law under Rule 1101, and analyzing whether the Rule needed to be amended to specifically state that the Evidence Rules do not apply to certain proceedings. The Committee ultimately decided not to propose an amendment to Rule 1101.

Roger Pauley and Laird Kirkpatrick have submitted a memorandum suggesting that the question of amending Rule 1101 should be revisited. The Pauley/Kirkpatrick memo is set forth in this agenda book immediately after this memorandum, and will be referred to from time to time in the course of the analysis in this memorandum.

What follows is an update and revision of the memorandum prepared for the Evidence Rules Committee in 1998.

The Rule

The current 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 in 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 case law has held the Rules 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, including whether subdivision (e) of the Rule fulfils any function.

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 attachment is the Pauley/Kirkpatrick memorandum. The second 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).

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 by the presumed inability of the jury to handle certain kinds of evidence; this "fear of jury misuse" 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); 5 Mueller and Kirkpatrick, *Federal Evidence* at 457 (the exclusions listed in Rule 1101(d) are justified by the fact that the listed matters "are traditionally conducted without strict observance of the Rules, and are generally considered preliminary or administrative in nature").

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* 850-60 (6th ed. 2000). 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. See Mueller and Kirkpatrick, *supra* at 460 (the reason for inapplicability of the Evidence Rules is that "the grand jury performs an ex parte investigative function without even the guidance of a presiding judicial officer, and adhering to the Rules of Evidence seems neither desirable nor attainable.").

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. The Court concluded that 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. One rationale for dispensing with Evidence Rules in a preliminary hearing, 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." Another rationale is that applying the Evidence Rules to preliminary hearings would create an incentive for the government to avoid such hearings, and this could lead to an increase in the number of preliminary motions. See 5 Mueller and Kirkpatrick, supra at 461.

There appears to be no reason to reject the rationales for holding the Evidence Rules inapplicable 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 American College of Trial Lawyers has tried to make 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, 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. See the extensive case law cited in Saltzburg, Martin and Capra, *Federal Rules of Evidence Manual* at 2110-11. *See also United States v. Davis,* 170 F.3d 617 (6th Cir. 1999) (hearsay evidence is admissible in sentencing proceedings under the guidelines). The Evidence Rules thus remain inapplicable.

Whatever the merits of extending the Evidence Rules to sentencing proceedings, there are also countervailing practical considerations that counsel strongly against such an extension. 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.

Thus, 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 evidentiary protection. For example, 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 that are really designed to protect against a jury's misuse of evidence. Procedural protection in revocation proceedings 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 decision 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. It should also be noted that the Supreme Court has held that probation and parole revocation proceedings are of necessity flexible and should not be subject to formalistic rules. See, e.g., *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) (permitting the use of hearsay in probation revocation proceeding); *Pennsylvania Board of Probation and Parole v. Scott,* 524 U.S. 357 (1998) (exclusionary rule is inapplicable in parole revocation proceeding; noting that the rule is "incompatible with the traditionally flexible, administrative procedures of parole revocation" and that "traditional rules of evidence generally do not apply" to such proceedings). Any change in Rule 1101(d) to extend the Rules of Evidence to probation revocation proceedings would create a conflict with existing Supreme Court case law.

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 something of 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 revocation proceedings 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 constrained 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 either. 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. The Pauley/Kirkpatrick memorandum (set forth in the agenda book immediately following this memorandum) provides suggested language for an amendment that would specify that the Rules of Evidence are inapplicable 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. Jackson,* 213 F.3d 1269 (10th Cir. 2000) (hearsay statement properly credited at a suppression hearing; the Federal Rules of Evidence do not apply to suppression hearings);*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. 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 denied the motion on the ground that Rule 615 (requiring sequestration upon motion) 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. Therefore it applied to suppression hearings. 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. Such a broad ruling would also be inconsistent with Ninth Circuit precedent indicating that Evidence Rules governing admissibility are not applicable in suppression hearings. See *United States v. Elliott,* 904 F.2d 25 (1990) (rule prohibiting leading questions is not applicable in suppression hearings).

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 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 suppression hearing 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 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 as well as the process of finding 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 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, Rule 104 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 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 and possibly Rule 104. 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*. If the Rule is to be amended on other grounds, then addressing Rules applicability to suppression hearings might make sense. Reasonable minds can certainly differ, however, on whether Rules applicability to suppression hearings is a problem grave enough to justify an amendment on its own.

The Pauley/Kirkpatrick memorandum sets forth some options for language that might be used in an amendment to Rule 1101 to deal with suppression hearings. The three options set forth codify each of the alternatives discussed supra, i.e., complete inapplicability, applicability of rules governing the process of factfinding, and applicability of certain enumerated rules.

10. Motion Practice

The discussion in the immediately proceeding section on suppression hearings can really be extended more generally to motion practice. Rule 1101(d) does not specifically say that the Evidence Rules are inapplicable to hearings on all motions (e.g., a motion to compel, a motion for a protective order, a motion to seal, a motion to dismiss, a motion for change of venue, etc.). But the federal courts have uniformly held that the Evidence Rules (except, of course, those with respect to privilege) are generally inapplicable in such hearings. As stated by Mueller and Kirkpatrick, supra, at 453, "If the Rules applied with full force to all motions, the judicial process would be overburdened and perhaps stymied." Moreover, motions are heard by judges, so there is no risk of jury misuse of evidence, which is the basic reason for the Evidence Rules in the first place.

For all the reasons discussed above with respect to suppression hearings and preliminary determinations, it makes no sense to amend Rule 1101(d) to provide that the Evidence Rules are applicable to motion practice. On the other hand, would it make sense to amend the Rule to

provide specifically that the Evidence Rules are *inapplicable* to motion practice? There is no dispute in the courts on the point, so it would appear that the need for an amendment is not great. At best, such a provision might be added if the Committee decided that it was going to proceed with other amendments to the Rule.

11. 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." As the Advisory Committee noted, it would be nonsensical to extend the Evidence Rules to summary contempt proceedings.

12. 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 detainee's personal traits. 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.

13. 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 court 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.

14. 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). See Mueller and Kirkpatrick, supra, at 448 ("FRE 1101(a) does not include federal administrative agencies among the tribunals where the Rules apply, and it seems clear that they do not apply in agency proceedings, at least in the absence of a statutory directive.").

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 implicit text of Rule 1101(a), 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 and arbitration 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). 9 U.S.C. §§ 1-9 (governing admission of evidence in arbitration proceedings). 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. An argument can be made that a specific exclusion in subdivision (d) is unnecessary because administrative and arbitration panels are not included in subdivision (a) as tribunals in which the Evidence Rules apply -- so

specifying an exclusion in subdivision (d) would be redundant. Clearly there is no need to amend the Rule to solely to provide a specific exclusion for administrative and arbitration proceedings. At best such a minor clarification might be part of a more general amendment if the Committee decides that it is necessary to amend Rule 1101.

15. Forfeiture Proceedings

The law of forfeiture is complex. Rule 1101 does not mention forfeiture proceedings, and so there is some ambiguity about the applicability of the Evidence Rules. Courts have held that the Rules of Evidence are not applicable to pre-trial forfeiture proceedings, on the same reasoning that the rules are inapplicable to other pre-trial proceedings. See, e.g., *United States v. Harvey,* 560 F.Supp. 1040 (S.D. Fla. 1982); *United States v. Monsanto,* 924 F.2d 1186 (2d Cir. 1991).

The major problem with treating forfeiture proceedings in Rule 1101 is that there are a number of statutes on both civil and criminal forfeiture; any attempt either to apply the Evidence Rules to forfeiture proceedings, or to exempt such proceedings from the Rules, would require a very careful analysis of how such an amendment would interface with these statutes. In addition, a careful inquiry would have to be undertaken on the relationship between an amendment to Evidence Rule 1101 and new Criminal Rule 32.2. If the Committee decides that Rule 1101 should be amended, and that it would be useful to include a provision on forfeiture, then the Reporter would be happy to conduct an in-depth analysis of whether specific treatment of forfeiture proceedings in Rule 1101 might be proposed.

16. 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 juvenile 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 be 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. The courts are having no problem finding the rules to be inapplicable. But if Rule 1101 is to be amended on other grounds, a clarification might usefully be added to that amendment.

17. 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 Rules 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 for 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. If the Rule is to be amended on other grounds, a clarification might usefully be added to that amendment.

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 some of 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.

The Pauley/Kirkpatrick memorandum argues that Rule 1101(e) should be retained in any amendment because it is necessary to prevent the enumerated statutes from being superseded by the Evidence Rules. But these independent statutes will not be superseded if Rule 1101(e) is abrogated. This is because the Evidence Rules are written so as not to supersede any statutory rule of evidence. The statutory rules of evidence generally govern one of five topics: 1) presumptions; 2) relevance and prejudice; 3) privilege; 4) hearsay; and 5) authentication. On none of these topics do the Evidence Rules preclude statutory authority from determining whether evidence is admissible. For example, Rule 301 provides a rule on presumptions to the extent "not otherwise provided for by Act of Congress". Rule 402 says that relevant evidence is admissible, unless otherwise provided by Act of Congress, etc.. Rule 501 provides for a federal common law of privilege except as otherwise provided by Act of Congress, etc.. Rule 802 provides that hearsay is not admissible except as otherwise provided by Act of Congress, etc.. And Rule 901 governs authenticity, but does not purport to supersede statutes that provide for authentication; the examples in 901 are illustrative only.

In sum, as Mueller and Kirkpatrick put it, Rule 1101(e) is not needed to preserve existing statutory rules of evidence, because "this purpose would be achieved by the various

qualifications found elsewhere in the rules."

Moreover, if Rule 1101(e) *were* needed to preserve pre-existing statutes, it would be doing a poor job of it. The Rule clearly makes no attempt to be inclusive. A quick look at the attached memorandum listing some of the statutes affecting evidence shows that the statutes cited in Rule 1101(e) are merely a drop in the bucket. At least one of the statutory references (that dealing with immigration) is erroneous. (It should be read to refer to "judicial proceedings for naturalization or revocation of naturalization under sections 310-360 of the Immigration and Nationality Act (8 USCS §§ 1421-1503)"). As the Pauley/Kirkpatrick memorandum indicates, some of the statutory references in the Rule are outmoded or require updating.

If the Committee decides that Rule 1101 should be amended, then it should give strong consideration to deleting subdivision (e). While it is harmless and unnecessary as is, it might well be useful to delete the provision as part of a larger amendment.

There might be understandable concern that deletion of subdivision (e) might send the wrong signal that the intent of the amendment is to supersede the statutory evidence rules in the specified statutes. But any such concern could be addressed in the Committee Note. The Note might say that subdivision (e) is deleted because it is unnecessary; that the intent of the original Advisory Committee was to signal to courts and practitioners that statutory rules of evidence remained in existence; but that such a reminder is no longer needed, especially since some of the statutes referred to have been abrogated or relocated. In a recent conversation between the Reporter and Roger Pauley, Roger agreed that it might be useful to abrogate subdivision (e) so long as the Committee Note emphasized that there is no intent to supersede any statutory rules of evidence.

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 two Evidence Rules operate 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"). And the limitations recently added to Rule 703 apply only in jury trials.

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 wish to 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 most obvious ambiguities 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 mention juvenile transfer proceedings.

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

6. 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.

7. 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 should 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.

Finally, it should be noted that if new rules of privilege are ever adopted, a conforming amendment would have to be made to subdivision 1101(c). That subdivision states:

> The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

This provision would have to be changed as follows:

> The rules with respect to privileges ~~applies~~ apply at all stages of all actions, cases, and proceedings.

The Pauley/Kirkpatrick Suggestion for Amending the Rule

As indicated in their attached memo, Roger Pauley and Laird Kirkpatrick have suggested certain language for a proposed amendment to Rule 1101. I set forth that language here for ease of reference by the Committee. For reasons previously discussed in this memorandum, the proposed amendment now provides for the deletion of current subdivision (e). Finally, I have prepared a proposed Committee Note to accompany the text. This should not be taken as a suggestion that Rule 1101 should be amended. Rather, the draft Committee Note is simply to provide guidance to the Committee in assessing whether the amendment is warranted.

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 or supervised release; proceedings for psychiatric commitment or release; proceedings to determine whether a juvenile should be prosecuted as an adult; arbitration proceedings; administrative hearings; preliminary injunction proceedings when conducted separately from a trial on the merits; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

~~(c) *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.~~

Option 1 for suppression hearing language:

e. Hearings on motions to suppress or exclude evidence in criminal cases. The rules relating to the admissibility of evidence (other than with respect to privileges) do not apply to proceedings on motions to suppress or exclude evidence in criminal cases.

Reporter's Note— If this option is chosen, it should not be a separate subdivision. It can just be incorporated into subdivision (d)(3) as a reference to "proceedings on motions to suppress or exclude evidence in criminal cases".

Option 2 for suppression hearing language:

e. Hearings on motions to suppress or exclude evidence in criminal cases. The rules do not apply to proceedings on motions to suppress or exclude evidence in criminal cases, except rules with respect to privileges and rules relating to regulation of the process of determining the admissibility of evidence.

Option 3 for suppression hearing language:

e. Hearings on motions to suppress or exclude evidence in criminal cases. The rules do not apply to proceedings on motions to suppress or exclude evidence in criminal cases, except rules with respect to privileges and rules 106, 612 and 615 **[and possibly others]** .

Draft Advisory Committee Note

Subdivision (d) of the Rule has been amended to add certain proceedings to which the evidence rules (except those with respect to privilege) are not applicable. Case law has generally held that the Federal Rules of Evidence are not applicable to the proceedings specified by the amendment. *See, e.g., United States v. Walker,* 117 F.3d 417 (9th Cir. 1997) (evidence rules do not apply in a supervised release revocation

proceeding); *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988) (Federal Rules of Evidence are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility);*Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153 (3rd Cir. 1994) (Federal Rules of Evidence do not apply to juvenile transfer hearings); *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); *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); *SEC v. General Refractories Co.,* 400 F.Supp. 1248 (D.D.C. 1975) (Evidence Rules not applicable to preliminary injunction hearing separate from a trial on the merits).

Note: The next paragraph of the Committee Note will depend on which option concerning sentencing proceedings, if any, the Committee agrees upon. If option 1, the Committee Note can simply add a citation on sentencing to the previous paragraph. If option 2 or 3 is chosen, the following paragraph might be added to the Note:

New subdivision (e) recognizes that Evidence Rules regulating the process of determining admissibility should apply to sentencing hearings, even where the rules of admissibility do not apply. *See United States v. Brewer*, 947 F.2d 404 (9th Cir. 1991) (holding that in suppression hearings "the traditional exclusionary rules do not apply, but . . . procedural regulation of the process of admission and exclusion remains applicable" and concluding that Rule 615 applies to suppression hearings because it is a procedural rule designed to guarantee a fair proceeding, as opposed to a rule dealing with the admissibility of evidence).

[The original] Subdivision (e) of the Rule has been abrogated. That subdivision is unnecessary to the extent that it was designed to preserve statutory evidence rules. The Federal Rules of Evidence preserve statutory evidence rules without regard to subdivision (e). See Federal Rules of Evidence 301, 402, 501 and 802. See also 5 Mueller and Kirkpatrick, *Federal Evidence* § 596, n.3 (2nd ed. 1994) (noting that the interest in preserving statutory rules of evidence is "achieved by the various qualifications found elsewhere in the Rules"). To the extent the Rule was intended as a signal to courts and practitioners that statutory rules of evidence remain in existence, the Committee believes that the usefulness of the subdivision has been diminished by the passage of time. The subdivision does not begin to cover all of the statutes bearing on admissibility of evidence, and some of the statutes referred to in the subdivision have been abrogated or relocated.

Nothing in the amendment is intended to affect the applicability of evidentiary rules provided by Act of Congress.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

December 4, 2000

MEMORANDUM

To: Evidence Rules Committee

From: Laird Kirkpatrick and Roger A. Pauley

Subject: Updating of Rule 1101(d) and (e)

More than two years ago, the Committee considered whether to amend Rule 1101(d) and (e) to respond to a number of court decisions involving the applicability of the rules to certain proceedings not therein specified. The Committee was aided by an excellent memorandum from its Reporter that reviewed the caselaw surrounding each proceeding in question. In one instance, i.e., whether (and if so how) the rules should apply to suppression hearings, the memorandum urged that the matter was sufficiently important and unclear to warrant the Committee's attention. In several other instances, such as whether to codify court rulings holding the rules inapplicable to juvenile transfer proceedings and psychiatric proceedings, and whether to abolish Rule 1101(e), the Reporter's memorandum opined that the issue seemed individually not important enough to warrant an amendment, but that if Rule 1101 were to be amended on other grounds, a clarification of the rule would be in order.

At the time the issue of whether to pursue an amendment of Rule 1101 was presented, the Committee had a full plate of pending and important rules amendment proposals, including the expert witness rules and Rule 103. The Committee determined in this context not to go forward with any further consideration of amending Rule 1101. While we did not oppose this decision at the time, we believe that, with those other proposals now concluded, the question whether to amend Rule 1101(d) and (e) merits reexamination. Several considerations support such an effort. First, a primary purpose of having rules of evidence, as opposed to relying wholly on caselaw, is to aid courts and practitioners in finding (and understanding) the law, and it is difficult to conceive of a more basic matter demanding the

utmost clarity in a set of rules than whether the rules apply to a particular proceeding. Thus to the extent that this question is not answered definitively in the rules, the rules' purpose is thwarted. Second, while questions involving the rules' applicability do not arise with great frequency, the Reporter's memorandum does show that over the years the lack of specificity about the rules' applicability to certain proceedings has generated some significant litigation that a codification would eliminate. Lastly, it has been more than a quarter of a century since the rules took effect. In that time, some proceedings have come into existence (e.g. supervised release revocation) that were not contemplated by the original rules framers. For all these reasons, it seems appropriate to revisit Rule 1101(d) and (e) to update these provisions and attempt to achieve further clarification.

We therefore request that this matter be placed on the Committee's agenda for the upcoming meeting. A draft amendment of Rule 1101(d) that is consistent with the caselaw set forth in the Reporter's memorandum is included as an Appendix for discussion purposes.

Contrary to the suggestion in the Reporter's memorandum, however, we do not advocate the repeal of subdivision 1101(e). The Reporter's memorandum argued that that provision, which enumerates a number of statutes in which the rules are applicable to the extent not governed by the statutes themselves, should be considered for repeal, since it "appears to have no independent content." But absent this subdivision, it would not necessarily be clear that Congress intended the previously enacted statutory evidence provisions to prevail over the rules, in light of the supersession clause in the Rules Enabling Act (28 U.S.C. 2072(b)), which generally provides for the primacy of a rule in case of any inconsistency between it and a pre-existing statute. We believe, therefore, that Rule 1101(e) continues to serve a useful purpose and should not be eliminated. However, in reviewing the various statutes enumerated in subdivision (e), it appears that some of the citations are outmoded or require updating. For example, 46 U.S.C. 679 has been repealed and its provisions relocated at 46 U.S.C. 11104(b)-(d); and as a result of recent immigration bills, revocation of naturalization is no longer found in 8 U.S.C. 1421-1429 but rather is contained in 8 U.S.C. 1451. Thus, if the Committee opts to proceed with an amendment of subdivision (d), it may also wish to make technical amendments to subdivision (e) to update its citations.

APPENDIX

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

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(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation **or supervised release; proceedings for psychiatric commitment or release; proceedings to determine whether a juvenile should be prosecuted as an adult; arbitration proceedings; administrative hearings; preliminary injunction proceedings when conducted separately from a trial on the merits;** issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

[Option 1](e) Hearings on motions to suppress or exclude evidence in criminal cases. The rules relating to the admissibility of evidence (other than with respect to privileges) do not apply to proceedings on motions to suppress or exclude evidence in criminal cases.

[Option 2](e) Hearings on motions to suppress or exclude evidence in criminal cases. The rules do not apply in proceedings on motions to suppress or exclude evidence in criminal cases, except rules with respect to privileges and the rules relating to procedural regulation of the process of determining the admissibility of evidence.]

[Option 3](e) Hearings on motions to suppress or exclude evidence in criminal cases. Only the rules with respect to privileges and rules 106, 612, and 615 [others?] apply in proceedings on motions to suppress or exclude evidence in criminal cases.

[Existing subdivision (e) would be relettered as (f)].

CC: Professor Daniel J. Capra and John Rabiej

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Statutes Affecting Admissibility of Evidence in Federal Courts.
Date: March 3, 1997

At the November, 1996 meeting, the possibility was discussed that the Federal Rules could be amended to include a reference to federal statutes which affect admissibility of evidence in the federal courts. I did a search for all such statutes. I include a short description below of each of the statutes I found--making no claim that I found them all. The length of the list should, I believe, give the Committee some indication of the enormity of the task of referencing, in the Federal Rules, all of the statutes affecting admissibility of evidence.

STATUTES BEARING ON ADMISSIBILITY IN ANY JUDICIAL PROCEEDING

- **2 USCA § 25 Oath of Speaker, Members, and Delegates (Congress)** (bearing on records, provides that signed or certified copies of the oath of office are admissible in any court as conclusive proof that the signer took the oath of office).

- **5 USCA § 1214 Investigation of prohibited personnel practices; corrective action** (bearing on records, provides that a written statement prepared by the Special Counsel pursuant to this section, at the close of an investigation into the allegation of prohibited personnel practices, shall not be admissible in any judicial or administrative proceeding without the consent of the person who made the allegation).

- **7 USCA § 15b. Cotton futures contracts** (bearing on records, provides that certificates as to the classification of cotton shall be accepted as evidence in all courts).

- **7 USCA § 79a Weighing authority** (bearing on records, provides that official certificates of weighing shall be accepted as evidence in all courts).

- **7 USCA § 94 Supply duplicates of standards; examination, etc., of naval stores and certification thereof** (bearing on records, provides that certificates issued by the Secretary of Agriculture showing the analysis, classification, or grade of naval stores shall be accepted as evidence in all courts).

- **7 USCA § 2276 Confidentiality of information (Department of Agriculture)** (bearing on records, provides that information furnished pursuant to this section shall not be admitted as evidence in any judicial or administrative proceeding without consent).

- **8 USCA § 1360 Establishment of central file; information from other departments and agencies (Aliens)** (bearing on the absence of records, provides that a written certification that after a diligent search no records were found shall be admissible as evidence in any proceeding to show that no such records exist).

- **8 USCA § 1435 Former citizens regaining citizenship** (bearing on records, provides that a certified copy of an oath of allegiance (of a woman who lost her citizenship through marriage) shall be admissible in any U.S. court).

- **8 USCA § 1443 Administration** (bearing on authentication, provides that certifications and certified copies of papers, documents, certificates and records required or authorized to be kept by the Nationality and Naturalization provisions, shall be equally admissible as the originals in all cases in which the originals are admissible and in all cases pursuant to this chapter).

- **10 USCA § 1102 Confidentiality of medical quality assurance records: qualified immunity for participants (Armed Forces)** (bearing on privileges and records, provides that medical quality assurance records shall not be admissible in any judicial or administrative proceeding except as provided).

- **10 USCA § 2254 Treatment of reports of aircraft accident investigations (Armed Forces)** (bearing on admissions and records, provides that the opinion of accident investigators as to the cause or contributing factors of an accident, set forth in an accident report, may not be considered as evidence or as an admission of liability by the person referred to in any criminal or civil proceeding arising from the accident).

- **12 USCA § 1820 Administration of Corporation (FDIC)** (bearing on authentication, provides that photographs, microphotographs, photographic film or copies taken pursuant to this section shall be admissible in all State and Federal courts or administrative agencies as an original record to prove any act therein).

- **13 USCA § 9 Information as confidential; exception** (provides that copies of census reports shall not be admitted as evidence in any judicial or administrative proceeding without consent of the parties concerned).

- **14 USCA § 645 Confidentiality of medical quality assurance records; qualified immunity for participants (Coast Guard)** (bearing on privileges and records, provides that medical quality assurance records shall not be admissible in any judicial or administrative proceeding except as provided).

- **15 USCA § 77z-1 Private securities litigation (Domestic Securities)** (bearing on admissions and relevance, provides that a statement concerning damages, made in accordance with this section, shall not be admissible in any judicial or administrative proceeding except one arising out of such statement).

- **15 USCA § 78u-4 Private securities litigation (Securities Exchanges)** (bearing on admissions and relevance, provides that a statement concerning damages, made in accordance with this section, shall not be admissible in any judicial or administrative proceeding except one arising out of such statement).

- **15 USCA § 281a Structural failures** (bearing on records, provides that a report by the National Institute of Standards and Technology of an investigation into the causes of a structural failure of a public building shall not be admissible in any suit for damages that arises from a matter mentioned in such report).

- **15 USCA § 1115 Registration on principal register as evidence of exclusive right to use mark; defenses (Trademarks)** (bearing on records, provides that certain trademark registrations shall be admissible in evidence).

- **15 USCA § 1693d Documentation of transfers (Electronic Funds Transfers)** (bearing on records, provides that documentation required by this section shall be admissible as evidence of such transfer in any action involving a consumer).

- **15 USCA § 2074 Private remedies (Consumer Product Safety)** (bearing on relevance, provides that the Commission's failure to take action with respect to the safety of a consumer product shall not be admissible in litigation relating to such product).

- **15 USCA § 2310 Remedies in consumer disputes (Consumer Product Warranties)** (provides that decisions from informal dispute settlement procedures shall be admissible in related warranty obligation civil actions).

- **15 USCA § 4015 Judicial review; admissibility (Export Trade Certificates of Review)** (bearing on relevance, provides that determinations denying applications for or amendments to a certificate of review, and statements supporting such determinations, shall not be admissible to support any claim under the antitrust laws in any judicial or administrative proceeding).

- **15 USCA § 4305 Disclosure of joint venture (Cooperative Research)** (provides: (1) that the facts of disclosure of conduct and publication of notice, pursuant to this section, shall be admissible in any judicial or administrative proceeding; and (2) that actions, taken pursuant to this section, by the Attorney General or the FTC shall not be admissible to support or answer antitrust claims in any proceeding).

- **18 USCA § 3491 Foreign documents** (bearing on records and hearsay generally, provides that any foreign book, paper, statement, record, account, writing or other document, shall be admissible in any criminal action if it satisfies the certification requirements of 18 USCA § 3491 and the authentication requirements of the Federal Rules of Evidence).

- **18 USCA § 3501 Admissibility of confessions** (bearing on hearsay, provides that any confession that is voluntarily given shall be admitted in any criminal prosecution).

- **18 USCA § 3502 Admissibility in evidence of eye witness testimony** (provides that such evidence shall be admissible in any criminal prosecution).

- **18 USCA § 3505 Foreign records of regularly conducted activity** (bearing on records, provides that such records are admissible in any criminal proceeding if foreign certification attests that such records meet (what are in essence) the requirements of Rule 803(6)).

- **18 USCA § 3507 Special master at foreign deposition** (provides that the refusal to appoint a special master under this section shall not affect the admissibility of depositions).

- **18 USCA § 3509 Child victims' and child witnesses' rights** (bearing on witness testimony, but not abrogating Rule 601, permits the court to admit a child's videotaped deposition, in lieu of live-testimony, if the child would be unable to testify).

- **18 USCA § 4241 Determination of mental competency to stand trial** (bearing on relevance, provides that a finding of mental competence shall not be admissible in a trial for the offense charged).

- **18 USCA § 5032 Delinquency proceedings in district courts; transfer for criminal prosecution** (bearing on admissions and statements against interest, provides that statements made by a juvenile prior to or at a transfer hearing shall not be admissible in subsequent criminal proceedings).

- **18 USCA App. 3 § 6 Procedure for cases involving classified information** (provides that if the United States fails to meet its obligations under this act, the court may exclude the subject evidence and prohibit examination by the U.S. of any witness with respect to such information).

- **18 USCA App. 3 § 8 Introduction of classified information** (provides that the court may exclude portions of writings, recordings or photographs in order to protect classified information).

- **19 USCA § 1484 Entry of merchandise (Tariff Act of 1930)** (bearing on records, provides that any electronically transmitted entry or information shall be admissible in all administrative or judicial proceedings as evidence of such entry or information).

- **20 USCA § 9007 Confidentiality (National Education Statistics)** (bearing on privileges and records, provides that copies of reports containing individually identifiable information shall not be admissible for any purpose in any judicial or administrative proceeding without the consent of the individual concerned).

- **21 USCA § 360i Records and reports on devices (Drugs and Devices)** (bearing on records and competency, provides that reports made by certain individuals shall not be admissible in any civil action unless the preparer had knowledge of the falsity contained in the report).

- **21 USCA § 885 Burden of proof; liabilities (Drug Abuse Prevention and Control)** (provides that labels identifying controlled substances shall be admissible in the case of persons charged, under 21 USCA § 844(a), with the possession of a controlled substance).

- **22 USCA § 4221 Depositions and notarial acts; perjury (Foreign Service)** (bearing on authentication, provides that documents certified under this act shall be admitted into evidence without proof of the genuineness of any seals or signatures used).

- **22 USCA § 4222 Authentication of documents of State of Vatican City by consular officer in Rome** (bearing on authentication and records, provides that documents of record or on file in a public office of the State of the Vatican City, when certified and authenticated by a consular office of the United States, shall be admissible in any U.S. court).

- **23 USCA § 402 Highway safety programs** (bearing on records, provides that a report, list, schedule or survey prepared pursuant to this section shall not be admissible in any suit for damages arising out of a matter mentioned in such report, list schedule or survey).

- **23 USCA § 409 Discovery and admission as evidence of certain reports and surveys (Highway Safety)** (bearing on records, provides that reports, surveys, etc., compiled for the purpose of identifying, evaluating or planning safety enhancement or developing any highway safety construction improvement project, shall not be admissible in any action for damages arising from an occurrence at a location mentioned in such reports, etc., in any State or Federal court proceeding).

- **26 USCA § 5555 Records, statements, and returns (IRC)** (bearing on authenticity, provides that copies of required records shall be admissible to the same extent as the originals).

- **26 USCA § 6103 Confidentiality and disclosure of returns and return information (IRC)** (bearing on privileges and authenticity, provides that: (1) returns shall not be

admissible in proceedings pursuant to this section if such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation; and (2) a reproduction of a return or documents shall be admissible in any judicial or administrative proceedings as if it were the original).

- **28 USCA § 655 Trial de novo (Arbitration)** (provides that the district court in a trial de novo shall not admit evidence that there has been an arbitration proceeding, the nature or amount of an award, or any matter concerning the prior arbitration proceeding unless such evidence would otherwise be admissible under the Federal Rules, or the parties have stipulated to the admission of such evidence).

- **28 USCA § 1732 Record made in regular course of business; photographic copies** (bearing on authentication, provides that a satisfactorily identified copy of a record both made and copied in the regular course of business is admissible in any administrative or judicial proceeding to the same extent as the original, regardless of whether the originals are in existence or not).

- **28 USCA § 1744 Copies of Patent Office documents, generally** (bearing on authentication, provides that copies of Patent Office documents which are authenticated under seal and certified by the Commissioner of Patents shall be admissible with the same effect as the originals).

- **33 USCA § 555a Petroleum product information** (bearing on authentication, provides that a reproduction made in accordance with the section shall, if properly authenticated, be admissible in any judicial or administrative proceeding as if it were the original, regardless of whether or not the original is in existence).

- **38 USCA § 8506 Notice of sale (Disposition of Deceased Veterans' Personal Property)** (provides that an affidavit setting forth the time and place of a posting of notice of sale of property shall be admissible).

- **42 USCA § 2240 Licensee incident reports as evidence (Development of Atomic Energy)** (bearing on records, provides that a report, made by a licensee pursuant to a requirement of the Commission, of an incident arising from licensed activity shall not be admissible in any suit for damages arising from any matter mentioned in such a report).

- **42 USCA § 3505 Seal (Department of Health and Human Services)** (bearing on authentication, provides that copies, under seal of the Department, of any books, records, papers, or other documents shall be admissible equally with the originals).

- **42 USCA § 3789g Confidentiality of information (Judicial System Improvement)** (provides that research and statistical information obtained pursuant to this chapter shall not be admissible in any proceeding).

- **42 USCA § 7412 Hazardous air pollutants** (bearing on records, provides that conclusions, findings, or recommendation of the Board relating to an accidental release or

an investigation of an accidental relief shall not admissible in any suit for damages arising from a matter mentioned in such report).

- **42 USCA § 9622 Settlements (CERCLA)** (bearing on relevance, provides that a person's participation in processes pursuant to this section shall not be considered as an admission of liability, and the fact of participation shall not be admissible in any judicial or administrative proceeding except as otherwise provided in the Federal Rules).

- **42 USCA § 10604 Administrative provisions (Victim Compensation and Assistance)** (bearing on records, provides that research or statistical information furnished under this chapter is inadmissible in any judicial or administrative proceeding absent consent of the person revealing the information).

- **42 USCA § 10708 Administrative provisions (State Justice Institute)** (bearing on records, provides that research or statistical information furnished under this chapter is inadmissible in any judicial or administrative proceeding absent consent of the person revealing the information).

- **43 USCA § 58 Transcripts from records of Louisiana** (bearing on records, provides that a copy of a plat of survey or a transcript from the records of the office of the former surveyor-general that is duly certified shall be admissible in all courts).

- **43 USCA § 83 Transcripts of records as evidence** (bearing on records and authentication, provides that transcripts of records of district land offices, when made and certified to by the Secretary of the Interior, shall be admissible in all courts and shall have the same force and effect as the originals).

- **43 USCA § 545 Appointment of agents to receive payments; record of payments and amounts owing** (bearing on authentication, provides that copies of records of entries authenticated as provided by the Secretary of the Interior, shall be admissible in evidence).

- **44 USCA § 2116 Legal status or reproductions; official seal; fees for copies and reproduction** (bearing on authentication, provides that reproductions authenticated by the seal for the National Archives and certified by the Archivist, shall be admissible equally with the originals).

- **44 USCA § 3312 Photographs or microphotographs or records considered as originals; certified reproductions admissible in evidence** (bearing on authenticity, provides that photographs or microphotographs of records made in compliance with 44 USCA § 3302 shall be admissible equally with the originals).

- **45 USCA § 744 Termination and continuation of rail services** (bearing on relevance, provides that a determination of reasonable payment for use of rail properties is inadmissible in action for damages arising under this chapter).

- **46 USCA § 10902 Complaints of unfitness (Proceedings on Unseaworthiness)** (bearing on records, provides that a report made by an official pursuant to this section shall be admissible in any legal proceeding).

- **47 USCA § 154 Federal Communications Commission** (provides that authorized publications of the Commission's reports and decisions shall be admissible in all courts).

- **49 USCA § 504 Reports and records (Department of Transportation)** (bearing on records, provides that a report of an accident or investigation that is required by the Secretary of Transportation shall not be admissible in any civil action for damages relating to a matter mentioned in such report or investigation).

- **49 USCA § 1154 Discovery and use of cockpit voice and other material** (bearing on records, imposes conditions on the admissibility of a cockpit voice recorder transcript that is not publicly available, and provides that a report, made by the National Transportation Safety Board, of an accident or investigation shall not be admissible in any civil action for damages relating to a matter mentioned in such report or investigation).

- **49 USCA § 20703 Accident reports and investigations (locomotives)** (bearing on records, provides that a report, made pursuant to this section, of an accident or investigation shall not be admissible in any civil action for damages relating to a matter mentioned in such report or investigation).

- **49 USCA § 47507 Inadmissibility of noise exposure map and related information as evidence (airport development and noise)** (provides that no part of a noise exposure map or related information may be admitted in any civil action asking for relief from noise resulting from the operation of an airport).

- **Illegal immigration reform and immigrant responsibility act of 1996 PL 104-208 (HR 3610), 110 Stat. 3009 (slip copy)** (bearing on authentication, provides conditions for the admission of an electronically submitted record of conviction, and provides for the admission of a videotaped deposition of a witness who has been deported or otherwise expelled from the United States, notwithstanding any provision of the Federal Rules, if the deposition otherwise complies with the Federal Rules).

- **Coast Guard Authorization Act of 1996; PL 104-324 (S 1004) 110 Stat. 3901** (bearing on records, provides that no part of a marine casualty investigation conducted pursuant to § 6301 of this title shall be admissible in any civil or administrative proceedings, other than an administrative proceeding initiated by the United States).

STATUTES APPLICABLE TO SPECIFIC TYPES OF PROCEEDINGS

- **5 USCA § 574 Confidentiality** (bearing on relevancy in alternative dispute resolution proceedings, provides that communications disclosed in violation of this section are inadmissible in any proceeding relating to that issue).
- **8 USCA § 1252a Expedited deportation of aliens convicted of committing aggravated felonies** (provides that the court abide by 18 USCA 1252b, not the Federal Rules of Evidence, in deportation proceedings for aliens convicted of specific offenses).
- **8 USCA § 1328 Importation of alien for immoral purpose** (bearing on privileges, provides that testimony of a husband and wife shall be admissible against each other in prosecutions pursuant to this section).
- **8 USCA § 1446 Investigation of applicants; examination of applications** (provides that the record of the examination of an applicant for naturalization shall be admissible as evidence in any hearing pursuant to 8 USCA § 1447(a)).
- **15 USCA § 16 Judgments (Monopolies)** (bearing on records, provides that a competitive impact statement filed under this section is not admissible in district court proceedings pursuant to this section).
- **15 USCA § 80a-39 Procedure for issuance of orders (Investment Companies)** (bearing on hearsay, provides that applications which are verified under oath may be admissible in any proceeding before the Commission).
- **15 USCA § 1071 Appeal to courts (Trademarks)** (bearing on hearsay, provides that the records in the Patent and Trademark Office shall be admitted without prejudice in suits brought pursuant to this section).
- **18 USCA § 981 Civil forfeiture** (bearing on prior testimony, provides that judgments or orders of forfeiture by courts of foreign countries, along with recordings and transcripts of such proceedings, and, orders or judgments of conviction for drug activities by foreign courts, along with recordings and transcripts of such proceedings, shall be admissible in evidence in proceedings brought pursuant to this section).
- **18 USCA § 2339B Providing material support or resources to designated foreign terrorist organizations** (requires the court to guard against the compromise of classified information in determining whether a response is admissible in any civil proceeding brought by the United States pursuant to this section).
- **18 USCA § 3118 Implied consent for certain tests** (applying in special maritime and territorial jurisdictions, allows a person's refusal to submit to sobriety tests to be admitted into evidence in any case arising from that person's driving under the influence in such jurisdiction).
- **18 USCA § 3504 Litigation concerning sources of evidence** (pertaining to proceedings to determined the admissibility of evidence, provides that where the evidence is alleged to be a product of an unlawful act, disclosure of the information contained in the evidence shall not be required unless relevant).

- **20 USCA § 1234 Office of Administrative Law Judges (Education)** (bearing on Evidence Rule 408, provides that conduct or statements made in compromise negotiations is inadmissible in proceedings before the Office of Administrative Law Judges).
- **26 USCA § 6103 Confidentiality and disclosure of returns and return information (IRC)** (bearing on privileges and authenticity, provides: (1) returns shall not be admissible in proceedings pursuant to this section if such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation; and (2) a reproduction of a return or documents shall be admissible in any judicial or administrative proceedings as if it were the original).
- **28 USCA § 2245 Certificate of trial judge admissible in evidence (Habeas Corpus Proceedings)** (provides that the certificate, setting forth the facts of the petitioner's trial, made by the presiding judge shall be admissible in evidence in habeas corpus proceedings).
- **28 USCA § 2247 Documentary evidence (Habeas Corpus Proceedings)** (provides that transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony shall be admissible in habeas corpus proceedings).
- **28 USCA § 2639 Burden of proof; evidence of value (Court of International Trade)** (bearing on hearsay and records, provides that reports or depositions of consuls, customs officers and others as provided, as well as relevant and authenticated price lists and catalogs, are admissible in any civil action in the Court of International Trade where the value of merchandise is in issue).
- **42 USCA § 666 Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement (Social Security)** (bearing on expert testimony, lists requirements for the admissibility of genetic testing in a child support enforcement proceeding).

- **47 USCA § 223 Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications** (provides that the use of measures to restrict access shall be admissible in criminal proceedings involving sexually offensive communications online).

STATUTES PROVIDING THAT THE RULES OF EVIDENCE ARE NOT APPLICABLE TO CERTAIN TYPES OF PROCEEDINGS

- **5 USCA § 579 Arbitration proceedings** (bearing on all rules, provides that *any* oral or documentary evidence is admissible, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded).
- **8 USCA § 1254 Suspension of deportation** (permits the Attorney General to consider "any credible evidence relevant to the application" when making a determination on whether to suspend the deportation of certain aliens).
- **16 USCA § 825g Hearings; rules of procedure (Licensees and Public Utilities)** (provides that the Rules of Evidence do not apply to proceedings pursuant to this chapter).
- **18 USCA § 1467 Criminal forfeiture (Obscenity)** (allows the court to consider, at hearings pursuant to this section, evidence that would be inadmissible under the Federal Rules).
- **18 USCA § 1512 Tampering with a witness, victim, or an informant** (allows the court to consider, at prosecutions pursuant to this section, inadmissible or privileged evidence).
- **18 USCA § 1736 Restrictive use of information (Postal Service)** (bearing on admissions, provides that compliance with 39 USCA § 3010 shall not be considered as an admission or used against a person in a criminal proceeding, except as provided).
- **18 USCA § 1963 Criminal penalties (RICO)** (permits the court to consider, at hearings pursuant to this section, evidence that would be inadmissible under the Federal Rules).
- **18 USCA § 2253 Criminal forfeiture (Sexual Exploitation and Other Abuse of Children)** (permits the court to consider, at hearings pursuant to this section, evidence that would be inadmissible under the Federal Rules).
- **18 USCA § 3142 Release or detention of a defendant pending trial** (provides that the Rule of Evidence do not apply to such hearings).
- **18 USCA § 3593 Special hearing to determine whether a sentence of death is justified** (provides that the Rules of Evidence do not apply to such hearings, however, information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury).
- **21 USCA § 848 Continuing criminal enterprise (Drug Abuse Prevention and Control)** (bearing on all rules, provides that information relevant to mitigating or aggravating factors may be considered, regardless of its admissibility under the Rules, at sentencing hearings pursuant to this section, however, information may be excluded if its probative valued is substantially outweighed by the danger of unfair prejudice, confusion or misleading the jury).
- **21 USCA § 853 Criminal forfeitures (Drug Abuse Prevention and Control)** (provides that the court may consider evidence, at forfeiture hearings pursuant to this section, that would be inadmissible under the Federal Rules).

- **22 USCA § 4136 Foreign Service Grievance Board procedures** (bearing on all rules, provides that any oral or documentary evidence may be received, except irrelevant, immaterial or unduly repetitious evidence shall be excluded, in any hearing held by the Board).
- **42 USCA § 405 Evidence, procedure, and certification for payments (Social Security)** (provides that the Federal Rules are inapplicable to hearings before the Commissioner of Social Security).
- **42 USCA § 1383 Procedure for payment of benefits (Social Security)** (provides that the Federal Rules are inapplicable to hearings before the Commissioner of Social Security).
- **42 USCA § 1395oo Provider Reimbursement Review Board (Social Security)** (provides that the Federal Rules are inapplicable to hearings pursuant to this section).
- **42 USCA § 11112 Standards for professional review actions** (provides that evidence may be considered in hearings reviewing the professional conduct of a physician, regardless of its admissibility under the Federal Rules).

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Memorandum To: Advisory Committee on Evidence Rules
From: Subcommittee on Privileges
Re: Draft of Privilege Rules
Date: March 1, 2001

Attached to this memorandum are several drafts and supporting memoranda setting forth proposed privileges. The proposals set forth the following rules:

1. A catch-all provision to take the place of the current Rule 501.
2. The lawyer-client privilege.
3. A privilege for a witness to refuse to give adverse testimony against a spouse in a criminal case.
4. A privilege for interspousal confidential communications.
5. A waiver rule.

At its April, 2000 meeting, the Committee considered initial drafts of the catch-all provision, lawyer-client privilege, and the waiver rule. Many helpful comments were made, and the Subcommittee revised the drafts to incorporate these comments and to address concerns expressed by the Committee. These drafts were further revised in light of comments made during a telephone conference of Subcommittee members.

The Subcommittee would appreciate any comments that the Committee may have on the current drafts.

"Catch-All" or General Rule of Privilege

General Privileges Provision, Revised to Reflect Discussion at Advisory Committee Meeting, April, 2000 and suggestions of the Style Subcommittee.

Rule 501. General Rule; State Law; Other Privileges.

(a) General rule. Except as otherwise provided by the Constitution of the United States, Act of Congress, these rules, or other rules prescribed by the Supreme Court pursuant to statutory authority, there is no privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object, writing, recording or other information, whether in tangible, electronic, or other form; or

(4) prevent another from being a witness, disclosing any matter or producing any object, writing, recording or other information, whether in tangible, electronic or other form.

(b) State law. In a civil action or proceeding with respect to an element of a claim or defense as to which state law supplies the rule of decision, and in which there is no federal claim, privileges shall be determined in accordance with state law.

(c) Other privileges. A privilege not recognized by Act of Congress, these rules, other rules prescribed by the Supreme Court pursuant to statutory authority, or existing federal common law, may be recognized only if the court finds in the light of reason and experience that the ~~public and private~~ benefits of the privilege substantially outweigh the loss of probative evidence that the privilege would entail.

Derivation--

Subsection (a) is derived from the original Rule 501 proposed by the Advisory Committee. It also tracks the Uniform Rule.

Subsection (b) is derived from the current Rule 501.

Subsection (c) is a codification of the principles of *Jaffee v. Redmond*, permitting the adoption of privileges not specifically covered by the Rules.

Response to Suggestions Made By Committee and Subcommittee Members

1. *"State Law":*

At the April Advisory Committee meeting, some members expressed concern that the reference in the rule to the "State" law of privilege may not cover the law of the District of Columbia, Virgin Islands, Puerto Rico, etc. A redraft of the rule was circulated to the Subcommittee, which referred to the law of a "domestic jurisdiction." The Subcommittee agreed that this term not only was awkward, but was also a term not used anywhere else in the Evidence Rules. Therefore the "domestic jurisdiction" language was rejected.

Subcommittee members also observed that while a federal court may need to defer to the State law of privilege in diversity cases, it might not have to defer to the law of the District of Columbia, Puerto Rico, etc. These jurisdictions have a different legal relationship with the federal government than do the states. Thus, it may be appropriate to refer in the rule only to "states" and not to District, commonwealths, etc.

The legislative history on the meaning of "state" in the Evidence Rules (i.e., Rules 302, 501 and 602) does not show that any thought was given to whether the District of Columbia, etc. were to be considered as "states" for purposes of those Rules.

I have done some investigation of case law on whether the privilege law of the District of Columbia, Puerto Rico, etc. must govern in federal court in actions where that law provides the rule of decision. So far, I have found only one privilege case somewhat on point. In *Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co.*, 117 F.R.D. 292 (D.D.C.,1987), the court applied the conflict of law rule of the District to determine that one state's law of privilege would apply rather than another. It would seem as if the court assumed that the district law of privilege would itself apply if the conflict rule required it to do so. The court states that Rule 501 leads to the result it reached. If this case is correct, then a reference to the "state" law of privilege may be too limited. I am continuing to research, but the case law is sparse.

Assume that under current Rule 501, a federal court does not and should not follow the District, etc. law of privilege in a case where that law supplies the rule of decision. If the privilege law of these jurisdictions is to be ignored, then the new Rule 501 should simply continue the reference to "State" law, with perhaps a reference in the Committee Note to the fact that the privilege laws of the District, etc. will not apply.

Assume instead that under current Rule 501, a federal court does and should follow the District, etc. law of privilege in a case where that law supplies the rule of decision. The solution in this situation is not to refer to the awkward term "domestic jurisdiction." A better solution might be to include a sentence at the end of the section, defining the term "State." Such a solution would look like this:

(b) State law. In a civil action or proceeding with respect to an element of a claim or defense as to which state law supplies the rule of decision, and in which there is no federal claim, privileges shall be determined in accordance with state law. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

The sentence defining the term "state" tracks the language of 18 USC 245(d).

Roger Pauley's response to this proposal is that it might create a problem of interpretation with Rules 302 and 601, where the term "State" is used without a definition. He suggests that a definitions section be added to the Evidence Rules, so that terms like "state" and "oath" can be defined for purposes of all the Rules.

Whether a definitions section should be added to the Evidence Rules is a complex question for the Committee. The Standing Committee historically has been unfavorably disposed to a definitions section in the Evidence Rules. One obvious problem with definitions is, "where do you stop?" Do you define "probative value"? Do you define "character" or "admissibility"? On the other hand, there might be the possibility of negative consequences if only some definitions are provided. Terms left undefined may raise a problem of unintended new construction by courts and litigants.

If the Committee does not wish to go down the road of a definitions provision, would it be anomalous to include a definition of "state" in a new Rule 501 if the term is left undefined in the other rules? This is a question for the Committee. It should be noted, however, that there is at least one other instance of terms being defined in one rule but not in others. Rule 1001 defines "writings" and "recordings" for purposes of Article X; these terms are used elsewhere undefined.

If the Committee believes that the term "state" should not be defined in the text of the rule, it might consider including the definition in the Committee Note.

Conclusion on the "state" question:

The rule as currently drafted uses the term "State" undefined. The Committee must decide whether a federal should defer to the privilege law of the District, Commonwealth or Territory in cases where that law provides the rule of decision. Existing case law on the subject is sparse and research is continuing. Assuming the Committee decides that a federal court should defer to District, etc. privilege law, then the following alternatives are presented:

1. Add the language defining "state" set forth above, to the end of the section.

2. Retain the current draft and add the language defining "state" to the Committee Note.

3. Add a definitions section to the Evidence Rules, and include the above definition of "state" to the list of definitions.

2. *"Mixed" Claims:*

At the April Advisory Committee meeting, the question was raised whether the federal law of privilege should apply to all claims and cases brought in federal court, even state law claims. Most Committee members were highly skeptical of this proposition. The predominant view was that applying federal law of privilege to state claims raises the same comity concerns that led Congress to reject the initial set of Advisory Committee proposals on privileges. Moreover, it is completely inconsistent with existing law. Therefore, the principle that the state law of privilege controls in state law cases has been retained in this draft. However, the predominant rule is that if there is any federal claim in the case, the privilege controls all the claims. In accordance with the suggestion of the Committee, the text now provides that state law of privilege is controlling only if there is no federal claim in the case.

3. *Other Privileges*

The section on other privileges has been amended to recognize that there might be common law privileges retained by Congress even after a codification. Without such language, there is a risk that codification will result in the inadvertent abrogation of a common law privilege.

The new draft also deletes the reference to "public and private interests" required to support a new privilege. There may be a privilege which serves only public interests (e.g., governmental privilege), and the recognition of such a pure public privilege does not seem foreclosed by *Jaffee*.

Catch-all Privilege Rule -- Matters for Committee Note

1. If the rule of decision is supplied by foreign law, the court must determine whether to apply the federal or the foreign law of privilege. Cite cases discussing this issue.

2. There are some provisions in CFR that might be thought to have an effect on privileges. See, e.g., 27 C.F.R.§ 70.803 (disclosure of ATF records in criminal cases, privilege controlled by Director); 32 C.F.R. § 725.8 (national defense, release of information and testimony by Navy personnel). To the extent administrative rules impact on privileges, it is almost always by determining the application of privileges in administrative proceedings. These regulations have no effect on the Evidence Rules, which apply to court proceedings. Other administrative rules appear to affect discovery (e.g., rules exempting certain governmental officials from pretrial discovery in criminal cases). But these rules are not grounded in an evidentiary privilege. To the extent there are administrative rules that purport to exclude evidence on grounds of privilege in a federal court proceeding, it could be argued that such a privilege is not recognized under Rule 501 because the source of law language does not mention administrative rules. But administrative rules, to be valid, must proceed from a delegation in an Act of Congress. Therefore, the reference to Act of Congress in the rule is broad enough to cover valid administrative regulations.

3. Specify that some new privileges might serve public and private interests whereas others might serve only public interests.

4. Specify that the reference to privileges existing under common law refers only to those privileges not specifically recognized or abrogated by Congress in a codification. Pre-existing federal common law should not affect privileges that are part of the enactment (e.g., the attorney-client privilege)–if it did, there would be little reason for codification.

Lawyer-Client Privilege

LAWYER-CLIENT PRIVILEGE (Draft, February 17, 2001)

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "client" is a person who or an organization that consults a lawyer to obtain professional legal services.

(3) An "organization" is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, governmental entity, or other for-profit or not-for-profit association.

(4) A "lawyer" is a person who is authorized to practice law in any domestic or foreign jurisdiction or whom a client reasonably believes to be a lawyer;

(5) A "privileged person" is a client, that client's lawyer, or an agent of either who is reasonably necessary to facilitate communications between the client and the lawyer.

(6) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

(b) General Rule of Privilege.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client.

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A lawyer, agent of the lawyer, or an agent of a client from whom a privileged communication is sought may invoke the privilege on behalf of the client if implicitly or explicitly authorized by the client.

(Continued on next page)

(d) Standards for Organizational Clients

With respect to an organizational client, the lawyer-client privilege extends to a communication that

(1) is otherwise privileged;

(2) is between an organization's agent and a privileged person where the communication concerns a legal matter of interest to the organization within the scope of the agent's agency or employment; and

(3) is disclosed only to privileged persons and other agents of the organization who reasonably need to know of the communication in order to act for the organization.

(e) Privilege of Co-Clients and Common-Interest Arrangements.

If two or more clients are jointly represented by the same lawyer in a matter or if two or more clients with a common interest in a matter are represented by separate lawyers and they agree to pursue a common interest and to exchange information concerning the matter, a communication of any such client that is otherwise privileged and relates to matters of common interest is privileged as against third persons. Any such client may invoke the privilege unless the client making the communication has waived the privilege. Unless the clients agree otherwise, such a communication is not privileged as between the clients.**[Communications between clients or agents of clients outside the presence of a lawyer or agent of a lawyer representing at least one of the clients are not privileged.]**

(f) Exceptions. The lawyer-client privilege does not apply to a communication

(1) from or to a deceased client if the communication is relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction;

(2) that occurs when a client consults a lawyer to obtain assistance to engage in a crime**[,]** [or] fraud **[or intentional tort]** or aiding a third person to do so. Regardless of the client's purpose at the time of consultation, the communication is not privileged if the client uses the lawyer's advice or other services to engage in or assist in committing a crime **[,] [or]** fraud **[or intentional tort].**

(3) that is relevant and reasonably necessary for a lawyer to reveal in a proceeding to resolve a dispute with a client **[regarding compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer];**

(4) that is relevant and reasonably necessary for a lawyer to reveal in order to defend against an allegation by anyone that the lawyer, the lawyer's agent, or any person for whose conduct the lawyer is responsible acted **[wrongfully or negligently]** during the course of representing a client;

(5) between a trustee of an express trust or a similar fiduciary and a lawyer or other privileged person retained to advise the trustee concerning the administration of the trust that is relevant to a beneficiary's claim of breach of fiduciary duties;

(6) between an organizational client and a lawyer or other privileged person, if offered in a proceeding that involves a dispute between the client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, provided the court finds

(A) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;

(B) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(C) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

Lawyer-client Privilege

Responses to Committee Questions With Regard to Draft Rule on Privilege

Prepared by Ken Broun

1. *Is the draft broad enough to cover people in foreign countries who perform legal services, such as notaries?*

No. However, I suggest that we leave the language as it is. The privilege, as drafted and as generally applied in both the state and federal courts, covers only lawyers. Where the case law has recognized the privilege as covering non-lawyers who are covered by a comparable privilege in other countries, the issue is a choice of law problem. The court does not decide that there would be privilege for such a communication under the appropriate law of the United States, but rather that, under choice of law principles, the foreign privilege should be recognized. See, e.g., *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992); *SmithKline Beecham Corp. v. Apotex*, 193 F.R.D. 530 (N.D. Ill. 2000). I don't think we should get into choice of law questions in this rule.

2. *A separate problem, suggested by the cases involving foreign patent agents, is the possibility that communications to U.S. patent agents are privileged.*

Although there is by no means unanimity among the courts that have looked at the question, a number of cases have held that communications between a U.S. patent agent and a client may be privileged where the patent proceeding is before the patent office and the agent is registered with that office. See, e.g., *In re Ampicillin Antitrust Litigation,* 81 F.R.D. 377 (D.D.C. 1978). See also discussion in Yoshida, The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals, 66 Fordham L. Rev. 209 (1997). If the Committee believes that such communications should be privileged, I believe that the privilege is and should continue to be viewed as a separate one from the lawyer-client privilege, even though it is based on some of the same policy considerations. If included within the lawyer-client privilege, the definitions of "communication," "lawyer" and "in confidence" would all have to be adjusted in order to take this special circumstance into account. Rather than draft some complex language to be included in this rule, I have decided to await the Committee's further instructions.

3. *Does the present language protect communications between two clients in a joint defense situation where a lawyer is not present?*

I think that it does under some circumstances. The court in *United States v. Gotti*, 771 F.Supp. 535 (E.D.N.Y. 1991) suggested that such communications would not be protected. However, the basis of the court's rejection of the privilege in that instance was the absence of any showing that the persons communicating with each other were in fact involved in a joint defense

situation. No case that I could find categorically rejects all such communications. Some commentaries have suggested that, under certain circumstances, communications between clients involved in a joint defense could be protected by the privilege. See, e.g., Welles, A Survey of Attorney-Client Privilege in Joint Defense, 35 U Miami L.Rev. 321 (1981). Some statements made in connection with a joint representation case, might well be entitled to protection. For example: one client says to the other: "Tell the lawyer about what happened and see if she thinks that affects our case." I would protect such a communication and the language as originally drafted does so. If we don't want such communications to be covered, the committee should adopt the suggested bold face language at the end of paragraph (e).

4. *Should the crime-fraud exception be expanded to preclude the privilege when the client seeks advice to aid him in a tortious, as opposed to a criminal or fraudulent act?*

Probably more cases, especially federal cases, that have looked at the issue have expanded the exception to include intentional torts. Virtually all the cases are district court opinions. The D.C. Circuit uses language that includes "other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982). However, the Court of Appeals decisions I have found have always involved activities that were criminal or fraudulent, rather than simply tortious. My own view is best expressed in the commentaries to the Restatement of the Law Governing Lawyers, §132, p. 462-3; " . . . limiting the exception to crimes and frauds produces an exception narrower than principle and policy would otherwise indicate. Nonetheless, the prevailing view limits the exception to crimes and frauds. The actual instances in which a broader exception might apply are probably few and isolated, and it would be difficult to formulate a broader exception that is not objectionably vague." If the Committee wants to include a somewhat broader concept than crime or fraud, the words "or intentional tort" as indicated in bold face in the draft, could be added.

5. *Have we dealt with the situation where an in-house lawyer is fired for whistleblowing and sues for retaliatory discharge?*

The cases dealing with this question, rather than turning on the definition of privilege, appropriately focus on the confidentiality language of rules such as 1.6 of the Model Rules of Professional Conduct or 4-101(C)(4) of the Model Code of Professional Responsibility. Such cases have reached varying results as to whether a discharged lawyer might disclose confidential communications in order to support a retaliatory discharge claim. Compare *Willy v. Coastal States Management Co.*, 939 S.W.2d 193 (Tex.Ct. App. 1996) with *Kachmer v. Sungard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997). Nevertheless, the exception to the privilege rule is not irrelevant to such disputes. Exception 3(f) as presently drafted is ambiguous. As drafted, a good argument can be made that a client could not successfully invoke the privilege in a retaliatory discharge case although the result is not entirely clear. The optional language in bold

face would more clearly limit the scope of the exclusion and more clearly prevent the lawyer from so testifying over the objection of his former client/employer in a retaliatory discharge case.

6. *Have we adequately set out the Garner v. Wolfinbarger exception?*

I think that we have. However, there are significant policy decisions to be made. Arguments can be made against the exception in any form. See Saltzburg, Corporate Attorney-Client Privilege in Shareholders' Litigation and Similar Cases: *Garner* Revisited, 12 Hofstra L. Rev. 817 (1984). Others have argued that the exception should not be expanded beyond the derivative suit. Friedman, Is the Garner Qualification of the Corporate Attorney-client Privilege Viable After Jaffee v. Redmond, 55 Bus. Lawyer 243 (1999). But see *In re Occidental Petroleum Corporation,* 217 F.3d 293 (5th Cir. 2000) (*Garner* exception applied other than in a derivative action). My recommendation is to leave the exception as drafted.

7. *Who are the client's agents within the definition of "privileged person?" Would a spouse or a friend qualify?*

The answer is sometimes yes and sometimes no. Although the case law is not entirely clear, the issue is probably correctly stated in 1 Strong et al, McCormick on Evidence, § 91 (5th Ed. 1999): "whether the presence of the relative or friend was reasonably necessary for the protection of the client's interests in the particular circumstances." By defining "privileged person" as we have, we have stated the general rule and appropriately left it up to the courts to decide whether a spouse or friend is an agent under the circumstances of the communication.

8. *Have we correctly defined "organization?"*

I think we have. The language includes all entities that might reasonably be included.

9. *Is the term "client" defined broadly enough to cover all potential clients?*

I think so. The definition is in accord with the case law.

Additional Comments Concerning Lawyer-Client Privilege Based Upon Subcommittee Meeting, Feb. 16, 2001

The Subcommittee on Privileges conferred by telephone conference on February 16 to review the existing drafts of the privilege rules. Suggestions made during the meeting resulted in a few needed changes to the drafts. The following comments discuss changes made in an earlier draft of the proposed lawyer-client privilege and elaborate on questions raised during the meeting of the subcommittee.

1. Section (a)(1) was amended by the subcommittee to change the phrase "attempts to convey information" to "intends to convey information." The change takes into account both the need for intent to convey information in order for a communication to exist and the fact that communications may be completed rather than simply attempted. The originally drafted language was based on Restatement of the Law Governing Lawyers, § 119 where the phrase used is "undertakes to convey information."

2. The word "record" is used in Section (a)(1). The subcommittee determined that we should not try to define the word in the rule, but recommended that the Committee Note refer to the use of the word "record" elsewhere in the rules, e.g., 803(6), 902(11) and 902(12), and its definition in those contexts.

3. The language of Section (b) was rewritten based upon the subcommittee's direction. The originally drafted language was based on Restatement § 118. It read: *The lawyer-client privilege may be invoked with respect to a communication made between or among privileged persons in confidence for the purpose of obtaining or providing legal assistance for the client.* The subcommittee believed that our rule must set forth the effect of an invocation of the rule, rather than simply stating when the privilege may be invoked. The privilege rule must operate as a rule of exclusion rather than a rule of invocation. The draft is now based on Proposed Uniform Rule of Evidence 503(b) and Revised Uniform Rule of Evidence 502(b).

4. In Section (c), the phrase "if implicitly or explicitly authorized by the client" has been added to the draft. The original draft was based on Restatement § 135 and Proposed Uniform Rule 503(c) and Revised Uniform Rule 502(c). The phrase was added by the subcommittee specifically to preclude a lawyer from invoking the privilege against the client's wishes.

5. The heading for Section (d) was changed from "Privilege for Organization" to "Standards for Organizational Clients." The change more clearly reflects the fact that organizations do not have a separate privilege. The section simply sets forth the specific standards for determining when the privilege exists in the case of an organization.

6. Section (f)(4) now contains the bracketed words **wrongfully or negligently.** The original draft used only the word "wrongfully." The subcommittee believed that the originally drafted language, which was borrowed from Restatement § 133, did not clearly cover a legal malpractice case and that such cases should be within the exception. However, it wanted to get full committee input on the issue and on the exact language that might be used.

Spousal Privilege Against Adverse Testimony

Draft of Spousal Privilege Against Providing Adverse Testimony

Rule 5__. Spousal Testimony In a Criminal Proceeding.

(a) General rule of privilege. In a criminal proceeding the spouse of an accused has a privilege to refuse to testify against the accused spouse.

(b) Exceptions. There is no privilege under this rule:

(1) if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged;

(2) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other or a child of either; or

(3) if the interests of a minor child of either spouse would be adversely affected by invocation of the privilege.

Derivation–

Subsection (a) is derived from Rule 504 of the Uniform Rules. The original Advisory Committee proposal is not a proper model because it provides that the accused has a privilege to prevent his spouse from testifying. This is no longer the law after *Trammel v. United States*.

Subsection (b)(1) is the joint participants exception, derived from the Uniform Rules. Federal courts are split on the exception–for example, the Second Circuit rejects it and the Tenth Circuit accepts it. So the Committee must decide whether such an exception is good policy. The problem with the exception is that it tends to swallow the privilege since most spouses who invoke the privilege are probably involved in one way or another in their spouse's criminal activity. Casting the language in terms of "acting jointly in the commission" of the crime tends to limit the exception somewhat (e.g., it probably would not cover accessories after the fact), and that is probably a good thing.

Subsection (b)(2) is derived from Rule 505 as initially proposed by the Advisory Committee. There is similar language in the Uniform Rule.

Derivation (cont.)

Note that Advisory Committee Rule 505 also provided the privilege did not apply as to testimony concerning matters occurring prior to the marriage. Only one federal court (the Seventh Circuit) has adopted this exception, meaning that in this Circuit the spouse must testify to adverse facts about the accused if the facts arose before their marriage. This rule makes little sense assuming that one believes that the adverse testimonial privilege is needed to preserve marital harmony at the time of the testimony. Since the focus is on the relationship at the time of the testimony, it shouldn't matter that the act testified to occurred before the marriage. Therefore, the "pre-marital acts" exception to the privilege is not included in the draft.

Subsection (b)(3) is derived from the Uniform Rule. Whether to establish a "harm to minors" exception–and whether to provide for an exception more limited than that set forth in the draft–are policy questions for the Committee.

Note: There is an a priori question of whether the adverse testimonial privilege should even be promulgated. Many states do not have such a privilege, and federal courts have not given the privilege a generous reading.

Matters for Advisory Committee Note on Adverse Testimonial Privilege–

1. The privilege does not apply to civil cases because the threat to marital harmony, and the emotional pressure on the witness, is not as severe as in criminal cases. Federal courts using a common law approach have refused to apply the privilege to civil cases.

2. The rule does not prohibit the government from seeking cooperation from a witness-spouse, e.g., by a plea agreement.

3. The rule does not prohibit the use of a spouse's out-of-court statement that is otherwise admissible under the hearsay rule.

4. Who is a spouse is defined by state law.

5. Where the privilege exists, it covers activity occurring before the marriage. The sham marriage exception entertained by some common law courts makes no sense after *Trammel*, which held that the privilege is held by the witness-spouse, not by the litigant. Thus, an accused would not likely engage in a sham marriage to invoke the privilege, because the invocation of the privilege is not within his control.

Privilege Protecting Interspousal Confidential Communications

MARITAL COMMUNICATIONS PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which one spouse intends to convey information to another spouse or any record containing such an expression.

(2) A "spouse" is either partner to a marriage recognized as such under the law of the place of the origination of their marriage.

(3) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating spouse reasonably believes that no one except the other spouse will learn the contents of the communication.

(b) General rule of privilege.

A spouse has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between spouses during the existence of their marriage.

(c) Who may claim the privilege.

Either spouse may claim the privilege. However, notwithstanding any other provision of these rules, a waiver of the privilege by the communicating spouse is binding on both spouses.

(d) Exceptions. There is no privilege under this rule:

(1) in any civil proceeding in which the spouses are adverse parties;

alternative 1
[(2) in any criminal proceeding if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged;]

alternative 2
[(2) in any criminal proceeding if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged and the communication was in furtherance of that crime;]

alternative 3
[(2) if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of patently illegal activity;]

(3) in proceedings in which one spouse is charged with a crime or tort against the person

or property of the other or of a child of either, or with a crime or tort against the person or property of a third person committed in the course of committing a crime or tort against the other or a child of either; or

(4) if the interests of a minor child of either spouse would be adversely affected by invocation of the privilege.

alternative 1

[(5) if the spouses were separated at the time of the communication and the marriage was irreconcilable.]

alternative 2

[(5) if the spouses were permanently separated at the time of the communication.]

Derivation of Marital Communications Privilege and Issues to be Discussed

Prepared by Ken Broun

Section (a)(1):

This is an adaptation of the communications definition in the lawyer-client draft. By adopting this definition, we would be limiting the privilege to expressions intended by one spouse to convey a meaning or message to the other. Many state courts go beyond this to include acts done privately in the presence of the spouse. The rule would have to be amended to include such acts. As expressed in 1 Strong et al, McCormick on Evidence, § 79 (5th Ed. 1999), an extension beyond intended expressions does not seem to be wise policy. For federal cases limiting the exception to communications, see *United States v. Lofton*, 957 F.2d 476 (7th Cir. 1992); *United States v. Estes*, 793 F.2d 465 (2d Cir. 1986). As in the case of the amendment made by the subcommittee to the lawyer-client privilege, this draft changes the phrase "attempts to convey" to "intends to convey."

Section (a)(2):

This definition was revised by the subcommittee to reflect the policy determination that the law of the place of origination of the marriage should govern. The parties have a reasonable expectation that the law governing their marriage will continue to be that place. The original draft of this subsection read as follows: *A "spouse" is either partner to a marriage recognized as such under the law of the place where the couple lived at the time of the communication in question or, if the couple was not living together at the time of the communication, the place of the origination of their marriage.* The first part of this definition, dealing with the place where the couple lived at the time of the communication, was based on case law. See particularly *People v. Schmidt*, 579 N.W. 2d 431 (Mich. App. 1998) (recognizing a common law marriage valid under the law of the place where the couple resided at the time of the communication); *Compare United States v. Acker*, 52 F.3d 509 (4th Cir. 1995) (no privilege where neither of the states in which couple had lived recognized common law marriages). The clause dealing with origination of the marriage was added in the original draft to deal with the unlikely, but possible, situation where the couple had temporarily separated and the partners were living in different states. There is little case law one way or the other to support the origination language, either in the original draft or in the subcommittee's version. However, at least one court has referred to the need to give full faith and credit to common law marriages "originating in other states." *State v. Williams*, 688 So.2d 1277 (La.App. 1997). In addition, the definition does not deal specifically with the question of a bigamous marriage. However, the word "marriage" is intended to mean a valid marriage. If the committee thinks it useful, the word "valid" can be added. However, a comment in the note should be sufficient to deal with the question. The issue that occurs when one spouse is not aware of the invalidity of the marriage can be dealt with by

the courts without trying to anticipate the question in the rule.

Section (a)(3):

The definition of "in confidence" is adapted from the draft of the lawyer-client privilege.

Section (b):

The general rule is adapted from the draft of the lawyer-client privilege. It was amended after the subcommittee meeting to conform to the suggested changes in the changes in the lawyer-client privilege. The new draft clearly states that a spouse may prevent "any other person from disclosing a communication." Obviously, this includes an eavesdropper, provided the communication was in confidence within the meaning of (a)(3). There are cases, especially older cases, that do not protect a spouse from the testimony of eavesdroppers. See cases collected in 1 Strong et al, McCormick on Evidence § 82 (5th Ed. 1999). However, the better policy would seem to be to protect confidential statements from disclosure from any source. See California Evidence Code § 980.

Section (c):

This statement varies from Uniform Rule 504, which states the privilege: "An individual has a privilege to refuse to testify and to prevent the individual's spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage." The Uniform Rule thus limits the privilege to the communicating spouse and we could certainly justify a similar statement. Such a limitation would be consistent with the policy of encouraging freedom of expression between spouses. However, there would seem to be no good policy reason to deny the listening spouse the right to assert the privilege. The privilege works both ways in conversations between lawyer and client. Similarly, in the case of marital communications, there may be situations in which one spouse's silence is itself a communication or an entire conversation is offered to show the collective expressions of both spouses. See discussion in Mueller & Kirkpatrick, Evidence §5.32, p. 457 (Aspen 1999). See also Calif. Evid. Code § 980. However, there would seem to be no reason to continue the existence of the privilege once it is waived by the communicating spouse. For example, the communicating spouse may want the statement in evidence because it is exculpatory. There is not a good policy reason to enable the listening spouse to prevent such a disclosure.

Section (d)(1):

Derived from Uniform Rule 504(1).

Section (d)(2):

There are three alternatives set out. The first alternative is taken from the draft of the Spousal Testimony Privilege. That draft is in turn borrowed from the Uniform Rule, although the burden is changed from "unrefuted" to a "preponderance."

The second alternative is based upon the discussion in 2 Saltzburg, Martin & Capra, Federal Rules of Evidence Manual, 742-43 (Lexis 1998) where the authors argue that a "joint participants" privilege may be applicable to the adverse testimony privilege, but is not well-suited to the marital communications privilege. The exception should rather go to the intent behind the communication rather than to the status of the communicant." Although the point made is a good one, there does not seem to be much federal case law support for it. Most cases, like *United States v. Hill,* 967 F.2d 902 (3d Cir. 1992), articulate a pure joint participant privilege without regard to whether the communications in question were in furtherance of the crime.

The third alternative is based upon the language of decisions in some circuits that limit the exception to "patently illegal activity." See *United States v. Evans,* 966 F.2d 398 (8th Cir. 1992); *United States v. Sims,* 755 F.2d 1237 (6th Cir. 1985). If the "patently illegal activity" test is used, there would seem to be little reason for limiting the exception to criminal cases or to communications dealing only with a crime charged in an indictment.

Section (d)(3):

Derived from the draft of the Spousal Testimony Privilege, which was borrowed from the Uniform Rule.

Section (d)(4):

Derived from the draft of the Spousal Testimony Privilege, which was borrowed from the Uniform rule.

Section (d)(5):

Many states apply the marital communications privilege regardless of whether the spouses are living together at the time of the communication. See 1 Strong, et al, McCormick on Evidence, § 81 (5th Ed. 1999). However, all of the federal circuits which have dealt with the question have considered the continuing viability of the marriage in determining whether the privilege is applicable. The two alternatives reflect the two different tests used to determine viability. *Compare United States v. Murphy*, 65 F.3d 758 (9th Cir. 1995) (no privilege where the couple has separated and the marriage is irreconcilable) with *United States v. Porter,* 986 F.2d 1014 (6th Cir. 1993) (no privilege if the couple has permanently separated).

Waiver Rule

Waiver Rule (Revised in light of comments at April, 2000 Advisory Committee meeting):

(a) General rule. A privilege conferred by these rules is waived as to any communication if the holder of the privilege, or the holder's authorized representative:

(1) voluntarily discloses or consents to disclosure of the otherwise privileged information in a non-privileged communication;

(2) uses the privileged information, directly or indirectly, as part of a claim or defense; or

(3) fails to make a proper objection to an attempt by another person to give or obtain testimony or other evidence of a privileged communication.

(b) Inadvertent disclosure. An inadvertent disclosure of privileged information is not a waiver if the person responsible for the disclosure:

(1) exercised due care under the circumstances;

(2) discovered the disclosure with due diligence; and

(3) took all reasonable efforts to protect and retrieve the information once the disclosure was discovered.

If the court finds that an inadvertent disclosure is not a waiver, the party who received the privileged information is prohibited from proffering that information at trial. The receiving party is also prohibited from proffering any evidence that is derived directly or indirectly from the privileged information. The party who disclosed the privileged information has the burden of showing, by a preponderance of the evidence, that information proffered by the receiving party is derived from the privileged information.

Derivation---

Subdivision (a) is taken from the Restatement's provision concerning waiver of attorney-client privilege.

Subdivision (b) is an attempt to codify the case law concerning inadvertent disclosures. This case law is not uniform; the language attempts to codify the majority rule. The last clause concerning "fruits" deals with a matter on which there is not much case law; it attempts to stake out a position that would be fair to a party who innocently receives privileged information from an adversary. This matter is obviously a subject of discussion for the Committee.

Change from April version–

In accordance with the suggestion of the Committee, the provision on inadvertent waiver was changed to provide that the disclosing party has the burden of showing that proffered evidence is the fruit of inadvertently disclosed privileged information.

Matters for the Advisory Committee Note–

1. Note that some courts are upholding agreements between the parties that inadvertently disclosed information will not constitute a waiver, especially in cases with a large amount of electronic information.

2. Discuss the advice of counsel defense.

3. Discuss the Westinghouse case and the rejection of the concept of selective waiver.

4. The note should include a discussion about the distinction between waiver and forfeiture. The Note might state that the committee decided against making such a distinction in the text of the rule given the extensive case law treating both waivers and forfeitures under the umbrella term, "waiver."

Consideration of the Distinction Between Waiver and Forfeiture

Judge Shadur has pointed out that the rule governing "waiver" actually covers both waiver and forfeiture of the attorney-client privilege. No attempt is made to distinguish between waivers (an intentional disclosure of privileged information) and forfeitures (conduct which disentitles a person from claiming the privilege).

In response to Judge Shadur's observation, I drafted a revised version of the waiver rule that would distinguish between waivers and forfeitures. It reads as follows:

(a) ~~General rule.~~ Waiver. A privilege conferred by these rules is waived as to any relevant communication if the holder of the privilege, or the holder's authorized representative:

~~(1)~~ knowingly and voluntarily discloses or consents to disclosure of the otherwise privileged information in a non-privileged communication;.

~~(2) uses the privileged information, directly or indirectly, as part of a claim or defense; or~~

~~(3) fails to make a proper objection to an attempt by another person to give or obtain testimony or other evidence of a privileged communication.~~

(b) Forfeiture. A privilege conferred by these rules is forfeited as to any relevant communication if the holder of the privilege, or the holder's authorized representative (1) uses the privileged information, directly or indirectly, as part of a claim or defense, or (2) fails to make a proper objection to an attempt by another person to give or obtain testimony or other evidence of a privileged communication.

~~(b)~~ **(c) Inadvertent disclosure.** A privilege is not forfeited by an inadvertent disclosure ~~An inadvertent disclosure of privileged information is not a waiver~~ if the person responsible for the disclosure:

(1) exercised due care under the circumstances;

(2) discovered the disclosure with due diligence; and

(3) took all reasonable efforts to protect and retrieve the information once the disclosure was discovered.

If the court finds that an inadvertent disclosure is not a ~~waiver~~ forfeiture the party who received the privileged information is prohibited from proffering that information at trial. The receiving party is also prohibited from proffering any evidence that is derived directly or indirectly from the privileged information. The party who disclosed the privileged information has the burden of showing, by a preponderance of the evidence, that information proffered by the receiving party is derived from the privileged information.

The Subcommittee considered this proposal and concluded that while the delineation between waiver and forfeiture would be useful, it might also create some problems. While some courts distinguish between waivers and forfeitures, most do not. Most use the term "waiver" as an umbrella term to cover both waiver and forfeiture. The Subcommittee was concerned that an abrupt change in terminology may be confusing and disruptive without providing a corresponding conceptual benefit. The Subcommittee therefore decided to retain the initial draft and to suggest that the waiver/forfeiture distinction be discussed in the Committee Note. It is for the Committee as a whole, however, to decide whether the rule should specifically distinguish between waivers and forfeitures in the text. If the Committee decides that waivers should be distinguished from forfeitures, then the revised draft that I prepared in response to Judge Shadur's comments should provide a good starting point.

IV

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 4/00 — Approved by Supreme Court **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 4/00 — Approved by the Supreme Court **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 10/99 — Subcomte established to study 4/00 — Considered **PENDING FURTHER ACTION**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared **COMPLETED**
[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**

Proposal	Source, Date, and Doc #	Status
[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**
[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 608(b)] — Inconsistent rulings on exclusion of extrinsic evidence		10/99 — Considered 4/00 — Considered; amendment to be drafted **PENDING FURTHER ACTION**
[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**

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

Proposal	Source, Date, and Doc #	Status
[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 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**
[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 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 4/00 — Approved by the Supreme Court **PENDING FURTHER ACTION**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules 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**

Proposal	Source, Date, and Doc #	Status
[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**
[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 4/00 — Approved by the Supreme Court **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**

Proposal	Source, Date, and Doc #	Status
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **COMPLETED**
[EV 803(18)] — Should "learned treatises" be received as exhibits	Judge Grady	4/00— Considered; comte decides not to act **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception	EV Rules Committee (5/95)	5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 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)(3)] — Degree of corroboration regarding declaration against penal interest		10/99 — Considered by cmte 4/00 — Considered; amendment to be drafted **PENDING FURTHER ACTION**

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

Proposal	Source, Date, and Doc #	Status
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Use of seals	DOJ Committee member	10/99 — Considered 4/00 — Considered; comte decides not to act **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 4/00 — 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 4/00 — Approved by the Supreme Court **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**

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

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

Proposal	Source, Date, and Doc #	Status
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC 6/98 — Reporter's Notes published **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**

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Note

*303 ARE WE THERE YET?: REFINING THE TEST FOR EXPERT TESTIMONY THROUGH DAUBERT, KUMHO TIRE AND PROPOSED FEDERAL RULE OF EVIDENCE 702

Derek L. Mogck [FNa1]

I. Introduction

In 1877, Lord Salisbury remarked that "[n]o lesson seems to be so deeply inculcated by the experience of life as that you never should trust experts. If you believe the doctors, nothing is wholesome: if you believe the theologians, nothing is innocent: if you believe the soldiers, nothing is safe." [FN1] Believing them to be unreliable, the Marquis concluded that experts "all require to have their strong wine diluted by a very large admixture of insipid common sense." [FN2] In American courtrooms, juries, or judges in the case of bench trials, are usually able to resolve cases without relying on expert opinion. However, some lawsuits involve issues beyond the jurors' knowledge or experience. In those situations, jurors need the help of knowledgeable people to reach a fair and informed verdict.

Since 1975, Federal Rule of Evidence 702 (hereinafter "Rule 702") has allowed experts to testify in America's federal courts when their "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." [FN3] However, as Lord Salisbury observed, experts are often unreliable. Therefore, to ensure that it is both helpful and reliable, trial judges must ensure that the "strong wine" of expert testimony is trustworthy or, in modern terms, is not "junk science."

For almost twenty years, however, federal trial courts struggled to interpret Rule 702 because it does not explain how to evaluate expert testimony. [FN4] Then, in both its 1993 Daubert v. Merrell Dow Pharmaceuticals, Inc. [FN5] and its 1999 Kumho Tire Co. v.

Carmichael [FN6] decisions, the United States Supreme Court explained how federal courts should apply the rule. ***304** Nevertheless, while these decisions provided needed clarification, on April 17, 2000, the Court proposed a new version of Rule 702 (hereinafter "Proposed Rule 702"). [FN7] Therefore, because federal courts will likely start employing this new rule on December 1, 2000, [FN8] judges, trial attorneys and legal scholars must understand Proposed Rule 702 and should consider whether it satisfies criticisms lodged against Daubert and Kumho Tire.

This Comment asserts that Proposed Rule 702 clarifies how to evaluate expert testimony after the Court's Daubert and Kumho Tire decisions. In Part II, this Comment traces the development of the standard used to evaluate expert testimony in America's federal courts. Part III presents Kumho Tire's majority and partially concurring opinions. Part IV describes some of the criticism lodged against Kumho Tire. Part V serves three functions. First, it reviews the process through which federal rules, or amendments to those rules, are adopted. Second, it presents the text of Proposed Rule 702. Third, it analyzes how well Proposed Rule 702 responds to Kumho Tire's critics.

II. Background

A. Frye v. United States

In the seminal case of Frye v. United States, the trial court refused to admit evidence offered by James Frye, a murder defendant. [FN9] Frye had produced an expert willing to testify about the results of his "systolic blood pressure deception test." [FN10] Its proponents claimed that the test revealed whether the subject was lying by recording changes in his systolic blood pressure. [FN11] However, the court sustained the prosecutor's objection to the test results' admission. [FN12] Further, the court prohibited the expert from conducting a new systolic blood pressure test on Frye before the jury. [FN13] Thereafter, ***305** when the jury convicted him of murder, Frye appealed. [FN14]

In 1923, the court now known as the United States Court of Appeals for the District of Columbia Circuit affirmed Frye's conviction. [FN15] Although earlier cases allowed "witnesses skilled in [a] particular science, art, or trade to which the question relates" [FN16] to offer opinion testimony, the court explained that not all opinions were admissible. Specifically, the court stated that:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized

scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. [FN17]

Accordingly, the court sustained the trial court's decision to exclude Frye's systolic blood pressure test results. [FN18] More significantly for the law of evidence, however, later courts used the "general acceptance" test to evaluate expert testimony for the next seventy years. [FN19]

B. Federal Rule of Evidence 702

In 1965, United States Supreme Court Chief Justice Earl Warren "appointed an advisory committee to draft rules of evidence for the federal courts." [FN20] In 1969, the advisory committee circulated its first draft. [FN21] In 1971, the committee published its second draft of the rules. [FN22] "In 1972, the Supreme Court prescribed the Federal Rules of Evidence, to be effective July 1, 1973." [FN23] Thereafter, Chief Justice Warren Burger submitted the rules to Congress, which suspended and studied them and added various amendments. [FN24] Finally, on January 2, 1975, Congress enacted an amended set of Federal Rules of Evidence, effective July 1, 1975. [FN25]

***306** Rule 702, "Testimony by Experts," states that:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. [FN26]

Notably, the explanation following Rule 702 did not mention whether an expert's opinion must be "generally accepted" as required by the court in Frye. [FN27] Further, not until its 1993 Daubert v. Merrell Dow Pharmaceuticals, Inc. decision did the Court explain Rule 702's relationship to the Frye test.

C. Daubert v. Merrell Dow Pharmaceuticals, Inc.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., [FN28] two couples, on behalf of their sons deformed at birth, sued Merrell Dow Pharmaceuticals (hereinafter "Dow"), which manufactured the anti-nausea drug Bendectin. [FN29] The families alleged that their sons' "birth defects had been caused by the mothers' ingestion of Bendectin" during pregnancy. [FN30]

However, Dow moved for summary judgment because no scientific evidence linked Bendectin to human birth defects. [FN31]

Specifically, Dow produced an expert who had reviewed "all the literature on Bendectin and human birth defects" and reported that "[n]o study had found Bendectin to be a human teratogen." [FN32]

The families opposed Dow's motion for summary judgment by producing testimony from eight experts. [FN33] Combining their study of Bendectin-related birth defects in animals, the similar chemical composition of Bendectin and known teratogens, and a synthesis of existing epidemiological studies, these experts contended that Bendectin could cause human birth defects. [FN34] Nevertheless, the court noted that the experts' Bendectin reanalysis was neither published nor reviewed by other scientists. [FN35] Therefore, invoking Frye's general acceptance test, the district court granted ***307** Dow's motion for summary judgment. [FN36]

On appeal, the Ninth Circuit Court of Appeals also applied the Frye test in affirming the grant of summary judgment to Dow. [FN37] Like the district court, the Ninth Circuit highlighted the fact that the reanalysis was "not subjected to the normal peer review process and generated solely for use in litigation." [FN38]

The Supreme Court granted the families' petition for certiorari [FN39] to consider two questions: first, whether Frye "remains good law after the enactment of the Federal Rules of Evidence; and second, if Frye remains valid, whether it requires expert scientific testimony to have been subjected to a peer review process in order to be admissible." [FN40] In reversing the grant of summary judgment, the Court agreed with the families' argument that Federal Rule of Evidence 702, and not the Frye test, was the prevailing standard for expert testimony.[FN41] Noting that "[n]othing in the text of [Rule 702] establishes 'general acceptance' as an absolute prerequisite to admissibility," [FN42] the Court concluded that "the Frye test was displaced by the Rules of Evidence." [FN43] However, the Court emphasized that this did not mean that "the trial judge [is] disabled from screening [scientific] evidence. To the contrary, under the [Federal] Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." [FN44] Therefore, to aid trial judges in reviewing expert testimony, the Court offered "some general observations" [FN45] to guide trial judges' consideration.

These four factors, although neither exclusive nor mandatory, [FN46] included (1) "whether [a scientific technique or theory] can be (and has been) tested;" [FN47] (2) "whether the theory or technique has been subjected to peer review and publication;" [FN48] (3) the theory's "known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation;" [FN49] and (4), confirming that Frye was only displaced ***308** as the prevailing standard, the Court added

that "'general acceptance' can yet have a bearing on the inquiry." [FN50] Equipped with these guidelines, the Court charged trial court judges to assume "a gatekeeping role . . . of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." [FN51]

Interestingly, in his partial concurrence, Chief Justice Rehnquist raised precisely the issue later presented in Kumho Tire. Specifically, while chiding the majority for providing "general observations" unnecessary to answer the question presented in the certiorari petition, [FN52] the Chief Justice asked whether the Court's four factors "appl[ied] to an expert seeking to testify on the basis of 'technical or other specialized knowledge'-the other types of expert knowledge to which Rule 702 applies-or are the 'general observations' limited only to 'scientific knowledge?"' [FN53]

D. Post-Daubert Confusion Regarding How to Evaluate Non-Scientific Expert Testimony

After Daubert, lower federal courts wrestled with the question of whether its factors applied to both scientific and non-scientific expert testimony. Indeed, among the eleven circuit courts of appeal that addressed the question, five courts concluded that Daubert's factors applied to non-scientific testimony while six courts concluded that they did not. [FN54] Later, when it resolved the dispute in Kumho Tire, the Court cited Watkins v. Telsmith, Inc. [FN55] and Compton v. Subaru, Inc. [FN56] to illustrate this confusion. [FN57]

***309** 1. Watkins v. Telsmith, Inc.

In Watkins, Loretta Watkins sued her late husband's employer, Telsmith, Inc. (hereinafter "Telsmith"), after a conveyer manufactured by Telsmith's predecessor fell on and killed him. [FN58] To support her defective design claim, Watkins offered the testimony of Marcus Dean Williams. Williams, a civil engineer and junior college engineering instructor who had worked for Mississippi's highway department and the Army Corps of Engineers, encountered conveyers while performing maintenance work during World War II. [FN59]

However, Telsmith moved to exclude Williams' testimony. [FN60] During the pretrial hearing, Telsmith offered the testimony of Raymond Neathery, a mechanical design professor with advanced degrees in mechanical engineering. [FN61] Neathery testified that Williams' conclusions were unreliable because his testimony reflected only "problem identification and proposing solutions [and neglected other essential steps including] investigati [ng] . . .

other designs, analysis, [and] testing of alternatives." [FN62] Thereafter, the court excluded Williams' testimony, in part based on Daubert. [FN63]

On appeal, the Fifth Circuit Court of Appeals affirmed the district court's reliance on Daubert. Specifically, the court concluded that although "Daubert dealt with expert scientific evidence, the decision's focus on a standard of evidentiary reliability and the requirement that proposed expert testimony must be appropriately validated are criteria equally applicable to 'technical, or other specialized knowledge."' [FN64]

2. Compton v. Subaru of America, Inc.

In Compton, Steven Compton was rendered a quadriplegic after the 1982 Subaru GL station wagon in which he and four other teenagers were riding spun out of control and overturned. [FN65] To support his claim against Subaru of America (Subaru), Compton offered the testimony of Larry Bihlmeyer. Bihlmeyer, an aerospace and mechanical engineer, proposed to testify that the car's design "permitted excessive roof crush" which he proposed ***310** to remedy by reinforcing the car's roof structure. [FN66] Subaru's attempt to exclude Bihlmeyer's testimony failed. [FN67] Thereafter, when the jury concluded that Subaru was fifty-six percent liable for Compton's quadriplegia, Subaru appealed. [FN68]

Although it affirmed the district court's verdict, [FN69] the Tenth Circuit Court of Appeals concluded that the "application of the Daubert factors is unwarranted in cases where expert testimony is based solely upon experience or training," instead of "when a proffered expert relies on some principle or methodology." [FN70] Further, because "Mr. Bihlmeyer reached his expert conclusions by drawing upon general engineering principles and his twenty-two years of experience as an automotive engineer . . . [and not on] some particular methodology or technique, [the court found that] Daubert simply ha [d] little bearing on Mr. Bihlmeyer's testimony." [FN71]

III. Kumho Tire Co. v. Carmichael

After observing the conflicting interpretations of Daubert represented by Watkins and Compton, the Supreme Court granted certiorari to review the next circuit court of appeals opinion involving Daubert's application to non- scientific expert testimony, Carmichael v. Samyang Tires, Inc. [FN72]

A. Facts and Procedure

On July 6, 1993, Patrick Carmichael and his family were traveling along Interstate Highway 65 in Alabama when the right rear tire failed on his 1988 Ford Aerostar XL minivan. [FN73] The van overturned, ejecting six of its passengers. [FN74] The accident injured all of the van's occupants and later claimed one passenger's life. [FN75]

Thereafter, Carmichael and his passengers (hereinafter "Carmichael") filed a products liability suit against, inter alia, Kumho & Company (hereinafter "Kumho Tire"), the tire's designer and manufacturer. [FN76] Specifically, Carmichael alleged that the "tire on the right rear of the van failed ***311** because of a manufacturing or design defect." [FN77] To support his claim, Carmichael offered the testimony of Dennis Carlson. Carlson was a tire failure expert with mechanical engineering degrees and experience as a tire tester for Michelin America's Research & Development division. [FN78]

Carlson proposed to testify that Carmichael's right rear tire failed because of a manufacturing defect. [FN79] Specifically, he asserted that the tire instantaneously deflated because the individual components within the tire separated from one another after the bond, or "adhesion," holding them together weakened. [FN80] According to Carlson, either a manufacturing defect or consumer abuse, including over- or underinflating the tire, could loosen this bond. [FN81] Although Carmichael's tire showed some signs of consumer abuse, Carlson believed this evidence was too small to attribute the tire's failure to such abuse. [FN82] Therefore, Carlson concluded that a manufacturing defect caused the tire's failure. [FN83]

Kumho Tire and the other defendants jointly moved to exclude Carlson's testimony as "inadmissible as expert testimony under the standard articulated by the Supreme Court in Daubert . . . [according to which trial courts] must 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."' [FN84]

B. District Court Opinion

Despite Carmichael's protest that Daubert was inapplicable to non-scientific expert testimony, [FN85] the district court applied Daubert's four factors to Carlson's testimony. First, the court found that Carlson's testimony could not be tested or refuted because "Carlson admit[ted] that his work is 'subjective' . . . [and he] could not identify any specific tests or other procedures which could be used to corroborate or refute the results of his visual inspection of the tire at issue." [FN86]

***312** Second, the court stated that "it is evident from Carlson's

testimony that there are no papers or publications which specifically address the propriety of the visual inspection method of analyzing failed tires which Carlson employed in this case." [FN87] Therefore, the court concluded that Carlson's testimony failed to meet Daubert's peer review factor. [FN88]

Third, the court concluded that Carlson's testimony did not supply a "known or potential rate of error" as suggested by Daubert. [FN89] Finally, the court concluded that Carlson's testimony had not been:

> generally accepted in the relevant scientific community. Indeed, the only evidence of general acceptance [wa]s Carlson's bare, unsupported statement that other tire experts testified in depositions that methods similar to those used by Carlson are acceptable means of distinguishing between abused tires and defective tires in tire failure cases. [FN90]

Together, the Daubert factors revealed that "Carlson's testimony is simply too unreliable, too speculative, and too attenuated to the scientific knowledge on which it is based to be of material assistance to the trier of fact." [FN91] Accordingly, the court excluded Carlson's testimony and, because Carmichael's case rested entirely on this testimony, granted Kumho Tire and the other defendants' joint motion for summary judgment. [FN92]

C. Eleventh Circuit Court of Appeals Opinion

On appeal, the Eleventh Circuit Court of Appeals considered "[w]hether the Supreme Court's Daubert criteria for admission of scientific evidence should apply to testimony from a tire failure expert." [FN93] In rejecting the district court's application of Daubert's factors to Carlson's testimony, the Circuit Court explained that "Daubert does not create a special analysis for answering questions about the admissibility of all expert testimony. Instead, it provides a method for evaluating the reliability of witnesses ***313** who claim scientific expertise." [FN94]

The court characterized Carlson's testimony as non-scientific because, although "[t]he laws of physics and chemistry are implicated in the failure of the Carmichaels' tire, Carlson makes no pretense of basing his opinion on any scientific theory of physics or chemistry. Instead, Carlson rests his opinion on his experience in analyzing failed tires." [FN95] Therefore, since "the Supreme Court in Daubert explicitly limited its holding to cover only the 'scientific context,'" [FN96] the court "conclude[d] that Carlson's testimony falls outside the scope of Daubert and that the district court erred as a matter of law by applying Daubert in this case." [FN97] Accordingly, the court remanded the case for reconsideration. [FN98] However, Kumho Tire disagreed and

successfully petitioned the United States Supreme Court to grant certiorari and hear the case. [FN99]

D. Supreme Court Opinion

1. Majority Opinion

Justice Breyer's majority opinion addressed the question of "how Daubert applies to the testimony of engineers and other experts who are not scientists." [FN100] In the next sentence, he stated that "[w]e conclude that Daubert's general holding-setting forth the trial judge's general 'gatekeeping' obligation-applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." [FN101] The Court's conclusion rested on three premises.

First, the Court observed that Rule 702's text "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge." [FN102] In Daubert, the Court had stated that Rule 702's "standard of evidentiary reliability . . . requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." [FN103] The Court explained that Daubert addressed only the trial judge's duty to ensure this connection for scientific testimony "'because that [wa]s the nature of the expertise' at issue." [FN104] Further, since "[d] isciplines such as engineering rest ***314** upon scientific knowledge," it would be "difficult, if not impossible, for trial judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge." [FN105] Accordingly, the Court concluded that a trial judge must ensure that "scientific, technical [and] other specialized knowledge" [FN106] are all reliable and relevant. [FN107]

Second, building logically on its conclusion that "Daubert's general principles apply to [all] the expert matters described in Rule 702," [FN108] the Court stated that "some of Daubert's questions can help to evaluate the reliability even of experience-based testimony." [FN109] The Court used the word "some" to underscore its belief that, as in Daubert, [FN110] these factors "do not constitute a 'definitive checklist or test"' [FN111] because the Court could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence." [FN112] Accordingly, trial judges "should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony." [FN113]

Finally, the Court reassured trial judges that their decisions concerning the admissibility of expert testimony would be conclusive. Specifically, the Court stated that "a court of appeals [should] apply an abuse-of-discretion standard. . . . [to both] the trial court's decisions about how to determine reliability [and] to its ultimate conclusion." [FN114] Consequently, "whether Daubert's specific factors are, or are not, reasonable measures of ***315** reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." [FN115]

These conclusions prompted the Court to label Carlson's testimony unreliable. Specifically, the court found that Carlson's methodology subjective, [FN116] that he was unable to approximate how many miles the tire had traveled [FN117] and did not follow his own methodology. [FN118] Accordingly, the Court reversed the circuit court's decision. [FN119]

2. Concurrence

Justice Scalia's paragraph-long concurrence emphasized that the discretion granted to trial court judges was the latitude to employ Daubert's four factors flexibly, "not discretion to abandon the gatekeeping function. . . . [or] to perform the function inadequately." [FN120]

3. Mixed Concurrence and Dissent

Justice Stevens agreed that the majority "fully and correctly answered" [FN121] the question of "whether a trial judge '[m]ay . . . consider the four factors set out by this Court in Daubert . . . in a Rule 702 analysis of admissibility of an engineering expert's testimony."' [FN122] However, he dissented from the majority's discussion of "whether the trial judge abused his discretion when he excluded [Carlson's testimony because Justice Stevens] firmly believe[d] that it is neither fair to litigants nor good practice for [the] Court to reach out to decide questions not raised by the certiorari petition." [FN123]

IV. Legal and Academic Criticisms of Kumho Tire

Naturally, both the legal and academic communities had much to say about the Court's conclusions in Kumho Tire. Indeed, some observers resurrected their criticism of Daubert to attack the Court's extension of the decision's gatekeeping concept to non-scientific testimony. Generally, ***316** Kumho Tire's critics focused on one of three subjects: Kumho Tire's impact on litigants, its impact on trial judges or the gatekeeper concept itself. A.

Impact on Litigants

First, Kumho Tire's critics noted that litigation is an inherently adversarial process. Therefore, they argued, if all expert witnesses are vulnerable to exclusion under a Daubert/Kumho Tire test, more defense attorneys will attempt to exclude plaintiffs' experts by raising a Daubert/Kumho Tire challenge. [FN124] These critics concluded that parties will invest more money in pretrial hearings in an attempt to either exclude or defend proposed expert witnesses. [FN125] It is equally likely that plaintiffs, hoping to defend their own experts, will spend more time ensuring the soundness of their witnesses' testimony even before defendants challenge those experts. [FN126] Consequently, these observers feared that many parties, especially plaintiffs, may exhaust their financial resources before they even begin the trial. Indeed, Kumho Tire's critics believed that the potentially prohibitive cost of defending one's expert witness will intimidate plaintiffs from filing a lawsuit altogether. [FN127]

Second, Kumho Tire's opponents feared a prolonged discovery process. The source of these fears is the belief, expressed by one federal district court judge, that at a minimum "trial counsel must, and I mean must, depose any expert" retained to provide expert testimony at trial. [FN128] Besides obtaining information that Federal Rule of Civil Procedure 26 requires that parties disclose, [FN129] Judge Real recommended that parties take "six [additional] ***317** prepatory measures." [FN130] Specifically, to operate effectively under the Daubert/Kumho Tire rule, trial attorneys should now:

> 1. Retain a consultant expert to evaluate the [opposing expert's] report. . . . 2. Do an up-to-date and complete scientific literature search on the subject matter of the lawsuit. . . . 3. Study the curriculum vitae to find limitations on the expertise of the witness. 4. Learn the detail of the test used by the expert to verify the opinions. 5. Insist on detailed answers to questions [by probing beyond an expert witness' initial answers such as] "the literature shows" or "in my experience" and "all of the data taken together." 6. Inquire as to what peer review the expert has experienced. [FN131]

Third, other commentators feared that Daubert and Kumho Tire will unconstitutionally block plaintiffs from presenting their case to a jury. For example, the Trial Lawyers for Public Justice's executive director predicted that Kumho Tire's "result would . . . deprive hundreds, if not thousands, of people from having their cases heard." [FN132] This deprivation could occur in two ways. First, the likely increased cost of defending an expert witness during a Daubert/Kumho Tire hearing may be too steep for some plaintiffs. Second, the possibility that a trial judge may exclude a plaintiff's expert during a pretrial Daubert/Kumho Tire hearing might violate parties' Seventh Amendment right to a jury trial.

[FN133]

B. Impact on Trial Judges

Kumho Tire's critics also predicted negative consequences for trial judges. First, they feared that judges will have to preside over many more, and longer, pretrial hearings. Before the Court's decision in Kumho Tire, five United States circuit courts of appeals applied Daubert's four factors to non- scientific testimony. [FN134] In those circuits, Kumho Tire will not considerably change federal courts' review of expert testimony. However, ***318** judges in the other seven circuits may now have to devote a significantly greater amount of judicial resources to pre-trial hearings to comply with Kumho Tire. Therefore, Kumho Tire's critics believe that the decision will exacerbate federal courts' already overburdened dockets. [FN135]

Second, Kumho Tire's detractors faulted the Court for failing to provide a clear standard with which judges will measure non-scientific expert testimony. Specifically, while some commentators agreed that Daubert's four factors are appropriate criteria for scientific testimony, they claimed that those tests were ill-suited for non-scientific testimony. For example, one amicus curiae brief filed in Kumho Tire explained that "[m]any fields of knowledge simply do not employ experimental procedures to test or falsify hypotheses, nor do they determine error rates." [FN136] To illustrate this point, Kumho Tire's critics might review the broad range of non-scientific experts now subject to a Daubert/Kumho Tire analysis, including: an expert calculating an airline's financial damages from a union pilots' "sick out"; [FN137] "ballistics experts, medical examiners and police officers who purport to be experts on anything from gang signals to tire tracks"; [FN138] psychiatrists; [FN139] retail store merchandise display experts; [FN140] securities experts; [FN141] "appraisers, economists, accountants, financial analysts and other[s testifying concerning] the value of assets, properties and business interests;" [FN142] and "toxicologist[s], chemist[s], or epidemiologist [s]." [FN143]

One observer used a fictional examination of the inventor Thomas Edison to argue that Daubert's factors were inappropriate measures of testimony based on "experience, training or other specialized knowledge." [FN144] The vignette is worth quoting at length:

***319** ATTORNEY: "Please state your occupation."

EDISON: "I am a full-time inventor."

ATTORNEY: "Mr. Edison, what education do you have that qualifies you to be an inventor?"

EDISON: "Well, I went to school for three months when I was 8 years old."

ATTORNEY: "Do you have any formal training in electricity and its use as a means of providing light?"

EDISON: "No."

ATTORNEY: "What then is the basis for your expertise in this area?"

EDISON: "I do a lot of tinkering in my workshop and laboratory."

ATTORNEY: "Are you a member of any professional societies?"

EDISON: "No."

ATTORNEY: "Do you have any other experience with electricity and its use as a means of providing light?"

EDISON: "Well I have invented an electric vote recorder, a quadraplex system for the telegraph, the phonograph, and a carbon transmitter for use in a telephone receiver."

ATTORNEY: "Do any of those supposed inventions produce light?"

EDISON: "Of course not."

ATTORNEY: "Mr. Edison, this incandescent light about which you wish to testify-have you written any articles about it?"

EDISON: "No, not yet, I have been too busy trying to make it work."

ATTORNEY: "What studies have you done to determine the validity of your concept?"

EDISON: "What do you mean studies? I just kept trying different things until one of them worked."

ATTORNEY: "Have there been any studies which established the reliability of your invention?"

EDISON: "No, I have the only working models-that's why I applied for a patent on it. But, I do have one of my light bulbs right here-do you want to see how it works?"

COURT: "There will be no demonstrations of this incandescent thing in my courtroom until I am satisfied it is based on valid scientific theory."

EDISON: "Your honor if it wasn't based on a valid scientific theory, it wouldn't work."

COURT: "Well, that's what you say. However, the Supreme Court has said that I cannot admit this type of technical evidence until I am convinced it is reliable, and you have not convinced me ***320** that the scientific principles upon which your incandescent light is based are reliable. I mean, after all, I have had all these impressive experts from the gaslight industry and the kerosene consortium saying your light is some kind of hoax."

EDISON: "Your honor, I cannot explain in scientific terms how my light works-but I can show you that when I apply electric current to a filament made of carbonized cardboard, it gets so hot that it glows."

COURT: "You want to burn cardboard in my courtroom? Not only does that sound ludicrous as a means of producing light, but also dangerous. Get this charlatan out of here!" [FN145]

The author of this fictional account claimed that it showed "that the Daubert factors may not be the best or the only basis for determining whether technical evidence is admissible." [FN146]

Third, opponents complained that the Court in Kumho Tire failed to meet its own goal of providing a consistent standard with which to measure both scientific and non-scientific expert testimony. By failing to provide a uniform standard, such critics claimed that the only rule apparent from Daubert and Kumho Tire is that trial courts can use largely whatever criteria they prefer while evaluating expert testimony. [FN147]

Fourth, critics feared that one of Kumho Tire's consequences for the judiciary will affect litigants, too. Specifically, some critics predicted that these new gatekeeping duties will overwhelm trial judges. To help understand a case's issues, a trial judge might rely on independent experts. Indeed, the Federal Rules of Evidence allow judges to retain an expert to help them evaluate complex issues. Specifically, Federal Rule of Evidence 706 provides, in part that:

> The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. [FN148]

***321** Because of the possibility of more frequent Daubert/Kumho Tire hearings, trial judges might increasingly rely on such court-appointed experts to help determine an expert witness' admissibility. However, Kumho Tire critics claimed that judges' reliance on outside advisors will not further the goals of accurately and impartially examining proffered expert testimony.

For example, Lisa Gelhaus, in her article A Case Against CASE, outlines four problems associated with such experts. [FN149] First, widespread disagreement regarding methodologies and conclusions reveal the inconsistency, and therefore uncertainty, of scientific advice. [FN150] Second, because many scientists and other experts receive research funding from corporations and are influenced by a host of social convictions, objective expert testimony is a myth. [FN151] Third, relying on scientific or technical experts displaces the jury's role in evaluating the credibility of conflicting or questionable expert testimony. [FN152] Finally, Gelhaus claimed that the CASE experts threaten the role of the jury if the trial judge "seems to be deferring excessively, even . . . to an unbiased" CASE expert. [FN153]

C. Fundamental Opposition to the Judge's Gatekeeping Role

Further, legal and academic commentators frequently criticized the judge's gatekeeping role underlying the Court's decisions in both Daubert and Kumho Tire. Specifically, these critics argued that Daubert usurps the jury's duty to determine the credibility of expert testimony. [FN154] After ***322** Kumho Tire, their concern

about the jury's role and litigants' right to present evidence to the jury became more urgent. [FN155] Indeed, these critics believed the Court's decisions reflected a "presuppos[ition] that the traditional adversary process is insufficient to enable opposing counsel and their experts to ferret out inaccuracies and bias in expert testimony." [FN156]

To mollify some of these concerns, and to reconcile the significant holding in both Daubert and Kumho Tire with the text of Rule 702, various proposals have sought to amend Rule 702.

V. Proposed Rule 702

In 1997, both United States Senator Orrin Hatch (R-UT) and Congressman Howard Coble (R-NC) introduced legislation amending Rule 702 to codify the Court's Daubert decision. [FN157] However, according to the Reporter ***323** to the Judicial Conference's (hereinafter "Conference") Advisory Committee on the Federal Rules of Evidence (hereinafter "Advisory Committee"), "both proposals [were] fraught with problems, and neither [were] adequate to explain how courts should assess the reliability of all expert testimony in the wake of Daubert." [FN158] Therefore, because it was dissatisfied with these congressional proposals, the Conference employed the rulemaking process to amend Rule 702. [FN159]

A. The Federal Rulemaking Process

Twenty-eight U.S.C. §§ 2071-2077 authorize the Supreme Court to establish or amend rules for federal courts, including rules of evidence. [FN160] Under the Court's direction, the Conference "carr[ies] on a continuous study of the operation and effect of the general rules of practice and procedure" within the federal court system. [FN161] The Conference's Committee on Rules of Practice and Procedure (hereinafter "Standing Committee") coordinates this activity through sub-committees (hereinafter "advisory committees") on specific areas of the law, [FN162] including "Appellate Rules, Bankruptcy,***324** Civil Rules" and Evidence. [FN163] A proposal must pass through seven steps before becoming a new federal rule. [FN164]

First, the relevant advisory committee, either in response to public suggestion or on its own initiative, considers an amendment to the existing rules at one of its biennial meetings. [FN165] Second, if it decides to amend the rule, the advisory committee submits its proposal to the Standing Committee. [FN166] If the Standing Committee permits it to solicit comment on the proposed amendment, the advisory committee prints a notice in the Federal Register and accepts public comment for six months. [FN167] Third, after receiving public comment, the advisory committee considers

whether the comments warrant revising the proposed amendment. [FN168] If it makes no, or only minor, changes, the advisory committee forwards its proposed amendment to the Standing Committee. [FN169] Alternatively, if the advisory committee makes major changes based on the public comments, the committee may repeat the public comment process. [FN170] Fourth, the Standing Committee either approves the amendment and forwards it to the Conference or returns the proposal, sometimes with revisions, to the advisory committee. [FN171] However, if the Conference approves the proposal, the Conference will then send the proposal to the Supreme Court. [FN172] Sixth, if the Court supports the proposal, it prescribes the amendment. [FN173] Federal law requires that the Court submit its prescribed rule to Congress by May 1 of the year in which the Court intends the rule to become effective. [FN174] Finally, unless Congress acts to amend, postpone or nullify the proposed rule, the rule as prescribed by the Court becomes effective no earlier than December 1 of the year in which the Court submitted the proposed rule to Congress. [FN175]

B. History of Proposed Rule 702

In 1998, the Advisory Committee proposed amending Rule 702 to ***325** clarify the rule's requirements of expert testimony. [FN176] After securing the Standing Committee's permission, the Advisory Committee solicited public comment between August 1998 and February 1999. [FN177] In April 1999, after revising only one of the proposal's three elements, the Advisory Committee forwarded Proposed Rule 702 to the Standing Committee. [FN178]

Thereafter, in June 1999, the Standing Committee approved and forwarded Proposed Rule 702 to the Conference. [FN179] Next, after approving Proposed Rule 702 on September 15, 1999, the Conference submitted the proposal to the Court on December 6, 1999. [FN180] Thereafter, the Court submitted Proposed Rule 702, together with other proposed rule changes, to Congress on April 17, 2000. [FN181] Because it is improbable that Congress will change the rule, Proposed Rule 702 will almost certainly become effective on December 1, 2000. [FN182]

C. Text of Proposed Rule 702

Throughout the process, Proposed Rule 702's text has remained largely unchanged. As first proposed by the Advisory Committee, Proposed Rule 702 stated that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, provided that (1) the

testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product ***326** of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [FN183]

The version ultimately submitted to the Court on December 6, 1999, and unchanged by either the Court or, to date, Congress, only slightly altered subpart (1), so that the text following the word "otherwise" read: "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." [FN184]

D. Analysis of Proposed Rule 702

Consistent with the Court's conclusions in Kumho Tire, [FN185] this text does not establish separate tests for expert testimony based on scientific and non-scientific knowledge. Essentially, Proposed Rule 702(1) ensures that the expert has an adequate reason for reaching the conclusion about which he proposes to testify. According to Proposed Rule 702's committee note, this inquiry "calls for a quantitative rather than qualitative analysis." [FN186] For scientific testimony, this might include confirming that the expert possesses adequate knowledge about his particular field's general theories or has conducted research in the area about which he proposes to testify. For non- scientific testimony, a court would likely ensure that the expert had enough experience with or sufficient study of the subject of his proposed testimony. However, regardless of the type of expert knowledge, "[i]f there is a well- accepted body of learning and experience in the field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how her conclusion is so grounded." [FN187]

Proposed Rule 702(2) examines how the expert reached his conclusion from the facts or data scrutinized by subpart (1); even if the expert has adequate knowledge of or experience with the subject of his testimony, he must also employ reasonable processes to reach his conclusion. This prong of Proposed Rule 702 simply requires that an expert reach his conclusion "employing the same methodology that [he] would employ in [his] professional life." [FN188]

Proposed Rule 702(3) reflects the Court's evolving definition of reliability. ***327**[FN189] Specifically, besides requiring the witness to have both a reliable basis for his opinion and that he reliably apply his method to those facts or data, this subpart requires that the expert's conclusion is itself a reasonable result of the process and supporting facts.

Rule 702's current language is the same as it was in 1975. Considering the Court's significant Daubert and Kumho Tire decisions interpreting Rule 702, a revised rule reflecting these important decisions will benefit both the judiciary and the bar. Further, by providing a single, three-part test applicable to both scientific and non-scientific expert testimony, Proposed Rule 702 accurately embodies the Court's guidance in both Daubert and Kumho Tire. Considering these decisions' emphasis on the trial judge's gatekeeping role, Proposed Rule 702 properly makes the judge's reliability inquiry an explicit part of the Federal Rules.

Besides its three-part analysis, Proposed Rule 702 is commendable for how it addresses trial judges' inquiries within that framework. Instead of merely listing Daubert's four factors and permitting courts to flexibly apply them, Proposed Rule 702 gives general guidance to trial judges about how to apply those, or other, factors. Specifically, by focusing a trial judge's attention on three aspects of an expert's testimony, Proposed Rule 702 provides criteria sufficiently general to address any type of expert testimony. [FN190] Further, although "any or all of the specific Daubert factors" might help evaluate specific expert testimony, Proposed Rule 702's committee note lists other factors which trial judges could apply to help determine an expert's reliability. [FN191] Finally, after listing these several alternative tests, the committee note states that still "[o]ther factors may also be relevant." [FN192] Therefore, although its illustrative criteria preserve the flexibility envisioned by the Court, Proposed Rule 702 ensures that litigants know the general expectations that trial judges will enforce during a pretrial reliability ***328** hearing.

E. Whether Proposed Rule 702 Responds to or Resolves Post-Kumho Tire Criticisms

While Proposed Rule 702 improves upon the current rule by reflecting the Court's recent decisions concerning the admissibility of expert testimony, both the legal and academic communities should ask whether Proposed Rule 702 addresses or, even better, disarms the type of criticism of Kumho Tire discussed in Part IV, above. This additional study of Proposed Rule 702 reveals that the proposal directly addresses some of the post-Kumho Tire criticisms, but leaves others unanswered. Some of these unresolved complaints are tolerable results of pursuing the greater good of enabling judges, and juries, to make informed decisions. However, other unresolved criticisms deserve greater attention because of their more serious implications.

1. Post-Kumho Tire Complaints Answered by Proposed Rule 702

Proposed Rule 702 directly addresses three criticisms lodged

against Kumho Tire. First, some Kumho Tire critics worry that the decision and, by association, Proposed Rule 702 will result in regular, expensive challenges to expert testimony. However, both Kumho Tire and Proposed Rule 702 directly address this concern. As one observer noted, the Court in Kumho Tire "explained that the [trial judge's] broad discretion . . . [allows him] to 'avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted."' [FN193] Therefore, because Proposed Rule 702 embodies Kumho Tire's conclusions, the proposal similarly allows "a trial court [to avoid] detailed and expensive proceedings . . . [and] in 'run of the mill' litigation . . . to take judicial notice of the reliability of well established expert methodologies." [FN194] Further, Proposed Rule 702's committee note emphasizes that "this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert." [FN195] Therefore, Proposed Rule 702 does not provide litigants with a license to challenge their opponent's every expert witness.

A second, related concern is that such frequent pretrial hearings will overburden the federal trial courts' already strained resources. However, just as Proposed Rule 702 addresses the fear that every expert will face a pretrial reliability challenge, the proposal similarly empowers trial judges ***329** to avoid unnecessary and time-consuming pretrial hearings. [FN196] Further, while the Court's Kumho Tire decision will require many judges to preside over more pretrial hearings, current federal practice will mitigate this impact. Specifically, because the Court's Daubert opinion is binding precedent on lower federal courts, federal trial judges already scrutinize the reliability of scientific expert testimony. Moreover, even before the Court's Kumho Tire opinion, almost one half of the federal circuit courts applied Daubert's reliability test to non-scientific expert testimony. [FN197] Accordingly, Kumho Tire will significantly affect only approximately one half of the federal circuits. While that is a sizable impact, Proposed Rule 702's committee note guides judges to curb unnecessary reliability hearings, which should minimize the predicted growth of federal trial judges' workloads.

Third, Proposed Rule 702 rebuts two related criticisms of Kumho Tire's guidance concerning how judges should test expert testimony's reliability. One claim is that Kumho Tire's extension of Daubert's four reliability criteria to non-scientific testimony was unwise. However, fears about the mismatch between Daubert's factors and non-scientific testimony, illustrated by the fictional pretrial examination of Thomas Edison, above, [FN198]simply ignore the Court's clear statements in both Daubert and Kumho Tire. In both of those cases, the Court emphasized that "[t]he inquiry envisioned by Rule 702 is . . . a flexible one" [FN199] and that Daubert's factors were "meant to be helpful, not definitive." [FN200] Further, besides reiterating that the factors used would

"depend[] upon 'the particular circumstances of the particular case at issue,"' [FN201] Proposed Rule 702's committee note approvingly lists other factors used by lower federal courts and concludes that still other criteria "may also be relevant." [FN202] Therefore, Proposed Rule 702 dispels claims about an inflexible application of Daubert's factors to non-scientific testimony.

Other critics wanted the Court to prescribe specific factors, other than Daubert's, to evaluate non-scientific testimony. They feared that, without them, judges would possess too much discretion in deciding how and with what to measure expert testimony. [FN203] However, Proposed Rule 702 rebuts ***330** this claim. Specifically, the proposal's three-step analysis in subsections (1), (2), and (3) establish a uniform framework that trial judges should apply to expert testimony. Indeed, while Joiner and Kumho Tire discussed what judges should examine to learn if an expert's testimony is reliable, [FN204] Proposed Rule 702 presents the Court's message in a single, coherent statement. Nevertheless, Kumho Tire's critics still claim that Proposed Rule 702 fails to tell trial judges what criteria to use within that framework. However, this omission is both deliberate and correct.

As the Court explained in Kumho Tire, Rule 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge." [FN205] Therefore, to provide a uniform rule applicable to both scientific and non-scientific expert testimony, any revision of Rule 702 must either contain an exhaustive list of factors for each type of testimony or allow trial judges some latitude to evaluate a variety of testimony. Considering the almost unlimited types of possible expert testimony, [FN206] listing factors specific to each type of testimony would be cumbersome, among other problems. [FN207] Therefore, although Proposed Rule 702 will continue to disappoint some of Kumho Tire's critics, it provides sufficient guidance, through its three-part framework and illustrative list of reliability tests, to avoid granting trial judges an unacceptable degree of independence in deciding whether expert testimony is reliable.

2. Unresolved Complaints

However, Proposed Rule 702 leaves other post-Kumho Tire concerns unanswered. One category of unresolved complaints includes the predicted increased cost of litigation resulting from more intensive discovery. First, while Proposed Rule 702's committee note emphasizes that not every expert will face a Daubert challenge, many experts will be challenged. Consequently, Kumho Tire's critics predict that litigants, especially plaintiffs, will incur greater litigation costs while both screening their own experts and defending them during pretrial hearings. [FN208]

Although neither Kumho Tire nor Proposed Rule 702 directly addresses this concern, the cost of ensuring the reliability of expert witnesses should not undermine support for Proposed Rule 702. Instead, the costs litigants incur to ensure the reliability ***331** of their expert witnesses should be recognized as money well spent. Granted, these costs may prevent some plaintiffs from filing their lawsuits at all. Nevertheless, a systemic or utilitarian analysis recommends Proposed Rule 702 as a standard with which to thoroughly measure expert testimony. Specifically, requiring parties to present only expert testimony capable of passing a Daubert challenge helps the trier of fact reach an informed decision. Because an informed decision is likely the correct decision, such costs help ensure that federal courts dispense justice in cases involving expert testimony.

Second, Proposed Rule 702 does not address the complaint that Kumho Tire lengthens the discovery process. Indeed, like the cost of pretrial hearings, engaging in more detailed discovery may cost more than some parties can afford. However, if Judge Real's list of six essential post-Kumho Tire discovery duties is accurate, [FN209] a party's discovery inquiry is unlikely to be significantly more expensive since, for example, several of Judge Real's inquiries would be made during discovery in a pre-Kumho Tire, or even pre-Daubert, medical malpractice case. [FN210]

Other unanswered concerns, however, cannot be discounted. These remaining concerns raise fundamental questions about the propriety of the judge's gatekeeping role and the use of court-appointed scientific experts. First, concerning the gatekeeper concept, some observers claim that "whether the expert opinion is reliable . . . [was] traditionally a question of fact, and in the province of the jury, but Daubert, Joiner and Kumho [Tire] have shifted it into the province of the judge." [FN211] Further, these critics alleged that these decisions will "deprive hundreds, if not thousands of people from having their cases heard [by a jury]" by allowing the judge to decide whether expert testimony is reliable. [FN212] These critics will be similarly dismayed by Proposed Rule 702 because it reinforces the judge's gatekeeping function. Still, because the proposal is faithful to the Federal Rules' system of determining whether testimony is admissible, Proposed Rule 702's failure to address this criticism is not a fatal flaw.

For example, a review of the relevant Federal Rules of Evidence demonstrates that long before the Court in Daubert called it "gatekeeping," the Federal Rules envisioned that the trial judge would exclude unreliable evidence. Specifically, Federal Rule of Evidence 104 (hereinafter "Rule ***332** 104") states, in part, that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." [FN213] Ordinarily, under Federal Rule of Evidence 602, witnesses may only testify

about matters of which they have personal knowledge. [FN214] This requirement embodies the "'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information."' [FN215] However, because they assume "that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline," [FN216] the Federal Rules allow expert witnesses to testify about matters beyond their personal knowledge. [FN217] Consequently, whether expert or lay testimony is admissible depends on the testimony's reliability, which the trial judge must determine.

Nevertheless, Kumho Tire's critics might claim that Rule 104(e) justifies their insistence that the jury, not the judge, should decide whether an expert's testimony is reliable. Rule 104(e) provides that Rule 104's other provisions "do[] not limit the right of a party to introduce before the jury evidence relevant to weight or credibility." [FN218] However, this argument confuses the distinction between reliable evidence and credible evidence, a distinction Proposed Rule 702 preserves.

Proposed Rule 702 strikes this balance through the proposal's three subparts, which establish the process through which trial judges will determine whether expert testimony is reliable. If the judge concludes that the evidence has a reliable basis, is the product of reliable methods and those methods logically lead to the expert's conclusion, then the judge will allow the expert to testify. [FN219] However, this decision does not mean that a judge endorses that expert's testimony as the only correct interpretation of the case's facts. Nor does this decision "necessarily mean that contradictory expert testimony is unreliable" or inadmissible. [FN220] Rather, Proposed Rule 702 "is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise." [FN221] Consequently, ***333** Proposed Rule 702 balances litigants' right to present evidence to a jury and the Federal Rules' requirement that such evidence is reliable.

Finally, because they believed Kumho Tire requires judges to preside over more pretrial hearings involving scientific or technical issues beyond their knowledge, some critics predicted that judges will, through Rule 706, appoint independent experts as advisors. Further, Kumho Tire's critics argue that judges might unwittingly undermine their efforts to ensure that expert testimony is reliable by failing to scrutinize court-appointed experts as thoroughly as experts retained by the parties. [FN222] Indeed, these observers claimed, because jurors and judges will defer to supposedly impartial court-appointed experts, these experts usurp both the judge's gatekeeping role and the jury's duty to decide whether evidence is credible. [FN223] Because Proposed Rule 702 does not address this concern, it is important to understand more about the role of court-appointed experts in federal courts.

In a widely relied-upon 1993 report, two Federal Judicial Center researchers presented their findings concerning federal district court judges' use and opinions of court-appointed scientific and technical experts. [FN224] Two of their findings appear to justify Kumho Tire's critics' fears. First, twenty percent of the judges who responded to the survey appointed an expert at least once, mainly in personal injury, patent, trade secret and other commercial cases. [FN225] One of the two main reasons these judges appointed these experts was to "advance the court's understanding of the merits of the litigation and to enhance the court's ability to reach a reasoned decision on the merits." [FN226] "Th[is] need for assistance in decisionmaking often arose when the parties failed to present credible expert testimony, thereby failing to inform the trier of fact on essential issues." [FN227]

Second, this study reported that the judge or jury usually followed the court-appointed expert's conclusions about the facts of the case, [FN228] revealing ***334** that "the concerns of judges and commentators that court-appointed experts will exert a strong influence on the outcomes of litigation seem to be well founded." [FN229] Therefore, when court-appointed experts are employed, their testimony or advice, and not the testimony of the parties, appears to decide complex scientific or technical cases.

In 1993, when the study was published, "[a]ppointment of an expert . . . [was] a rare and extraordinary event." [FN230] However, since both Daubert and Kumho Tire emphasized the judge's role as the scientific and technical gatekeeper, it is possible that judges will increasingly rely on court- appointed experts as they confront unfamiliar scientific and technical issues more frequently. Conversely, Daubert and Kumho Tire might have the opposite effect; since only expert testimony capable of satisfying Proposed Rule 702' s reliability test will be admitted, one of the main reasons judges appoint outside experts becomes moot. [FN231] Therefore, judges might appoint outside experts less frequently. However, regardless of whether judges appoint outside experts after Daubert and Kumho Tire, court-appointed experts will continue to significantly affect the outcome of those cases in which they are employed.

Nevertheless, Proposed Rule 702 is not the appropriate vehicle through which to address this concern. Proposed Rule 702 presents a framework with which judges should evaluate parties' expert witnesses. In contrast, this criticism focuses on the impact and questionable neutrality of court-appointed experts. Certainly, courts should employ neutral experts and impose on them the same reliability tests courts apply to parties' experts. [FN232] ***335** However, while Proposed Rule 702 leaves concerns about court-appointed experts largely unanswered, the difference between the nature of the problem and Proposed Rule 702's subject matter reveals that this unresolved issue does not discredit the proposal.

VI. Conclusion

In Daubert and Kumho Tire, the Court interpreted Federal Rule of Evidence 702 to require judges to act as gatekeepers, excluding unreliable expert testimony concerning both scientific and non-scientific issues. Considering the important instruction in these cases, Rule 702 should be amended to reflect this guidance. Proposed Rule 702 accurately reflects the Court's explanation of the judge's duty under Rule 702 in a straight-forward, three- part test that judges can apply to challenged expert testimony. Further, Proposed Rule 702's text mollifies some fears expressed after Kumho Tire. First, the proposal reassures critics that judges can avoid unnecessary pretrial hearings. Second, Proposed Rule 702 requires all judges to apply the same three-part test to challenged expert testimony. Third, the proposal allows judges to adapt the test's specific factors to the particular testimony involved.

However, Proposed Rule 702 does not address all ofKumho Tire's critics' concerns. Some of those fears, like the predicted increased cost of ensuring expert testimony can withstand a reliability test and a prolonged discovery process, are tolerable results of enabling the judge and jury to reach an informed decision in complex cases. Similarly, opposition to Proposed Rule 702's gatekeeping concept confuses the judge's duty to ensure that evidence is reliable with the jury's right to decide if that testimony is credible. Further, it continues to debate an issue settled twenty-five years ago when the Federal Rules empowered judges to require that evidence be reliable. Finally, fears about the role of court-appointed experts, while partially valid, are beyond the scope of Proposed Rule 702, which is limited to the standard by which judges measure the expert testimony presented by litigants. Since Congress will almost certainly not change Proposed Rule 702 before it adjourns, federal courts will begin applying the new rule to expert testimony starting on December 1, 2000. Therefore, considering its clear, three-part analysis, Proposed Rule 702 will ***336** soon provide exactly the "large admixture of insipid common sense" that Lord Salisbury believed expert opinion so desperately needed in order to be reliable. [FN233]

[FNa1]. B.A., Gordon College, 1993; M.S.P.A., University of Massachusetts Boston, 1998; J.D. Candidate, University of Connecticut School of Law, May 2001. I thank Professor Colin Tait for both his encouragement and constructive criticism and dedicate this Comment to my wife, Sara. See Proverbs 31:10-12; 29.

[FN1]. Letter to Lord Lytton (June 15, 1877) in Lady Gwendolen Cecil, 2 Life of Robert, Marquis of Salisbury 158 (1921).

[FN2]. Id.

[FN3]. Fed. R. Evid. 702.

[FN4]. See, e.g., DeLuca v. Merrell Dow Pharms., Inc., 911 F.2d 941, 955 (3d Cir. 1990) (rejecting the general acceptance test announced in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)); United States v. Shorter, 809 F.2d 54, 59-60 (D.C. Cir. 1987) (employing Frye's general acceptance test). For a discussion of Frye, see infra notes 9-18 and accompanying text.

[FN5]. 509 U.S. 579 (1993).

[FN6]. 526 U.S. 137 (1999).

[FN7]. See Letter from William H. Rehnquist, Chief, Justice, United States Supreme Court, to J. Dennis Hastert, Speaker of the United States House of Representatives (April 17, 2000) (copy on file with author); H.R. Doc. No. 106- 225, at 9, reprinted in 2000 U.S.C.C.A.N. G197 (containing the text of Proposed Rule 702).

[FN8]. Unless Congress changes a proposed rule, the rule as prescribed by the Supreme Court becomes effective on December 1 of the year in which the Court submits the rule to Congress. 28 U.S.C. § 2074(a) (1995). However, as of October 27, 2000, Congress had not yet adjourned. Nevertheless, according to John Rabiej, Chief of the Administrative Office of the United States Courts' Rules Committee Support Office, Congress will almost certainly not change Proposed Rule 702. Telephone interview with John Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Oct. 24, 2000).

[FN9]. 293 F. 1013, 1014 (D.C. Cir. 1923).

[FN10]. Id. at 1013.

[FN11]. Id.

[FN12]. Id. at 1014.

[FN13]. Id.

[FN14]. Id. at 1013.

[FN15]. Id. at 1014.

[FN16]. Id.

[FN17]. Id.

[FN18]. Id.

[FN19]. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993) (concluding that the Federal Rules of Evidence displaced the Frye test as the standard for admitting expert testimony).

[FN20]. Edward W. Cleary, Introduction to Federal Rules of Evidence, at III (West 1999).

[FN21]. Id.

[FN22]. Id.

[FN23]. Id.

[FN24]. Id. However, Congress did not change the Supreme Court's version of Rule 702, "Testimony by Experts." See Fed. R. Evid. 702 note by Federal Justice Center.

[FN25]. Cleary, supra note 20, at III.

[FN26]. Fed. R. Evid. 702.

[FN27]. See Fed. R. Evid. 702 advisory committee's note.

[FN28]. 509 U.S. 579 (1993).

[FN29]. Id. at 582. While the families filed suit in California state court, Dow successfully removed the case to federal court under federal diversity jurisdiction. Id.

[FN30]. Id.

[FN31]. Id.

[FN32]. Id. A teratogen is an agent that "causes defects in the formation of an embryo or fetus." Gerry W. Beyer & Kenneth R. Redden, Modern Dictionary for the Legal Profession 756 (2d ed. 1996).

[FN33]. Daubert, 509 U.S. at 583.

[FN34]. Id.

[FN35]. Id. at 584.

[FN36]. See Daubert v. Merrell Dow Pharms., Inc., 727 F. Supp. 570, 572 (S.D. Cal. 1989), aff'd 951 F.2d 1128 (9th Cir. 1991), cert. granted, 506 U.S. 914 (1992), vacated and remanded, 509 U.S. 579 (1993).

[FN37]. Daubert, 951 F.2d at 1129 ("a scientific technique 'is admissible if it is generally accepted as a reliable technique among the scientific community."') (internal citations omitted).

[FN38]. Id. at 1131.

[FN39]. Daubert, 506 U.S. at 914.

[FN40]. Daubert, 509 U.S. at 598 (Rehnquist, C.J., partially concurring).

[FN41]. Id. at 587.

[FN42]. Id. at 588.

[FN43]. Id. at 589.

[FN44]. Id.

[FN45]. Id. at 593.

[FN46]. See id. at 594 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.").

[FN47]. Id. at 593.

[FN48]. Id.

[FN49]. Id. at 594.

[FN50]. Id.

[FN51]. Id. at 597. On remand, the Ninth Circuit Court of Appeals concluded that, under the Court's Daubert factors, the testimony of Daubert's experts was inadmissible. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1322 (9th Cir. 1995).

[FN52]. Daubert, 509 U.S. at 598 (Rehnquist C.J., partially concurring).

[FN53]. Id. at 600 (Rehnquist, C.J., partially concurring).

[FN54]. The five courts applying Daubert to non-scientific evidence included: Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997) (excluding civil engineer's testimony about mechanical engineering matters); Surace v. Caterpillar, Inc., 111 F.3d 1039, 1056 (3d Cir. 1997) (excluding electromechanical engineer's testimony about warning devices); Smelser v. Norfolk S. Ry. Co., 105 F.3d 299, 303 (6th Cir. 1997) (excluding biomechanical engineer's testimony about a defective seat belt); Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 296-97 (8th Cir. 1996) (excluding engineer's testimony about a tire changing machine); Cummins v. Lyle Indus., 93 F.3d 362, 367 n.2 (7th Cir. 1996)

(excluding agricultural engineer's testimony about an industrial trim press). The six courts concluding that Daubert did not apply included: Desrosiers v. Flight Int'l, Inc., 156 F.3d 952, 960 (9th Cir. 1998), cert. denied, 525 U.S. 1062 (1998); Carmichael v. Samyang Tires, Inc., 131 F.3d 1433, 1436 (11th Cir. 1997), cert. granted, 525 U.S. 1062 (1998), rev'd sub nom, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Freeman v. Case Corp., 118 F.3d 1011, 1016 n.6 (4th Cir. 1997), cert. denied, 522 U.S. 1069 (1998); Stagl v. Delta Airlines, Inc., 117 F.3d 76, 81 (2d Cir. 1997); Bogosian v. Mercedes-Benz, Inc., 104 F.3d 472, 479 (1st Cir. 1997); Compton v. Subaru, Inc., 82 F.3d 1513, 1518 (10th Cir. 1996).

[FN55]. 121 F.3d 984 (5th Cir. 1997).

[FN56]. 82 F.3d 1513 (10th Cir. 1996).

[FN57]. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 146-47 (1999).

[FN58]. Watkins, 121 F.3d at 985.

[FN59]. Id. at 986-87.

[FN60]. Id. at 986.

[FN61]. Id. at 988.

[FN62]. Id.

[FN63]. Id.

[FN64]. Id. at 991 (internal citations omitted). The court concluded that Williams' testimony was unreliable because, inter alia, he "lacks education in mechanical engineering, and his experience in machine design is limited to a project he conducted in one of his [junior college] engineering classes in which he designed the base of a chair." Id. at 987-88. Further, he "made no design drawings and conducted no tests of his proposed alternatives [and he] reached his opinion in this case after one day's work." Id. at 988.

[FN65]. Compton v. Subaru of America, Inc., 82 F.3d 1513, 1516 (10th Cir. 1996).

[FN66]. Id.

[FN67]. Id.

[FN68]. Id. at 1515.

[FN69]. Id. at 1521.

[FN70]. Id. at 1518.

[FN71]. Id. at 1519.

[FN72]. 131 F.3d 1433 (11th Cir. 1997), cert. granted, 524 U.S. 936 (1998), rev'd sub. nom, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[FN73]. Carmichael v. Samyang Tires, Inc., 923 F. Supp. 1514, 1516 (S.D. Ala. 1996), rev'd 131 F.3d 1433 (11th Cir. 1997), cert. granted, 524 U.S. 936 (1998), rev'd sub. nom, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[FN74]. Id.

[FN75]. Id.

[FN76]. Id. at 1517.

[FN77]. Id. at 1518.

[FN78]. Carmichael, 131 F.3d at 1434 n.2.

[FN79]. Carmichael, 923 F. Supp. at 1518.

[FN80]. Id. at 1519.

[FN81]. Id.

[FN82]. Id.

[FN83]. Id. Carlson primarily based his conclusions on his review of the file of his employer, George Edwards. See Carmichael, 131 F.3d at 1434. After the accident, Carmichael presented the dilapidated tire to Edwards, "a purported expert on tire failure." Id. After examining the tire, Edwards concluded that a manufacturing or design defect, and not consumer abuse, caused the tire's failure. Id. However, before Samyang could depose him, Edwards became ill. Id. Therefore, Edwards assigned Carlson to handle the Carmichael matter. Id. Carlson concurred with Edwards' conclusion after discussing the case with Edwards and reviewing Edwards' file. Id. Carlson's only independent examination of the tire occurred on the day of Carlson's deposition by Samyang. Id.

[FN84]. Carmichael, 923 F. Supp. at 1520 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993)).

[FN85]. Id. at 1521-22.

[FN86]. Id. at 1520.

[FN87]. Id. at 1521.

[FN88]. Id.

[FN89]. Id. Specifically, the court relied on Carlson's deposition testimony which revealed that: he does not know whether his previous analyses of failed tires have been correct or incorrect; moreover, there is no evidence that he (or anyone else) has tested his methods in a controlled laboratory setting to gauge their accuracy in correctly distinguishing between [failures caused by consumer misuse and those attributable to design and manufacturing defects] Id.

[FN90]. Id.

[FN91]. Id. at 1522.

[FN92]. See id. While the district court granted Carmichael's request for a rehearing, the court again granted Kumho Tire summary judgment. Carmichael v. Samyang Tires, Inc., No. 93-0860-CB-S, 1996 U.S. Dist. LEXIS 22431, at *10 (S.D. Ala. June 5, 1996).

[FN93]. Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1434 (11th Cir. 1997), cert. granted, 524 U.S. 936 (1998), rev'd sub. nom, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[FN94]. Id. at 1435 (quoting United States v. Sinclair, 74 F.3d 753, 757 (7th Cir. 1996)) (internal quotation marks omitted).

[FN95]. Id. at 1436.

[FN96]. Id. at 1435 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 n.8).

[FN97]. Id. at 1436.

[FN98]. See id. at 1437. The court made a point of noting that the district court might find Carlson's testimony unreliable on other grounds. Id. at 1436 n.9.

[FN99]. 524 U.S. 936 (1998).

[FN100]. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).

[FN101]. Id.

[FN102]. Kumho Tire, 526 U.S. at 147.

[FN103]. Id. at 149 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590, 592 (1993)).

[FN104]. Id. at 148 (quoting Daubert, 509 U.S. at 590 n.8).

[FN105]. Id.

[FN106]. Fed. R. Evid. 702.

[FN107]. Kumho Tire, 526 U.S. at 149.

[FN108]. Id.

[FN109]. Id. at 151.

[FN110]. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594-95 (1993) (emphasizing the flexible nature of its four factors).

[FN111]. Kumho Tire, 526 U.S. at 150 (quoting Daubert, 509 U.S. at 593).

[FN112]. Id. at 150.

[FN113]. Id. at 152.

[FN114]. Id. The Court's application of an abuse-of-discretion standard followed its earlier decision in General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (holding that "abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence."). Significantly, Joiner also expanded the judge's gatekeeping role. Specifically, in Daubert the Court had explained that the "focus [of a Rule 702 inquiry], of course, must be solely on principles and methodologies, not on the conclusions that they generate." Daubert, 509 U.S. at 595. However, in Joiner the Court rejected Joiner's argument that the district court had erroneously reviewed, and excluded, his expert's conclusions. Instead, the Court stated that:

> conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.
> Joiner, 522 U.S. at 146.

[FN115]. Kumho Tire, 526 U.S. at 153 (citing Joiner, 522 U.S. at 143).

[FN116]. Id. at 155.

[FN117]. Id. at 154-55. The Court was troubled by his uncertainty because Carlson testified that he was able to discern, based on the small disparities between wear on the inside and outside of the tire's tread, that the tire did not fail because of consumer abuse. Id.

[FN118]. Id. at 155-56. Specifically, Carlson stated that he would "look at a lot of [similar] tires" before concluding whether one sign of possible consumer abuse indicated defective design or consumer abuse. Id. (internal quotation marks omitted.) However, Carlson had not compared the tire involved in Kumho Tire with any other tires. Id. at 156.

[FN119]. Id. at 158.

[FN120]. Id. at 158-59 (Scalia, J., concurring). Justices O'Connor and Thomas joined Justice Scalia's concurrence. Id. at 158.

[FN121]. Id. at 159 (Stevens, J., concurring and dissenting in part).

[FN122]. Id. (Stevens, J., concurring and dissenting in part).

[FN123]. Id. (Stevens, J., concurring and dissenting in part).

[FN124]. See, e.g., Scott R. Jennette, Attacking the Plaintiff's Hazardous Substance Expert in the Post-Kumho Era, For the Def., May 1999, at 33, 38 ("Kumho Tire provides defense counsel with a license to vigorously challenge all expert testimony."). Courts hold Daubert/Kumho Tire hearings pursuant to Federal Rule of Evidence 104, which states, in part, that: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." Fed. R. Evid. 104.

[FN125]. See ABA Panelists: Daubert hearings to increase costs of

litigation, Fed. Discovery News, Sept. 1999, at 1, 1 [hereinafter ABA Panelists] (quoting Bert Black, a Dallas attorney, stating that lawyers relying on expert testimony should "be prepared to spend money" and James A. George, a Baton Rouge, Louisiana plaintiff's attorney, who remarked that "Daubert hearings will cost a fortune" considering the Court's conclusions in Kumho Tire.)

[FN126]. "A full-scale Daubert hearing can be an expensive proposition, involving the transportation and court time of the testifying expert, accompanied by supporting documentation and-not infrequently-supporting experts." Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Respondents at 21, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-2709).

[FN127]. See ABA Panelists, supra note 125, at 1, 6 (quoting plaintiff's attorney James A. George as stating that because "'Daubert hearings will cost a fortune,' . . . [he feared for] plaintiffs' abilities to litigate because of the Daubert hearing expenses.").

[FN128]. Manuel L. Real, Daubert-A Judge's View, Civil Practice and Litigation Techniques in Federal and State Courts (A.L.I-A.B.A Course of Study) Dec. 9, 1999, at 233.

[FN129]. Federal Rule of Civil Procedure 26(a)(2)(B) requires that a party disclose information concerning its expert witnesses including:

> a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2)(B).

[FN130]. Real, supra note 128, at 233.

[FN131]. Id. at 233-34.

[FN132]. Marcia Coyle, Beyond 'Daubert'-Court Hears 'Kumho,' Nat'l L.J., Dec. 14, 1998, at A1 (quoting Arthur H. Bryant) (internal

quotation marks omitted).

[FN133]. See ABA Panelists, supra note 125, at 6 (quoting Baton Rouge, Louisiana plaintiffs' attorney James A. George questioning "what [Daubert/Kumho Tire hearings] do to the Seventh Amendment right to a trial by jury?"). The Seventh Amendment states that: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

[FN134]. See supra note 54.

[FN135]. See Administrative Office of the United States Courts, Federal Judicial Caseload: A Five-Year Retrospective 1 (1999) (describing thirteen percent and forty-three percent increases in the caseloads of federal district court and bankruptcy court judges, respectively, between 1993 and 1997, despite "no new Article III judgeships . . . since 1990, and [no change in] the number of bankruptcy judges authorized and funded . . . since 1993.").

[FN136]. Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Respondents at 7, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-1709) (quoting John M. Conley & David W. Peterson, The Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence, 74 N.C. L. Rev. 1183, 1201-04 (1996)); see also Edward J. Imwinkelried, The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony, 15 Cardozo L. Rev. 2271, 2278-80 (1994) (describing how the tests for scientific expert testimony cannot similarly verify non-scientific expert testimony).

[FN137]. See Am. Airlines, Inc. v. Allied Pilots Ass'n, 53 F. Supp. 2d 909, 934 (N.D. Tex. 1999).

[FN138]. David E. Rovella, 'Kumho' Could Affect Criminal Cases, Nat'l L.J., Apr. 12, 1999, at A5.

[FN139]. See Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 617-18 (5th Cir. 1999).

[FN140]. See Lawrence J. Zweifach, Deposing The Expert Witness, in Taking and Defending Depositions in Commercial Cases 143 (1999).

[FN141]. See id. at 144.

[FN142]. Robert F. Reilly, Implications of Recent Daubert-Related Decisions on Valuation Expert Testimony, Am. Bankr. Instit. J., June 1999, at 28.

[FN143]. Jennette, supra note 124, at 38.

[FN144]. Jeffrey T. Infelise, "Mr. Edison, You Call That Science?", Fed. Law., Aug. 1999, at 3, 5.

[FN145]. Id. at 5.

[FN146]. Id.

[FN147]. See, e.g., Dabney J. Carr IV et al., After Kumho Tire: Challenging Non-Scientific Experts, For the Def., June 1999, at 12, 13 ("[T]hough Kumho Tire resolved whether Daubert applies to non-scientific expert testimony, it effectively grants district courts a 'clean slate' to determine how to apply Daubert to a particular expert."); see also Jeffrey Robert White, Supreme Court Clarifies Expert Testimony Rules, Trial, May 1, 1999, at 15 ("The result of the decision is that admissibility in federal court will depend even more on district judges in particular cases than on any bright lines from" the United States Supreme Court.).

[FN148]. Fed R. Evid. 706(a). While the Federal Rules became effective in 1975, see supra note 25 and accompanying text, the Federal Rules Advisory Committee's Notes reveal that a judge's discretion to appoint a witness predated the adoption of the Federal Rules of Evidence: "In the f e comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. . . . [However it was not until 1975 that Federal Rule of Evidence 706] expand[ed] the practice to include civil cases." Fed. R. Evid. 706 advisory committee's note.

[FN149]. Lisa Gelhaus, A Case Against CASE, Trial, Aug. 1999, at 11. CASE is the acronym for Court-Appointed Scientific Experts.

Since September 1999, judges adjudicating civil cases may contact the American Association for the Advancement of Science and "retrieve lists of experts in medical, scientific, or technological fields." Id.

[FN150]. Id. at 12. (citing Association of Trial Lawyers of America (hereinafter "ATLA") policy paper "Myths and Misconceptions About 'Neutral' Experts").

[FN151]. Id. at 12-13 (citing ATLA's policy paper "Myths and Misconceptions About 'Neutral' Experts").

[FN152]. Id. at 13 (citing ATLA's policy paper "Myths and Misconceptions About 'Neutral' Experts").

[FN153]. Id. (quoting Ellen Deason, Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference, 77 Or. L. Rev. 59, 122 (1998) (internal quotation marks omitted)); see also Cynthia H. Cwik, Guarding the Gate: Expert Evidence Admissibility, Litigation, Summer 1999, at 6, 66 ("[B]oth judges and juries appear to decide cases in a manner that is consistent with the testimony of the court-appointed expert. In a study of 58 cases with court-appointed experts, only two resulted in decisions that were inconsistent with the position of the court-appointed expert." (citation omitted)).

[FN154]. See, e.g., Marilee M. Kapsa & Carl B. Meyer, Scientific Experts: Making Their Testimony More Reliable, 35 Cal. W. L. Rev. 313, 318 (1999) (stating that "whether the expert opinion is reliable . . . [was] traditionally a question of fact, and in the province of the jury, but Daubert, Joiner and Kumho Tire have shifted it into the province of the judge."); Salvatore R. Faia, How to Be Sure Your Expert Report Does Not Get Stricken under Daubert, Legal Intelligencer, Oct. 11, 1999, at 8, 9 (quoting Philadelphia Court of Common Pleas Judge Mark I. Bernstein as fearing that, unless judges are careful, the "Daubert case law . . . [might allow] the judge [to] . . . decid[e] issues that a party has a Constitutional right to have decided by the jury."); Gelhaus, supra note 149, at 13 (summarizing an ATLA research paper on court-appointed experts which argued that judges' reliance on court-appointed experts to help examine expert testimony "encroaches on jurors' constitutional role as triers of fact and undermines 'the adversarial process that has stood at the heart of the Anglo-Saxon judicial system for more than 800 years."').

[FN155]. See, e.g., ABA Panelists, supra note 125 at 1, 6 (citing

Baton Rogue, Louisiana plaintiff's attorney James A. George as stating that the Daubert and Kumho Tire decisions reveal the Court's distrust of the jury); Coyle, supra note 132, at A14 (quoting Trial Lawyers for Public Justice official Arthur H. Bryant as fearing that "the result [of extending Daubert to non-scientific evidence in Kumho Tire] w[ill] be to . . . deprive hundreds, if not thousands, of people from having their cases heard [by a jury]").

[FN156]. Kapsa & Meyer, supra note 154, at 319.

[FN157]. Senator Hatch's proposal, Senate Bill 79, would have attached the following textto Rule 702:

(b) Adequate basis for opinion.-

(1) Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge shall be inadmissible in evidence unless the court determines that such opinion-

(A) is based on scientifically valid reasoning;

(B) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403; and

(C) the techniques, methods, and theories used to formulate that opinion are generally accepted within the relevant scientific, medical, or technical field.

(2) In determining whether an opinion satisfies conditions in paragraph (1), the court shall consider-

(A) whether the opinion and any theory on which it is based have been experimentally tested;

(B) whether the opinion has been published in peer-reviewed literature; and

(C) whether the theory or techniques supporting the opinion are sufficiently reliable and valid to warrant their use as support of the proffered opinion.

(c) Expertise in the Field.-Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge, shall be inadmissible in evidence unless the witness's knowledge, skill, experience, training, education, or other expertise lies in the particular field about which such witness is testifying.

(d) Disqualification.-Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if such witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which such testimony is offered.

S. 79, 105th Cong. § 302 (1997).

Congressman Coble's proposal, House Bill 903, would have added the following to Rule 702's provisions:

(b) Adequate basis for opinion. Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such

opinion-
(1) is scientifically valid and reliable;
(2) has a valid scientific connection to the fact it is offered to prove; and
(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.
(c) Disqualification. Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.
(d) Scope.-Subdivision (b) does not apply to criminal proceedings.
H.R. 903, 105th Cong. § 4 (1997).

[FN158]. Daniel J. Capra, The Daubert Puzzle, 32 Ga. L. Rev. 699, 763 (1998).

[FN159]. Id. at 765, 766 n.350 ("After extensive deliberations at a[n October 21-22, 1997 meeting], the Advisory Committee agreed [that] . . . Rule 702 should be amended."); see also Fed. R. Evid. 702 (proposed 1999) advisory committee's note ("Rule 702 has been amended in response to Daubert . . . and to the many cases applying Daubert . . . ." (citations omitted)).

[FN160]. See 28 U.S.C. § 2072 (1994) ("The Supreme Court shall have the power to prescribe . . . rules of evidence.").

[FN161]. 28 U.S.C. § 331 (1994). The Court's Chief Justice serves as the Conference's Chairman and its other members include the chief judges of the twelve federal circuit courts of appeals, the Federal Circuit, the Court of International Trade and twelve district court judges representing each of the twelve circuits. Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech. L. Rev. 323, 328 (1991).

[FN162]. See 28 U.S.C. § 2073(b) (1994). "The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under section 2072 and 2075 of this title," which concern rules of procedure and evidence. Id. § 2073(a)(2).

[FN163]. Baker, supra note 161, at 329; Admin. Office of the U.S. Courts, The Federal Rules of Practice and Procedure: A Summary for the Bench and Bar, Oct. 1997 [hereinafter Rules Summary].

[FN164]. See Rules Summary, supra note 163.

[FN165]. See Baker, supra note 161, at 329; Rules Summary, supra note 163.

[FN166]. Baker, supra note 161, at 329. The Advisory Committee both considers and, if it agrees, seeks approval to publish a proposed amendment at either the same meeting or the next semi-annual meeting. See Rules Summary, supra note 163.

[FN167]. See Baker, supra note 161, at 329-30; Rules Summary, supra note 163.

[FN168]. See Baker, supra note 161, at 330; Rules Summary, supra note 163.

[FN169]. See Baker, supra note 161, at 330; Rules Summary, supra note 163.

[FN170]. See Baker, supra note 161, at 330; Rules Summary, supra note 163.

[FN171]. See 28 U.S.C. § 2073(b); Baker, supra note 161, at 330; Rules Summary, supra note 163.

[FN172]. Baker, supra note 161, at 331; Rules Summary, supra note 163.

[FN173]. See 28 U.S.C. § 2072(a) (1994).

[FN174]. See id. § 2074(a).

[FN175]. Id.

[FN176]. See Fed. R. Evid. 702 (proposed 1999) advisory committee's note ("Rule 702 has been amended in response to Daubert . . . and to the many cases applying Daubert . . . ." (citations omitted)).

[FN177]. See Notice of Public Hearings, 63 Fed. Reg. 41,865 (Aug. 5, 1998).

[FN178]. Compare the text of Fed. R. Evid. 702 (proposed 1998) against the text of Fed. R. Evid. 702 (proposed 1999).

[FN179]. Telephone interview with Mark Shapiro, staff member, Rules Committee Support Office, Administrative Office of the United States Courts (Nov. 19, 1999).

[FN180]. Memorandum from Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court (Dec. 6, 1999) (copy on file with author); H.R. Doc. No. 106-225, reprinted in 2000 U.S.C.C.A.N. G195- 199.

[FN181]. See Letter from William H. Rehnquist, Chief Justice, United States Supreme Court, to J. Dennis Hastert, Speaker of the United States House of Representatives (April 17, 2000) (copy on file with author); see also H.R. Doc. No. 106-225, at 4-24, reprinted in 2000 U.S.C.C.A.N. G197. (containing text of Proposed Rule 702 as submitted by the Court).

[FN182]. Id.; telephone interview with John Rabiej, supra note 8.

[FN183]. Fed. R. Evid. 702 (proposed 1998) (emphasis added to new language).

[FN184]. Fed. R. Evid. 702 (proposed 1999).

[FN185]. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (concluding "that Daubert's general holding-setting forth the trial judge's general 'gatekeeping' obligation-applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

[FN186]. Fed. R. Evid. 702 (proposed 1999) committee note.

[FN187]. Capra, supra note 158, at 745-46.

[FN188]. Id. at 781.

[FN189]. Compare Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993) (stating that a judge's reliability inquiry must focus "solely on principles and methodology, not on the conclusions that they generate."), with General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (concluding that "conclusion and methodology are not entirely distinct from one another.") For an explanation of Joiner's role in the development of federal jurisprudence concerning the evaluation of expert testimony, see supra notes 114-15 and accompanying text.

[FN190]. This flexible generality was an early goal of Proposed Rule 702' s authors. See Daniel J. Capra, Proposed Amendments to the Federal Rules of Evidence, N.Y. L.J., Sept. 11, 1998, at 3 (justifying Proposed Rule 702's general language because supplying a detailed list of criteria "would create more harm than good.").

[FN191]. Fed. R. Evid. 702 (proposed 1999) committee note (listing additional criteria, including: "[w]hether experts are 'proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purpose of testifying[;]"' "[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion [;]" "[w]hether the expert has adequately accounted for obvious alternative explanations[;]" "[w]hether the expert 'is being as careful as he would be in his regular professional work outside his paid litigation consulting[;]"' and "[w]hether the field of expertise claimed by the expert is known to reach reliable results.") (internal citations omitted).

[FN192]. Id.

[FN193]. William H. Latham, The "Gatekeepers' Discretion:" Flexible Standards on Admissibility of Expert Evidence in Wake of Kumho, S.C. Law., July-Aug. 1999, at 18 (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)) (emphasis omitted).

[FN194]. Id. at 19.

[FN195]. Fed. R. Evid. 702 (proposed 1999) committee note.

[FN196]. Id. (allowing trial courts to avoid unnecessary pretrial

hearings).

[FN197]. See supra note 54 listing federal circuit courts of appeal applying Daubert to non-scientific expert testimony before the Court's Kumho Tire decision.

[FN198]. See Infelise, supra note 144.

[FN199]. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594 (1993).

[FN200]. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151 (1999).

[FN201]. Fed. R. Evid. 702 (proposed 1999) committee note.

[FN202]. Id.

[FN203]. See, e.g., White, supra note 147, at 15 (describing how post-Kumho Tire admissibility decisions will depend on particular trial judges instead of a clear test provided by the Court); Carr, supra note 147, at 13 (concluding that trial judges have a "'clean slate' to determine how to apply Daubert to a particular expert.").

[FN204]. Kumho Tire, 526 U.S. at 149, 152 (requiring an expert to use methods reflecting "the same level of intellectual rigor that characterized the practice of an expert in the relevant field" and to possess sufficient facts or data as a basis for his ultimate conclusion); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (affirming judges' requiring more of an explanation of the connection between the data and the expert's conclusion than the "ipse dixit of the expert").

[FN205]. Kumho Tire, 526 U.S. at 147.

[FN206]. See, e.g., supra notes 137-43 and accompanying text (listing a diverse group of potential experts).

[FN207]. See Capra, supra note 158, at 765 (explaining that listing expert- specific criteria "would create more harm than good").

[FN208]. See, e.g., supra notes 125-27 and accompanying text.

[FN209]. See Real, supra note 128, at 233-34 (describing six discovery steps necessary to ensure parties fully understand whether and where an expert may be vulnerable to a Daubert challenge).

[FN210]. For example, it is unlikely that a medical malpractice insurance defense attorney would fail to hire a physician to read the plaintiff's medical reports, to see if the plaintiff's testifying physician practiced in the type of medicine involved, to press the physician to explain his findings during a deposition or to check the physician's reputation in the medical community.

[FN211]. Kapsa & Meyer, supra note 154, at 318.

[FN212]. Coyle, supra note 132, at A14 (quoting Trial Lawyers for Public Justice representative Arthur H. Bryant).

[FN213]. Fed. R. Evid. 104 (emphasis added).

[FN214]. Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. [However, t]his rule is subject to the provisions of [R]ule 703.").

[FN215]. Fed. R. Evid. 602 committee's note (quoting Charles T. McCormick, McCormick on Evidence, §§ 10, 19 (5th ed. 1984)).

[FN216]. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 592 (1993).

[FN217]. Fed. R. Evid. 703 committee's note ("Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources[, including] presentation of data to the expert outside of court and other than by his own perception.").

[FN218]. Fed. R. Evid. 104(e).

[FN219]. Fed. R. Evid. 702(1)-(3) (proposed 1999).

[FN220]. Fed. R. Evid. 702 (proposed 1999) committee's note.

[FN221]. Id. Further, Proposed Rule 702's committee note cites two Third Circuit Court of Appeals decisions to emphasize that the amended rule measures only testimony's reliability, not its weight or credibility. Id. (citing Heller v. Shaw Indus., Inc., 167 F.3d 146, 160 (3d Cir. 1999) (concluding that an expert's testimony should not be excluded solely because he used a different test than another expert, when the experts' field accepts either test); In re Paoli Yard R.R. PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994) (reaffirming that the judge's gatekeeping test does not require parties "to demonstrate . . . that the assessments of their experts are correct, they only have to demonstrate . . . that their opinions are reliable.")).

[FN222]. See, e.g., Gelhaus, supra note 149, at 12-13 (arguing that corporate research funding and personal social convictions prevent scientists from being impartial).

[FN223]. Id. at 13 (arguing that judges' reliance on scientific or technical experts displaces the jury's role in evaluating the credibility of conflicting or suspect expert testimony).

[FN224]. Joe S. Cecil & Thomas S. Willging, Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L. J. 995, 1041 (1994). "Questionnaires were sent to 537 active federal district court judges[. Four hundred thirty-one] judges responded." Id. at 1004 n.33.

[FN225]. Id. at 1004, 1006.

[FN226]. Id. at 1009.

[FN227]. Id. at 1010.

[FN228]. Id. at 1041 (When asked "Was the disputed issue resolved in a manner consistent with the advice or testimony of the [court-appointed] expert? [,]" fifty-six of fifty-eight judges answered yes.); see also Gelhaus, supra note 149, at 13 (arguing that court-appointed experts threaten the role of the jury if the trial judge "seems to be deferring excessively, even . . . to an unbiased

[court-appointed expert]").

[FN229]. Cecil & Willging, supra note 227, at 1045.

[FN230]. Id. at 1070.

[FN231]. See id. at 1010 (reporting that one of the main reasons judges appointed experts was that the parties "failed to present credible expert testimony, thereby failing to inform the trier of fact on essential issues"). Further, the study's authors reported that:

> judges who appointed experts appear to be as devoted to the adversarial system as those who made no such appointments. Most appointments were made after extensive efforts failed to find a means within the adversarial system to gain the information necessary for a reasoned resolution of the dispute. Appointment of an expert was rarely considered until the parties had been given an opportunity and failed to provide such information.

Id. at 1069.

[FN232]. One possible solution may come from the Washington, DC-based American Association for the Advancement of Science (hereinafter "AAAS"). Cooperating with the Federal Judicial Center (hereinafter "FJC"), the AAAS recently created a Court Appointed Scientific Experts project to help judges retain reliable, independent experts. Deborah Runkle, Court Appointed Scientific Experts: A Demonstration Project of the American Association for the Advancement of Science, Fed. Discovery News, Dec. 1999, at 1, 3. The project, through its three subcommittees on Education, Professional Standards and Evaluation, and its Recruitment and Screening Panel, hopes to achieve four goals. First, to educate experts about how judges conduct trials. Second, to inform judges about the project. Third, to ensure experts provided by the project are competent, respected members of their discipline. Fourth, to detect conflicts of interest. Id. at 3-4. At the conclusion of the demonstration project, the AAAS will summarize the project's experience and the FJC's evaluation of the project's performance. Id. at 4. Depending on that review, this project may help resolve those concerns left unanswered by Proposed Rule 702. Other possible solutions to the problems presented by court- appointed experts appear in Note, Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence, 110 Harv. L. Rev. 941, 952-58 (1997) (suggesting a solution to the tension between the need for expert advice and preserving the adversarial system by including parties in the expert's selection, limiting the scope of the experquiring a written report of the expert's conclusion and allowing parties to respond to the report).

[FN233]. See Letter to Lord Lytton, supra note 1.

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LawBeat

Admissions Tests

Fewer post-Daubert federal judges allow experts to testify without limitation in civil trials, study finds

BY MARK HANSEN

Federal judges today are more likely to exclude expert testimony in civil trials than they were less than a decade ago, a new study shows.

The study, conducted by the Washington, D.C.-based Federal Judicial Center, the research arm of the federal courts, found that six out of every 10 federal judges surveyed had permitted an expert to testify without limitation in their most recent civil trial.

A similar study, conducted in 1991, found that three out of every four federal judges surveyed had allowed an expert to testify without limitation at what was then their most recent civil trial.

Wary of Witnesses

The findings suggest that federal judges have become more cautious about admitting expert testimony in the wake of the U.S. Supreme Court's three recent decisions on the admissibility of scientific evidence, the authors say.

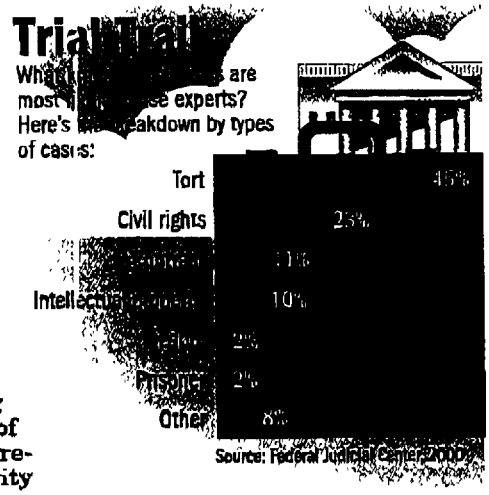
The Court, in a series of decisions beginning with *Daubert v. Merrell Dow Pharmaceuticals Inc.* in 1993, has changed the standard for admitting expert testimony from one of "general acceptance" in the scientific community to one of proven scientific reliability.

"We think the findings show that judges are responding to the Supreme Court's invitation to examine the basis of expert testimony under the new standards and exclude evidence that doesn't meet those standards," says Joe Cecil, a spokesman for the Federal Judicial Center and a study co-author.

In fact, the results probably understate the impact the Court's decisions have had on the federal judiciary's consideration of expert testimony, Cecil says, because they reflect only those cases that actually went to trial.

Experts on scientific evidence say they don't need a survey to know that trial court judges have become far more skeptical about expert witnesses under *Daubert*, particularly when it comes to plaintiffs' experts in civil cases.

James Starrs, a professor of law and forensic science at George Washington University in Washington, D.C., says that much is apparent to anyone who reads the monthly case law reports on *Daubert* issues.



"There's been a sea change in the attitude of District Court judges toward expert witnesses," Starrs says.

"Call it what you will, but there's no question that the trial courts have become more restrictive, more narrow-minded, more jaundiced toward expert witnesses than ever before."

Starrs says much of that is the result of the Supreme Court's 1999 decision in *Kumho Tire Co. v. Carmichael*, which gave trial courts broad latitude to determine what kind of technical, nonscientific evidence is admissible.

"*Kumho* gave them a big, glowing green light to be as restrictive as they want," he says.

The Federal Judicial Center's study was based on a 1998 survey of federal judges and lawyers.

According to the findings, experts testified most frequently in tort cases, particularly those involving personal injury or medical malpractice. Following in frequency were civil rights, contract, intellectual property, and labor and prisoner cases.

The types of experts who testified most frequently were medical and mental health specialists, who accounted for more than 40 percent of all the experts testifying, the survey found. Experts in engineering were second in frequency of testifying, followed by those in business and science.

The companion survey of lawyers confirmed some of the findings about the impact of the *Daubert* decision on judges, according to the study.

Sixty-five percent of the lawyers with pre-*Daubert* trial experience said judges are less likely to admit some types of expert evidence now than they were prior to *Daubert*. And 60 percent said judges are more likely to hold pretrial hearings on the admissibility of expert testimony now than they were before *Daubert*.

Changes in Practice

In terms of their own practices, lawyers said they now file more motions to exclude expert evidence than they did prior to *Daubert*. They also said they more closely scrutinize the credentials of experts they are considering using than they did before the decision in *Daubert*.

The study also found that judges who excluded expert testimony did so primarily because it was not relevant, because the witness was not qualified or because the proferred testimony would not have assisted the trier of fact.

It also showed that judges and lawyers agree on what they perceive to be the biggest problems with expert testimony.

Both groups said it was experts who "abandon objectivity and become advocates for the side that hired them," followed by the high cost of party-hired experts.

The study, "Expert Testimony in Federal Civil Trials: A Preliminary Analysis," is available on the judicial center's Web site at www.fjc.gov. ■

GRAPHIC BY JEFF DIONISE