ADVISORY COMMITTEE
ON
EVIDENCE RULES

Washington, DC
November 14, 2005

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
Washington, D.C.
November 14, 2005

I. Opening Remarks of the Chair

Including approval of the minutes of the Spring 2005 meeting, welcome to new members, and a report on the June meeting of the Standing Committee. The draft minutes of the Spring 2005 meeting are included in this agenda book.

II. Privileges

The agenda book includes Ken Broun's memorandum concerning the possible proposal of a statute to govern waiver of privileges.

III. Update on Case Law Development After *Crawford v. Washington.*

The agenda book contains a memorandum from the Reporter setting forth the federal case law applying the Supreme Court's decision in *Crawford v. Washington*, and discussing the implications of that case law on any future amendments of hearsay exceptions.

IV. Consideration of New Proposals

A. Rule 804(b)(3)

The agenda book contains a memorandum from the Reporter on the possibility of reviving and modifying the proposed amendment to Rule 804(b)(3), the amendment that was referred back to the Rules Committee by the Supreme Court after *Crawford v. Washington.*

B. New Rule 107/1104

The agenda book contains a memorandum from the Reporter on the possibility of adding a new Evidence Rule to accommodate electronic evidence, by updating the paper-based language that currently exists in the rules.

V. Other Business

Time-counting Project: The Standing Committee has appointed a subcommittee, chaired by Judge Kravitz, to consider a uniform approach to counting time periods in the national rules. This project does not directly involve the Evidence Rules Committee, as none of the Evidence Rules contain a method for counting any time period. But the subcommittee is interested in any views that the members of the Committee may have on the project. The agenda book includes a memorandum from Professor Schiltz, reporter to the subcommittee on time-counting, describing the project.

Style Process: After consulting with the committees' chairs and reporters and the Standing Style Subcommittee, Judge Levi approved a style protocol, which sets out procedures governing submission, consideration, and adoption of comments, suggestions, and edits proposed by the Standing Committee's Style Subcommittee. Under these procedures, the committees' reporters will be working with the Style Subcommittee's consultants in drafting rule proposals.

VI. Next Meeting

ADVISORY COMMITTEE ON EVIDENCE RULES

October 1, 2005

Chair:

Honorable Jerry E. Smith
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Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
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Washington, DC 20544

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Chairs	Reporters
Honorable David F. Levi Chief Judge, United States District Court United States Courthouse 501 I Street, 14th Floor Sacramento, CA 95814	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02159
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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 28th, 2005

Phoenix, Arizona

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 28th 2005 in Phoenix, Arizona, with a subsequent electronic vote on a proposed amendment taken during the week of May 9-13.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Acting Chair
Hon. Andrew D. Hurwitz
Patricia Refo, Esq.
William W. Taylor III, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Thomas B. Russell, Liaison from the Civil Rules Committee
Robert Fisk, Esq., Liaison from the Criminal Rules Committee
Hon. Jeffrey L. Amestoy, former member of the Evidence Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

Opening Business

Judge Hinkle served as Acting Chair at the request of Judge Smith, who could not attend due to a death in the family. Judge Hinkle asked for approval of the minutes of the January 2005 Committee meeting. The minutes were approved.

Proposed Amendments to the Evidence Rules That Have Been Issued for Public Comment

The Standing Committee issued for public comment four proposed amendments to the Evidence Rules—Rules 404(a), 408, 606(b), and 609. At the April 2005 meeting, the Committee reviewed the public comments and considered whether the proposals should be approved as issued for public comment, approved as amended, or deferred.

1. Rule 404(a)

Over the course of several meetings the Committee tentatively agreed to propose an amendment to Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment is necessary because the circuits have long been split over whether character evidence can be offered to prove conduct in a civil case. The question of the admissibility of character evidence to prove conduct arises frequently in cases brought under 42 U.S.C. § 1983, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it can lead to a trial of personality and can cause the jury to decide the case on improper grounds. The risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. But none of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

At the Spring 2004 meeting, the Committee approved an amendment to Rule 404(a) to be released for public comment, and the Standing Committee released that proposal. Only a few public comments were received. Most were positive, and the ones that were critical mistook the proposal as one that would affect character evidence when offered to prove a character trait that is actually in dispute in the case (e.g., in a case brought for defamation of character). Rule 404(a) by its terms does not apply when character is "in issue", and the proposed amendment does not change that fact. Another comment argued that the amendment might create the inference was no longer applicable to civil cases. While Committee members did not believe such an inference could fairly be derived from the amendment, they resolved to add a sentence to the Committee Note to express the point that nothing in the amendment was intend to affect the admissibility of evidence under Rule 404(b).

A motion was made and seconded to approve the proposed amendment to Evidence Rule 404(a), together with the Committee Note, and to recommend to the Standing Committee that the proposal be approved and sent to the Judicial Conference. The motion was approved by a unanimous vote. The proposed amendment is set forth in an appendix to these minutes.

2. Rule 408

Over the course of several meetings, Committee members determined that the courts have been long-divided on three important questions concerning the scope of the Rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the 2003 meetings, at the Spring 2004 meeting, and finally at the meetings of January and April 2005. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed a crime. The DOJ contended that if Rule 408 were amended to exclude such statements in criminal cases, then this probative and important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements. But he contended that the Civil Division of the DOJ had not noted any deterrent to civil

compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

But other Committee members argued for a distinction between statements made in settlement negotiations and the offer or acceptance of the settlement itself. It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. These Committee members argued that in such cases the settlement should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities.

Committee members noted that the DOJ's concerns about admissibility of compromise evidence were essentially limited to statements of fault made in compromise negotiations; such direct statements of criminality might be relevant to subsequent criminal liability, but the same does not apply to the settlement agreement itself. At the April 2004 meeting, a majority of the Committee voted to release a proposed amendment to Rule 408 that would exclude offers and acceptances of settlement in criminal cases, but that would admit in such cases conduct and statements made in the course of settlement negotiations. The Standing Committee approved the proposal for release for public comment.

The public comment on the proposed amendment to Rule 408 was uniformly negative. Criticisms included: 1) the rule would deter settlement discussions; 2) it would create a trap for the poorly counseled and the otherwise unwary, who might not know that statements of fault made in a settlement of a civil case might later be used against them in a criminal case; 3) it would allow private parties to abuse the rule by threatening to give over to the government alleged statements of fault made during private settlement negotiations; 4) it would result in attorneys having to become witnesses against their civil clients in a subsequent criminal case, as a lawyer may be called to testify about a statement that either the lawyer or the client made in a settlement negotiation; and 5) it would raise a problematic distinction between protected offers and unprotected statements and conduct—a distinction that was rejected as unworkable when Rule 408 was originally enacted. The public comment supported a rule providing that both statements and offers made during compromise negotiations are never admissible in a subsequent criminal case when offered to prove the validity or amount of the claim.

At the April 2005 meeting, most of the Committee members expressed significant concern over and sympathy with the negative public comment. But the DOJ representative argued at length that the comment was misguided. He made the following points: 1) the comment overstates the protection of the existing rule, which prohibits compromise evidence in criminal cases only when it is offered to prove the validity or amount of the claim; 2) the comment fails to note that several circuits already employ a rule that admits compromise evidence in criminal cases even when offered as an admission of guilt; 3) the comment fails to take account of the fact that many statements made to government enforcement officials in an arguable effort to settle a civil regulatory matter are

essential for proving the defendant's guilt in a subsequent criminal case—the primary example being a statement to a revenue agent that is later critical evidence against the defendant in a criminal tax prosecution; 4) the rule preferred by the public comment would allow a defendant to make a statement in compromise and later testify in a criminal case inconsistently with that statement, free from impeachment.

Extensive discussion ensued in response to the DOJ representative's presentation in favor of the proposed amendment as issued for public comment. Several committee members were sympathetic to the government's position that statements of fault made to government regulators would provide critical evidence of guilt in a subsequent criminal prosecution. They noted, however, that the government's concerns did not apply to statements made in compromise between private parties. The practicing lawyers on the Committee noted that it was often necessary for a client to apologize to a private adversary in order to obtain a favorable settlement. If that apology could later be referred to the government and used as an admission of guilt, it is highly likely that such an apology would never be made, and many cases could not be settled. In light of this concern, a Committee member proposed a compromise provision that would permit statements in compromise to be admitted as evidence of guilt, *but only when made in a civil action brought by a government regulatory agency.*

Committee members recognized that the proposed compromise would require some work on the language of the proposal, and moreover that it would be inappropriate to vote as a final matter on the compromise in the absence of the Chair. The Committee therefore resolved to allow the Reporter to prepare language that would permit statements of compromise to be admitted in criminal cases only when made in an action brought by a government regulatory agency. That language would be reviewed by the Chair and if the Chair approved, the proposal could be sent out for an electronic vote by the Committee members.

On May 9, 2005 the Committee Chair issued to the Committee for consideration a proposed amendment to Rule 408 that would permit statements of compromise to be admitted in criminal cases only if made in cases brought by a government regulatory agency. A motion to approve the amendment for consideration by the Standing Committee, with the recommendation that it be approved by that Committee and referred to the Judicial Conference, was made and seconded by e-mail. An e-mail vote was taken and the proposed amendment was approved by a 5-2 vote. The proposed amendment and Committee note are set forth in an appendix to these minutes.

3. Rule 606(b)

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a

possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. At its Spring 2003 meeting, the Committee agreed in principle on a proposed amendment to Rule 606(b) that would be part of a possible package of amendments to be referred to the Standing Committee, for release for public in 2004.

Committee members recognized the need for an amendment to Rule 606(b) because 1) all courts have found an exception to the Rule permitting juror testimony on certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule, and 2) the circuits have long been in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

The proposed amendment to Rule 606(b) that was released for public comment in 2004 added an exception permitting juror proof that "the verdict reported is the result of a clerical mistake." The Committee determined that a broader exception permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. The broad exception would be in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury would not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did. The Committee note to the proposed amendment emphasized that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled.

Only a few public comments were received on the proposed amendment to Rule 606(b). The comments were largely positive; but one comment contended that the term "clerical mistake" was vague and could be interpreted to provide an exception for juror proof that was broader than that intended by the Committee

For the April 2005 meeting, the Reporter prepared language for the amendment to Rule 606(b) in response to the public comment. This language was intended to sharpen and narrow the "clerical mistake" exception that was released for public comment. The language would permit juror proof to determine "whether there was a mistake in entering the verdict onto the verdict form." Committee members unanimously agreed that this language was an improvement on the language of the amendment that was released for public comment.

A motion was made and seconded to approve an amendment to Evidence Rule 606(b) permitting juror proof to determine "whether there was a mistake in entering the verdict onto the verdict form," together with the Committee Note. The motion was to recommend to the Standing Committee that the proposed amendment be approved and sent to the Judicial Conference. The motion was approved with one dissenting vote. The proposed amendment to Rule 606(b)is set forth in an appendix to these minutes.

4. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a nuanced balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Evidence Rule 609(a)(2) that was intended to resolve the long-standing conflict in the courts over how to determine whether a conviction involves dishonesty or false statement within the meaning of that Rule. The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Most courts, however, look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

Throughout the Committee's consideration of Rule 609(a)(2), most Committee members have favored an "elements" definition of crimes involving dishonesty or false statement. These Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts. Finally, if a crime not involving false statement as an element (e.g., murder or drug dealing) is found inadmissible under Rule 609(a)(2), it is still likely to be admitted under the balancing test of Rule 609(a)(1). Thus, the costs of an "elements" approach would appear to be low–all that is lost is automatic admissibility.

The Department of Justice, however, has opposed a strict "elements" test. The DOJ representative on the Committee emphasized that the Department was not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that

should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

The Department recognized that Rule 609(a)(2) is not the only avenue for admitting a conviction committed through deceit even though the elements do not require proof of receipt. Such a conviction could be offered under the Rule 609(a)(1) balancing test. But the Department's response was that Rule 609(a)(1) would not apply if the conviction is a misdemeanor; and moreover the balancing test of Rule 609(a)(1) might lead to a judge excluding the conviction even though it should really have been admitted under Rule 609(a)(2) (though there is little support for this latter argument in the cases). The Department also recognized that the deceitful conduct could itself be admissible as a bad act under Rule 608(b). But the Department's response was that Rule 608(b) would not permit extrinsic evidence if the witness denied the deceitful conduct.

After extensive discussion over several meetings, the Committee as a whole determined that there was no real conflict within the Committee about the basic goals of an amendment to Rule 609. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness.

The proposal released for public comment provided for automatic impeachment with any conviction "that readily can be determined to have been a crime of dishonesty or false statement." The public comment on the proposed amendment was largely negative. Public commentators generally favored a strict "elements" test. They contended that anything broader would lead to difficulties of application, and the very kind of mini-trial into the facts of a conviction that the Committee sought to avoid. Public comments also noted that the term "crime of dishonesty or false statement" was undefined, and that this would lead to disputes in the courts over its meaning.

At the April 2005 meeting Committee members considered the public comment. The Department of Justice remained opposed to a strict "elements" test for Rule 609(a)(2). The DOJ representative did not disagree, however, with Committee members' comments that the term "crime of dishonesty or false statement" should be clarified to provide courts and counsel with a better indication of when it is permissible to go behind the elements of the conviction. After extensive discussion, one Committee member agreed that more precise language was necessary to define and limit the potential scope of Rule 609(a)(2). A Committee member proposed that the language be changed to provide for mandatory admission of a conviction "if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness." This language would permit some limited inquiry behind the conviction, but would provide for automatic admissibility only where it is clear that the jury had to find, or the defendant had to admit, that an act of dishonesty or false statement occurred that was material to the conviction. The

language had the additional benefit of specifically encompassing convictions that resulted from guilty pleas.

The Committee discussed this alternative and all members agreed that it better captured what the Committee had agreed was necessary for an amendment to Rule 609(a)(2)—to limit enquiry behind the judgment to those cases where it can be determined easily and efficiently that an act of dishonesty or false statement was essential to the conviction. All members of the Committee — including the DOJ representative — were in favor of this change to the proposal issued for public comment.

A motion was made and seconded to approve an amendment to Evidence Rule 609 (together with the Committee note) that would provide among other things for mandatory admission of a conviction "if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness." The motion was to recommend to the Standing Committee that the proposed amendment be approved and sent to the Judicial Conference. The motion was approved unanimously. The proposed amendment to Rule 609 is set forth in an appendix to these minutes.

Privileges

Professor Ken Broun, the consultant to the Evidence Rules Committee on the privileges project, reported on the status of the project. The goal of the privileges project is to prepare a document for publication. There is no intent to propose the codification of the federal law of privilege. For each privilege, the project will draft 1) a survey rule, equivalent to a restatement of the federal law of privilege; 2) commentary on the federal case law bearing on the respective privilege; and 3) a section addressing future developments and special issues such as circuit splits. The Committee has already reviewed the project's work on the medical privilege, which has been completed. The attorney/client privilege section of the report is virtually completed. Professor Broun presented for the Committee's review new material on the crime-fraud exception.

At previous meetings, Committee members noted a number of problems with the current law governing the waiver of privilege. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case but to other cases as well. An enormous amount of expense is put into document production in order to protect waiver. Moreover, the fear of waiver leads to extravagant claims of privilege. Members observed that if there was a way to produce documents in discovery without risking subject matter waiver, the discovery

process could be streamlined.

At the April 2005 Committee meeting, Professor Broun presented for the Committee's consideration a draft statute that would treat the question of inadvertent disclosure of privileged material. The Committee agreed to review the draft statute at the next meeting and consider whether to take action on the subject of waiver of attorney-client privilege. Judge Hinkle expressed his thanks to Professor Broun for all of his hard work on the privilege project.

Respectfully submitted,

Daniel J. Capra
Reporter

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 20, 2005

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All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

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At its September 20, 2005 session, the Judicial Conference of the United States:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2005.

Committee on the Administration of the Bankruptcy System

Approved with respect to certain bankruptcy judgeships the fixing and transfer of official duty stations and designation of additional places of holding court requested by the circuit judicial councils and recommended by the Director.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Approved adoption of the Director's Interim Guidance Regarding Tax Information Under 11 U.S.C. § 521.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2007, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Committee on Rules of Practice and Procedure

Approved proposed amendments to Appellate Rule 25(a)(2)(D), Bankruptcy Rule 5005(a)(2), and Civil Rule 5(e) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed new Appellate Rule 32.1 with the condition that the rule would apply only to judicial dispositions entered on or after January 1, 2007, and agreed to transmit the proposed rule to the Supreme Court for its consideration with a recommendation that the rule be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 1009, 5005(c), and 7004 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Civil Rules 16, 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34, 37(f), 45, and 50 and Form 35 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Supplemental Rules A, C, and E, new Supplemental Rule G, and conforming amendments to Civil Rules 9, 14, 26(a)(1)(E), and 65.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rules 404, 408, 606, and 609 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Committee on Security and Facilities

With regard to the *U.S. Courts Design Guide*:

a. Endorsed *U.S. Courts Design Guide* Phase I revisions 9 through 18 and recommitted revisions 1 though 8 for further consideration;

Memorandum To: Advisory Committee on Evidence Rules
From: Ken Broun, Consultant
Re: Possible statute concerning waiver of privilege
Date: October 12, 2005

Waiver of privilege problems frequently arise in large document litigation. The issues usually involve the attorney-client privilege, but may involve other privileges as well. There are at least three distinct, but sometimes overlapping, problems:

1. The effect on a privilege of an inadvertent production of a privileged document ["inadvertent waiver"].

2. The scope of the waiver of a document produced either intentionally or inadvertently ["scope of waiver"].

3. The effect on future privilege claims of the production of documents in the course of a government investigation, either with or without a confidentiality agreement entered into with the government agency ["selective" or "limited" waiver referred to in this memorandum as "selective waiver"].

Concern that privilege may be waived even by an unintended disclosure of a document will cause counsel and his or her staff to spend countless hours reviewing documents in large volume cases to insure against inadvertent disclosure. The rule applied by many courts that waiver of privilege by disclosure of a single document is a waiver of privilege with regard to all communications dealing with the same subject matter will cause counsel to guard against disclosure of privileged documents even though counsel may not really care if a particular document is disclosed to opposing counsel. The likelihood that disclosure of documents to a government agency may result in waiver of privilege as against other parties may limit a party's willingness to cooperate fully with a government investigation.

With regard to the inadvertent waiver and scope of waiver issues, the cases differ widely on such matters as the effect of an inadvertent disclosure and the scope of the subject matter if a waiver or forfeiture is found. Stipulations or case-management orders saving the privilege, at least against inadvertent disclosure, have become common. Nevertheless, as will be discussed, such orders are of somewhat limited usefulness.

With regard to selective waivers, most federal circuits hold, at least without a confidentiality agreement, that a party may not selectively waive a privilege. In other words, disclosure to a government agency literally destroys the privilege. One circuit, the Eighth, holds to the contrary. The other circuits are split on whether the existence of a confidentiality agreement with the government agency preserves the privilege against the rest of the world.

This memorandum seeks to flesh out the dimensions of these interrelated problems, to discuss the case law dealing with the issues, and to propose some statutory models intended to ease the burden on the courts and counsel.

Inadvertent waiver and scope of waiver: the problem

The best formal statement of these two related problems is contained in Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1606-07 (1986).

Marcus sets forth the concerns as follows:

> . . . [E]normous energy can be expended to guarantee that privileged materials are not inadvertently revealed in discovery, and lawyers may adopt elaborate witness preparation strategies in order to prevent witnesses from seeing privileged materials. Judges also feel the burden; where waiver is at stake, parties will litigate privilege issues that otherwise would not require judicial attention. Finally, for those not lucky or wealthy enough to adopt strategies that avoid waiver, broad waiver rules erode the reliability of the privilege. In recognition of these costs, courts are increasingly willing to enter orders preserving privilege despite disclosure in order to facilitate the pretrial preparation process. Although commendable, these orders appear totally unenforceable under classical waiver doctrine.

See also, Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege,* 2000 Wis. L. Rev. 31, 73; Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished,* 47 Duke L. J. 853 (1998).

Although the Marcus piece is now almost twenty years old, its description of the problem is still largely current. Perhaps the only things that have changed are the even more frequent use of protective orders to deal with inadvertent disclosures in discovery and the added complexities caused by the increasing existence of electronically stored information.

The Report of the Civil Rules Advisory Committee (May 17, 2004, Revised, August 3, 2004) dealing with proposed amendments concerning electronic discovery specifically notes the problem as well as the attempts of parties to deal with the issue by protocols minimizing the risk of waiver.[1] The Committee notes (p. 8):

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[1]The Civil Rules Advisory Committee elected to use the term "waiver" in connection with even inadvertent or unintended disclosures of privileged material. Technically, such disclosures may result in a "forfeiture" rather than a "waiver," which by definition would be intentional. Nevertheless, the courts have consistently used the term "waiver" in connection with unintentional disclosures, and this memorandum and proposed model statutes continue that use of terminology.

> Such protocols may include so-called quick peek or claw back arrangements, which allow production without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

The Civil Rules Committee Report cites the Manual for Complex Litigation (4th) § 11.446, setting forth the same issue:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate at the outset of discovery to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.[2]

The Civil Rules Committee's concern for the problem is reflected in its proposed amendments to Rules 16(b)(6) and 26(f)(4) and Form 35 providing that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement.

However, although a protective or case-management order may be quite useful as among the parties to a particular litigation, it is likely to have no effect with regard to persons or entities outside the litigation. As Marcus indicates in the statement quoted above, protective orders "appear totally unenforceable under classical waiver doctrine."

Moreover, even if the courts were to hold that a stipulation or protective order is effective to guard against waiver with regard to parties outside the litigation, problems still exist. For

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[2]An example of a case-management order dealing with disclosure of privileged documents is contained in *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1995 WL 411805 at * 4 (Del. Super.Ct. Mar. 17, 1995), where the court quotes the order as stating:

> The production of a privileged document shall not constitute, or be deemed to constitute, a waiver of any privilege with respect to any document not produced. The production of a document subject to a claim of privilege or other objection and the failure to make a claim of privilege or other objection with respect thereto shall not constitute a waiver of a privilege or objection. . . .

example, such orders may deal only with inadvertent disclosures. Questions may and do arise under such orders as to what is an inadvertent disclosure. *See Baxters Travenol Labs., Inc. v. Abbott Labs.*, 117 F.R.D. 119 (N.D. Ill. 1987) (disclosure not inadvertent under the circumstances).

Thus, an order requiring the return of inadvertently disclosed document may help in the instant litigation, but it still requires careful counsel to claim privilege even where she doesn't care about disclosure.

Because both concepts are important to a discussion of possible legislative remedies for the above described problem, the next two sections of this memorandum attempt briefly to describe the case law on 1) the effect of inadvertent waiver and 2) the scope of waiver based upon disclosure of documents during the litigation process.

Inadvertent waiver

The courts have taken three different approaches to inadvertent disclosure: 1) inadvertent disclosure does not waive the privilege even with regard to the disclosed document; 2) inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure; 3) inadvertent waiver may waive the privilege depending upon the circumstances, especially the degree of care taken to prevent disclosure of privileged matter and the existence of prompt efforts to retrieve the document.

Perhaps the fewest number of cases take the first approach finding no waiver from inadvertent disclosure. The leading case is *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (1982). The court stated:

> Mendenhall's lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the *client's* welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege. [citing *Dunn Chemical Co. v. Sybron Corp.*, 1975-2 Trade Cas. ¶ 60,561 at 67,463 (S.D.N.Y. 1975)] No waiver will be found here.

See also Conn. Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955) (no evidence of intent to waive privilege).

The opposite approach has been taken by a significant number of courts. Among the more frequently cited cases holding that an inadvertent disclosure waives the privilege regardless of the circumstances is *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988). The court in *International Digital Systems* analyzed the three different approaches to inadvertent disclosure. The court is particularly critical of the

approach that analyzes the precautions taken, noting that if precautions were adequate "the disclosure would not have occurred." It added:

> When confidentiality is lost through "inadvertent" disclosure, the Court should not look at the intention of the disclosing party. . . . It follows that the Court should not examine the adequacy of the precautions taken to avoid "inadvertent" disclosure either.

The court adds that a strict rule "would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure." 120 F.R.D. at 450.

The court in *International Digital Systems* relied upon *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970). In that case, the court stated:

> The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.

In accord are *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D.Ill. 1996) ("With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position."); *Ares-Serono v. Organon Int'l. B.V.*, 160 F.R.D. 1 (D. Mass. 1994) (trade secrets privilege); *Wichita Land & Cattle Co. v. Am. Fed. Bank*, F.S.B. 148 F.R.D. 456 (D.D.C. 1992) (attorney-client and work product privileges).

The third or balanced approach is also taken by a significant number of courts. Many decisions cite the factors for determining whether waiver exists as a result of inadvertent disclosure set forth in *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985). In *Hartford Fire*, the Court relied upon the analysis in an earlier case, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985), which had found the following elements significant in deciding the existence of a waiver, calling it the "majority rule":

> (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error, (3) the scope of discovery; (4) the extent of the disclosure; and (5) the "overriding issue of fairness."

The court in *Hartford Fire* found there had been waiver under the circumstances.

Other cases among the many taking a similar balancing approach to inadvertent disclosure include *Alldread* v. *City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) (governmental privilege); *Zapata v. IBP*, Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product privilege); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client

privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege).

For more detailed descriptions of the various approaches *see* John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – Federal Law,* 159 A.L.R. Fed. 153 (2005); Note, Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts,* 1998 U.Ill. L. Rev. 643, 659.

The scope of waiver based upon disclosure of documents during the litigation process

A decision that an inadvertent disclosure results in waiver with respect to the disclosed document does not necessarily mean that the privilege is waived with regard to all communications dealing with the same subject matter. As in the case of the effect of an inadvertent disclosure with regard to a disclosed document, there are various approaches to the issue of subject matter waiver.

Some courts hold that even where an inadvertent disclosure results in a waiver with regard to the disclosed documents themselves, there is no waiver with regard to other communications – even those dealing with precisely the same subject matter.

For example, in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.* 132 F.R.D. 204 (N.D. Ind. 1990), the court found that there had been a waiver of the attorney client privilege based upon an inadvertent disclosure. Waiver was found under either the strict or balancing approach. However, the court limited the waiver to the actual document produced, stating (132 F.R.D. at 208):

> Laying aside for the moment the question of whether the attorney-client privilege has been waived as to the letter, the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter. [citing Marcus, *supra,* at 1636].

International Digital Systems Corp. v. Digital Equipment Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988), discussed above, is a leading case for the strict approach to inadvertent disclosure. Yet, the court in that case refused to find subject matter waiver.

In *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.,* 116 F.R.D. 46, 52 (M.D.N.C. 1987), the court used the balancing test to find waiver with regard to an inadvertent disclosure. However, the court noted:

> The general rule that a disclosure waives not only the specific communications but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.

Despite the strong language in cases such as *Golden Valley,* other courts have in fact found subject matter waiver even where the disclosure was inadvertent. *E.g., In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989); *In re Grand Jury Proceedings,* 727 F.2d 1352 (4th Cir. 1984); *Nye v. Sage Prods., Inc.* 98 F.R.D. 452 (N.D. Ill. 1982) (court notes that plaintiffs had secured no agreement from defendants that inadvertent disclosure would not waive privilege with respect to other documents); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F. Supp. 1146 (D.S.C. 1974) (statement of intent not to waive privilege ineffective); *Malco Mfg. Co. v. Elco Corp.,* 307 F. Supp. 1177 (E.D. Pa. 1969) (attempt to reserve privilege ineffective).

Other courts have applied a subject matter waiver but have limited that waiver in some way based upon the circumstances – often indicating a concern for fairness to both of the parties. For example in *Hercules, Inc. v. Exxon Corp.,* 434 F. Supp. 136, 156 (D. Del. 1977), the court applied subject matter waiver but noted:

> The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny to the other party an opportunity to discover other relevant facts with respect to that subject matter.

See also In re Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251 (6th Cir. 1996) (intentional, non-litigation disclosure; waiver of subject matter, but subject matter limited under the circumstances); *Weil v. Inv./Indicators, Research and Mgmt., Inc.,* 647 F.2d 18 (9th Cir. 1981) (subject matter waiver; however, because disclosure made early in proceedings and to opposing counsel rather than the court, the subject matter of the waiver is limited to the matter actually disclosed and not related matters); *In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989) (determination of subject matter of waiver depends on the factual context); *Goldman, Sachs & Co. v. Blondis,* 412 F. Supp. 286 (D.C. Ill. 1976) (disclosure at deposition; waiver limited to specific matter disclosed at deposition rather than broader subject matter); *Perrignon v. Bergen Brunswig Corp.,* 77 F.R.D. 455 (D.C. Cal. 1978) (same).

The Marcus article surveys the cases up to that point in time in great depth. The author uses the case of *Transamerica Computer Co. v. IBM,* 573 F.2d 646 (9th Cir. 1978) as an example of a court that appropriately considered the circumstances of the case in determining the existence of waiver. In *Transamerica Computer*, the court considered whether the inadvertent disclosure of documents in an earlier case waived the privilege in this case. The court determined that it did not, based upon the extreme logistical difficulties of protecting documents in the earlier case.

Marcus argues that waiver should be analyzed in terms of fairness, stating, "the focus should be on the unfairness that results from the privilege-holder's affirmative act misusing the privilege in some way." (84 Mich. L. Rev. at 1627). Elsewhere in the article, the author states (84 Mich. L. Rev. at 1607-08):

> This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight. . . .
>
> Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.

Marcus expands on his "truth garbling" point later in the article where he raises the possibility that the use of disclosed information, while still protecting other information through the exercise of the privilege, might result in a distortion of the facts. He refers to cases involving the Fifth Amendment privilege against self-incrimination, including *Rogers v. United States,* 340 U.S. 367, 371 (1951). Marcus notes (84 Mich. L. Rev. at 1627-28):

> Similarly with the attorney-client privilege, the courts have condemned "selective disclosure," in which the privilege-holder picks and chooses parts of privileged items, disclosing the favorable but withholding the unfavorable. It is the truth-garbling risk that results from such affirmative but selective use of privileged material, rather than the mere fact of disclosure, that justifies treating such revelations as waivers.

Even where there is no use of the disclosed communications by the privilege holder, it is also possible that the matter disclosed has become so much a part of the common knowledge that protection of the other communications dealing with the same subject matter makes no sense. Marcus states (84 Mich. L. Rev. at 1641- 42):

> At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain the information or offer it in evidence, the opponent is subjected to a judicial result that many others (who do have the information) know to be wrong. Very strong fairness arguments then counsel disclosure, and the interest in preserving the privilege diminishes to the vanishing point. This, indeed, seems to be a central concern of courts that condemn "selective disclosure" to some but not others.

Selective Waiver[3]

Only the Eighth Circuit has held that a selective waiver of the attorney-client privilege applies whenever a client discloses confidential information to a federal agency. Other courts have suggested that a selective waiver may apply if the client has clearly communicated his or her intent to retain the privilege, such as by entering into a confidentiality agreement with the federal agency. The First, Third, Fourth, Sixth, and D.C. Circuits have expressly held that when a client discloses confidential information to a federal agency, the attorney client privilege is lost. Cases from the Third and Sixth Circuits have held that disclosure destroys the privilege, even in the presence of a confidentiality agreement.

Cases permitting selective waiver

The court in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) adopted a selective waiver approach. Diversified Industries had conducted an internal investigation over a possible "slush fund" that may have been used to bribe purchasing agents of other corporations to buy its product. The Securities and Exchange Commission instituted an official investigation of Diversified and subpoenaed all documents relating to Diversified's internal investigation. Without entering into a confidentiality agreement, Diversified voluntarily complied with the SEC's request. Subsequently, Diversified was sued by one of the corporations affected by the alleged bribery scandal. The plaintiff in that suit sought discovery of the materials disclosed to the SEC, arguing that the attorney-client privilege was waived when privileged material was voluntarily disclosed to the SEC. The Eighth Circuit rejected this argument, holding that because the documents were disclosed in a "separate and nonpublic SEC investigation . . . only a limited waiver of the privilege occurred." 572 F.2d at 611. The court explained, "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them. . . ." *Id.*

Some district courts outside the Eighth Circuit have adopted the *Diversified* approach to waiver, holding that the attorney-client privilege may be selectively waived to federal agencies even in the absence of an agreement by the agency to keep the information confidential. For example, in *In re Grand Jury Subpoena Dated July 13, 1979,* 478 F. Supp. 368, 373 (D. Wis 1979), the court held that cooperation with federal agencies should be encouraged, and therefore refused to treat disclosure of privileged information to the SEC as a waiver of the corporation's attorney-client privilege. *See also In re LTV Sec. Litig.,* 89 F.R.D. 595, 605 (N.D. Tex. 1981), where the court held that disclosure of privileged information to a federal agency does not always constitute an implied waiver of the attorney-client privilege. The court explained that, because the client did not intend to waive the privilege and assertion of the privilege was not unfair, the

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[3]I am indebted to former UNC law student Mark Tolman, now an attorney with the firm Kilpatrick Stockton in Winston-Salem, N.C., for his excellent work on this portion of the memorandum.

client's "disclosure of . . . materials to the SEC does not justify [a third party's] discovery of the identity of those documents. . . ."

General rejection of selective waiver

In *United States v. Massachusetts Institute of Technology,* 129 F.3d 681 (1st Cir. 1997), the court held that the attorney-client privilege was lost when MIT disclosed privileged materials to the Department of Defense. The documents had been voluntarily disclosed to the DOD pursuant to a regular audit. The same documents were sought as part of an IRS investigation. In rejecting the *Diversified* approach, the court explained that selective waiver was unnecessary because "agencies usually have means to secure the information they need and, if not, can seek legislation from Congress." 129 F.3d at 685. The court added that applying the general principle of waiver of privilege to any third party disclosure "makes the law more predictable and certainly eases its administration. Following the Eighth Circuit's approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty." *Id.*

In *Permian Corp. v. United States,* 665 F.2d 1214 (D.C. Cir. 1981), Permian sought attorney-client protection for documents sought by the Department of Energy. The documents had previously been disclosed to the SEC. The court rejected the approach of the *Diversified* case and held that the privilege had been waived by the SEC disclosure. The court stated that "[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship." 665 F.2d at 1221. The court added that the "client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment." *Id.*

In *In re Weiss,* 596 F.2d 1185 (4th Cir. 1979), the court, distinguishing *Diversified* as involving a private litigation, held that a lawyer's testimony before the SEC constituted a waiver of the attorney-client privilege as to future testimony before a grand jury.

Rejection of selective waive even with a confidentiality agreement

Two prominent cases, from the Third and Sixth circuits, have rejected selective waiver, even when privileged material is disclosed to a federal agency pursuant to a confidentiality agreement.

In *Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991), Westinghouse had voluntarily turned over privileged material to the SEC and to the Department of Justice in connection with investigations concerning the bribing of foreign officials. Westinghouse said that its disclosures to the SEC were made in reliance upon SEC

regulations that provided that "information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically authorized." 951 F.2d at 1418, n. 4 citing 17 C.F.R. § 240.0-4 (1978). The disclosures to the DOJ were subject to an agreement expressly providing that review of corporate documents would not constitute a waiver of Westinghouse's work product and attorney-client privileges. The Republic of the Philippines brought suit against Westinghouse alleging the bribing of former President Marcos to obtain a power plant contract. The Republic sought discovery of the documents Westinghouse had previously disclosed to the federal agencies. The court held that Westinghouse had waived the attorney-client privilege by its voluntary disclosure of privileged material to the SEC and DOJ. The court noted (951 F.2d at 1425):

> [S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose. . . . Moreover, selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in *Diversified*. . . .
>
> The traditional waiver doctrine provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice. Because the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine. Therefore, we are not persuaded to engraft the *Diversified* exception onto the attorney-client privilege. Westinghouse argues that the selective waiver rule encourages corporations to conduct internal investigations and to cooperate with federal investigative agencies. We agree with the D.C. Circuit that these objectives, however laudable, are beyond the intended purposes of the attorney-client privilege, see *Permian,* 665 F.2d at 1221, and therefore we find Westinghouse's policy arguments irrelevant to our task of applying the attorney-client privilege to this case. In our view, to go beyond the policies underlying the attorney-client privilege on the rationale offered by Westinghouse would be to create an entirely new privilege.

The court also noted that in 1984, Congress had rejected an amendment to the Securities and Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rule regarding documents disclosed to the agency. 951 F.2d at 1425, citing *SEC Statement in Support of Proposed § 24(d) of the Securities and Exchange Act of 1934,* in 16 Sec.Reg. & L.Rep. at 461 (March 2, 1984). A regulation to the same effect was proposed, but not adopted, in connection with the Sarbanes-Oxley Act. See proposed 17 C.F.R. § 205.3 (e)(3), http://www.sec.gov/rules/final/33-8185.htm (Viewed Oct. 5, 2005). The Commission indicated that the regulation, although included in the final draft of the regulations implementing Sarbanes-Oxley, was not adopted because of the Commission's concern about its authority to enact such a provision. In its final report, the Commission reiterated its position that there were strong policy reasons behind such a provision and

that, because of those policy reasons, it still intended to enter into confidentiality agreements. *Id.*

Relevant to the question of scope of waiver, the court in *Westinghouse* also held that the privilege is waived only as to those communications actually disclosed, "unless a partial waiver would be unfair to the party's adversary." *Id.* at 1426 n.12. If partial waiver disadvantages the adversary by allowing the disclosing party to present a one-sided story to the court, the privilege would be waived as to all communications on the same subject.

The court in *Westinghouse* distinguished between the attorney-client and work product privileges and stated that a disclosure to another party might not necessarily operate as a waiver of the work product privilege. Disclosures in aid of an attorney's preparation for litigation would still be protected. However, the court found that disclosure to the federal agencies in this instance did operate as a waiver, because the disclosures were not made to further the goal underlying the work product doctrine – the protection of the adversary process. *Id.* at 1429.

The court in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289 (6th Cir. 2002) also rejected a selective waiver doctrine for both the attorney-client and work product privileges, even in the face of an express confidentiality agreement. In that case, the Department of Justice had conducted an investigation of possible Medicare and Medicaid fraud. Columbia/HCA had disclosed documents to the DOJ under an agreement with "stringent" confidentiality provisions. *Id.* Numerous lawsuits were then instigated against Columbia/HCA by insurance companies and private individuals. These plaintiffs sought discovery of the materials disclosed to the DOJ. Columbia/HCA raised attorney-client and work product privilege objections. The court expressly rejected the application of selective waiver for either privilege under these circumstances. In rejecting the argument that the confidentiality agreement precluded waiver, the court noted that the attorney-client privilege was "not a creature of contract, arranged between parties to suit the whim of the moment." *Id.* at 303. The court further reasoned that allowing federal agencies to enter into confidentiality agreements would be to allow those agencies to "assist in the obfuscating the truth-finding process." *Id.*

Recognition of selective waiver where a confidentiality agreement exists

A few courts have at least indicated that they would recognize selective waiver where there was an express reservation of confidentiality before disclosure.

The leading decision taking this position is *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). The court held in that case that a waiver of the attorney-client privilege occurs upon disclosure of privileged information to a federal agency "only if the documents were produced without reservation; no waiver [occurs] if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party's claim of privilege as to the material disclosed." *Id.* at 646. The court noted:

> [A] contemporaneous reservation or stipulation would make it clear that . . . the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation.

In *In re Steinhardt Partners, L.P.,* 9 F.3d 230 (2d Cir. 1993), the court rejected the *Diversified* selective waiver approach with regard to prior disclosures of documents to the SEC that would otherwise have been protected as work product. However, after so holding, the court stated (*Id.* at 236):

> In denying the petition, we decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. . . . Establishing a rigid rule would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

See also Dellwood Farms, Inc. v Cargill,Inc., 128 F.3d 1122, 1127 (7th Cir. 1997) (claim of law enforcement privilege could have been maintained after government had disclosed information to a third party if the disclosure had been made under a confidentiality agreement); *Fox v. Cal./Sierra Fin. Serv.,* 120 F.R.D. 520, 527 (N.D. Cal. 1988) (privilege lost "without steps to protect the privileged nature of such information;" follows *Teachers Insurance*); *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 697 (D. Colo. 1993) (prior disclosure to United States Attorney under a confidentiality agreement did not waive privilege against a private party).

The need for a statute rather than a rule.

Much of the controversy surrounding the adoption of the Federal Rules of Evidence involved the proposed rules governing privileges. Perhaps as a reaction to that controversy, Congress not only deleted those rules from the rules ultimately adopted, it enacted a statute, 28 U.S.C. § 2074(b), providing that any "rule creating, abolishing, or modifying an evidentiary privilege" must be approved by an act of Congress. Put otherwise, rules governing privilege cannot be enacted through the normal rulemaking process. *See* Kenneth S. Broun, *Giving Codification a Second Chance – Testimonial Privileges and the Federal Rules of Evidence,* 53 Hastings L. J. 769, 778 (2002).

There has been no case directly construing § 2074(b), largely because the judiciary has elected not to deal with privileges in face of the Congressional mandate. (*But see Baylson v. Disciplinary Bd. of the Supreme Court of Pa.,* 764 F. Supp. 328 (E.D. Pa. 1991) (28 U.S.C. §

2074(b) cited in the case considering the effect of a Pennsylvania Rule of Professional Conduct and its application to federal prosecutors).

An argument might be made that a rule governing the scope of waiver of privileges would not come within § 2074(b) because such a rule would not modify a privilege itself – only its effect after disclosure.

Nevertheless, probably the better argument is that change in the scope of waiver, the development of rules with regard to inadvertent waiver or a provision for selective waiver would all be modifications of privilege law and thus within the meaning of the statute. A statutory, rather than a rule, approach to the issue is the more prudent course.

The limitations on rule making with regard to waiver of privilege were recognized by the Committee on Rules of Practice and Procedure in its report submitting proposed amendments to the Federal Rules of Civil Procedure dealing with electronic discovery to the Judicial Conference. The Standing Committee noted the problems that privileged documents present in large volume document cases, especially in electronic discovery cases. However, its proposed amended rules deal only with a procedure for asserting privilege claims. The committee stated in its report (Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sept., 2005, at 29):

> Because the proposed amendment only establishes a procedure for asserting privilege or work-product protection claims after production and does not attempt to change the rules that determine whether production waives the privilege or protection asserted, it does not trigger the special statutory process for adopting rules that modify privilege. By providing a clear procedure to allow the responding party to assert privilege after production, the amendment helpfully addresses the parties' burden of privilege review, which is particularly acute in electronic discovery.

Some possible statutes

Following are two models of statutes. The core of each model is taken from the language of Proposed Federal Rule 511 dealing with Waiver of Privilege by Voluntary Disclosure. The proposed statute is also intended to be consistent with § 79 of the Restatement the Law Governing Lawyers 3d (2000), which provides:

> The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication.

The models incorporate the fairness considerations discussed in the Marcus article as set forth above. No guidance is given as to what might constitute fairness under the circumstances. In that respect, the statutes are patterned on Fed. R. Evid. 106, which provides:

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

Under Model 1, there is no waiver, even with regard to the disclosed document, for inadvertent disclosure, provided the privilege holder took reasonable precautions to prevent disclosure, took reasonably prompt measures to rectify the error, and, if applicable, adhered to the provisions of what is now Proposed Fed.R.Civ.P. 26(b)(5)(B), which set forth a procedure for retrieving privileged information disclosed during discovery. This treatment of inadvertent waiver is an attempt to incorporate the balancing test put forth in cases such as *Hartford Fire Insurance Co. v. Garvey,* 109 F.R.D. 323, 332 (N.D. Cal. 1985), discussed above. The *Hartford Fire* case lists several factors. Model 1 sets out only two of those factors – the reasonableness of the precautions and the time taken to rectify the error. The statute could be reworked to add other factors, and the language could be amended to provide more predictability.

The word "inadvertent" is used in Model 1. Arguably, "unintended" or "mistaken" may be better terms. The word "inadvertent" is used because that is the word used in the cases. In addition, using "inadvertent" seems to avoid the argument that a document may be intentionally produced but without consideration of the implications of production on the question of privilege. "Intended or unintended" is used in Model 2 for the sake of parallelism and because the subtleties are not as significant where the mental state of the lawyer or client is made irrelevant to the issue.

The bracketed clause in part (b)(2) of Model 1 would limit the inadvertent waiver protection to discovery situations. The problems with inadvertent waiver have come largely in the context of discovery. The loophole may simply be too broad if not confined to discovery. There would seem to be no need for similar language in Model 2, where even inadvertent waiver constitutes a waiver with regard to the document in question. Just as in Model 1, the scope of the waiver is treated as a matter of fairness.

Model 2 specifically provides for waiver with regard to the documents disclosed, even if disclosure was inadvertent. Most of the concern by lawyers and judges involved in large document cases has to do with the scope of the waiver. Once a document is disclosed, it is difficult to put its contents back into the privileged domain. Under both of the drafted statutes, there would have to be a hearing as to the fairness of limiting disclosure to the document. Putting a balancing test in place for the document itself would cause one more issue to be resolved at a hearing and likely cause even more uncertainty.

Model 1 bracketed part (b)(3) and Model 2 bracketed part (b)(2) are identical and are intended to deal with the selective waiver issue. Both include alternative language that would require either a confidentiality agreement or simply that the disclosure be made in the course of a "nonpublic" investigation by the agency in question. The term "nonpublic" is taken from the *Diversified Industries* case, *supra,* 572 F.2d at 611. The draft language assumes that the ability to

waive selectively would apply only to agreements with governmental agencies, but that an agreement with a governmental agency at any level would qualify. The phrase "by or to" is used to cover situations such as involved in *Dellwood Farms, Inc. v. Cargill, Inc., supra,* where disclosure by a government agency was held to have waived the law enforcement privilege.

There is no alternative language set out that would take the position of cases such as *Westinghouse Electric,* which refuse to recognize selective waiver under any circumstances. If the drafters opt for that alternative, the bracketed selective waiver provision should be eliminated. The language of part (a), providing for waiver, would then govern, despite the circumstances of the earlier disclosure.

Part (d) of each model provides for a potentially binding effect of a court order on non-parties to the litigation. The language (together with the first clause of part (a)) recognizes specifically that the parties may want the court to tailor results in a particular case to their circumstances. The language of parts (a) and (d) gives the courts that flexibility and provides for greater assurance to the parties in the event that a non-party seeks to take advantage of a disclosure in other litigation.

Part (e) and the qualifying language in part (a) insure that the parties will continue to have the ability to create waiver rules different from those in the proposed rule even if not incorporated into a court order. The last clause of this subsection is intended to make sure that the agreement would not be binding on other parties unless incorporated into a court order. It would seem to be unfair to other parties to bind them to the terms of a private agreement.

There are other possible permutations of the statute. For example, the statute could be drafted to cover attorney-client privilege only. However, there are enough cases dealing with other privileges that it makes sense to deal with all privileged documents, not simply those covered by the attorney-client privilege.

ACT DEALING WITH WAIVER OF PRIVILEGE

MODEL 1

The Federal Rules of Evidence are amended to add a new Rule 502, providing as follows:

(a) Waiver of privilege. Unless provided otherwise by court order or by agreement between or among parties to litigation or by the terms of part (b), a person upon whom the law confers a privilege against disclosure of a confidential matter or communication waives the privilege if the privilege holder – or a predecessor while holder of the privilege – voluntarily discloses or consents to disclosure of any significant part of the matter or communication.

(b) Exceptions. A voluntary disclosure of a communication does not operate as a waiver of a privilege where

(1) the disclosure is itself a privileged communication, or

(2) the disclosure is inadvertent [and is made in the course of discovery in connection with ongoing litigation], provided the privilege holder took reasonable precautions to prevent disclosure and took reasonably prompt measures to rectify the error, including, if applicable, adherence to the procedures set forth in Fed. R. Civ. P. 26(b)(5)(B).

[(3) the prior disclosure is made by or to a federal, state, or local governmental agency [under an agreement that preserves the confidentiality of the communications disclosed.] [in the course of a nonpublic investigation by the agency by or to which the disclosure is made.]]

(c) Subject matter. Disclosure of a communication waives the privilege with regard to other communications dealing with the same subject matter where the other communications ought in fairness to be considered in connection with the disclosed communication. The privilege is not waived with regard to any other communications dealing with the same subject matter.

(d) Binding effect of court orders on non-parties. To the extent that the order so provides, an order entered in any matter to which these rules apply, concerning the existence or waiver of a privilege held or claimed by a party to the matter, governs the continuing existence of the privilege with regard to all persons or entities, whether or not they were parties to the matter.

(e) Party agreements. An agreement among the parties to litigation with regard to the effect of disclosure of a communication on privilege is binding on the parties without regard to the provisions of this rule, but not on other parties unless the agreement is incorporated into a court order as set forth in subsection (d).

MODEL 2

The Federal Rules of Evidence are amended to add a new Rule 502, providing as follows:

(a) Waiver of privilege. Unless provided otherwise by court order or by agreement between or among parties to litigation or by the terms of part (b), a person upon whom the law confers a privilege against disclosure of a confidential matter or communication waives the privilege if the privilege holder – or a predecessor while holder of the privilege – voluntarily discloses or consents to disclosure of any significant part of the matter or communication. The waiver operates whether the disclosure was intended or unintended.

(b) Exceptions. A voluntary disclosure of a communication does not operate as a waiver of a privilege where

(1) the disclosure is itself a privileged communication, or

[(2) the prior disclosure is made by or to a federal, state, or local governmental agency [under an agreement that preserves the confidentiality of the communications disclosed.] [in the course of a nonpublic investigation by the agency by or to which the disclosure is made.]]

(c) Subject matter. Disclosure of a communication waives the privilege with regard to other communications dealing with the same subject matter where the other communications ought in fairness to be considered in connection with the disclosed communication. The privilege is not waived with regard to any other communications dealing with the same subject matter.

(d) Binding effect of court orders on non-parties. To the extent that the order so provides, an order entered in any matter to which these rules apply, concerning the existence or waiver of a privilege held or claimed by a party to the matter, governs the continuing existence of the privilege with regard to all persons or entities, whether or not they were parties to the matter.

(e) Party agreements. An agreement among the parties to litigation with regard to the effect of disclosure of a communication on privilege is binding on the parties without regard to the provisions of this rule, but not on other parties unless the agreement is incorporated into a court order as set forth in subsection (d).

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: October 10, 2005

Two meetings ago, the Evidence Rule Committee resolved to defer the consideration of any amendments to the hearsay exceptions of the Federal Rules of Evidence, at least insofar as an amendment would affect the admissibility of a hearsay statement offered against a criminal defendant. The reason for deferral was the Supreme Court's decision in *Crawford v. Washington. Crawford* overruled in part the previous Confrontation Clause jurisprudence— the *Roberts* test — which had held that hearsay satisfies the Confrontation Clause if it is reliable. Under *Crawford*, if hearsay is "testimonial", it cannot be admitted against a criminal defendant in the absence of cross-examination, even if it is otherwise reliable.

The Committee directed the Reporter to keep it apprised of case law developments after *Crawford*. This memo is intended to fulfill that function. The memo describes the federal case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases are divided along two topics, approximating the open questions left by *Crawford*. First, when is a hearsay statement "testimonial" within the meaning of *Crawford*? Second, if a hearsay statement is not testimonial, what requirements does the Confrontation Clause place on its admissibility? Within those topics, the cases are arranged by circuit.

Summary

A quick summary of results on what has been held "testimonial" and what has not, so far, might be useful:

Statements Found Testimonial:

1. Confession of an accomplice made to a police officer.

2. Grand jury testimony.

3. Plea allocutions of accomplices, even if specific references to the defendant are redacted.

4. Statement of an incarcerated person, made to a police officer, identifying the defendant as taking part in a crime.

5. Report by a confidential informant to a police officer, identifying the defendant as involved in criminal activity.

6. 911 call accusing the defendant of criminal activity, and similar accusations made to officers responding to the call. *(Courts are in conflict about this fact situation, see below).*

7. Statements by a child-victim to a forensic investigator, which statements are referred as a matter of course by the investigator to law enforcement.

8. Statements made by an accomplice while placed under arrest, but before formal interrogation.

9. False alibi statements made by accomplices to the police.

Statements Found Not Testimonial:

1. Statement admissible under the state of mind exception, made to friends.

2. Statement made by the defendant to police officers before formal interrogation.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's

interpretation of Rule 804(b)(3) in *Williamson v. United States*).

4. Letter written to a friend admitting criminal activity by the writer and the defendant.

5. Surreptitiously recorded statements of conspirators.

6. Certificate of nonexistence of a record, prepared by government authorities in anticipation of litigation.

7. Statements by coconspirators during the course and in furtherance of the conspiracy, when not made to the police or during a litigation.

8. Statements made for purpose of medical treatment.

9. 911 calls reporting crimes.

10. Statements to law enforcement officers responding to the declarant's 911 call reporting a crime.

11. Accusatory statements in a private diary.

Cases Defining "Testimonial" Hearsay After Crawford

Statement admissible under the state of mind exception is not testimonial: ***Horton v. Allen,*** 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier shortly thereafter. The defendant argued that the admission of the hearsay statements violated his right to confrontation, but the Court rejected this argument. The Court held that Christian's statements were not "testimonial" within the meaning of *Crawford.* The Court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . .In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Defendant's own hearsay statement was not testimonial: ***United States v. Lopez,*** 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

The *Lopez* court probably had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront himself. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself.

Co-Conspirator Statement Not Testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The Court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.*

Formal Statement to Police Officer is Testimonial: ***United States v. Rodriguez-Marrero,*** 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The Court held that any information in that confession that incriminated

the defendant could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial", it clearly covers sworn statements by accomplices to police officers.

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 233 (2d Cir. 2004): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. Under *Williamson v. United States,* statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3), because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer--the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. The court elaborated on the *Crawford* test in the following passage:

> Although the Court declined to "spell out a comprehensive definition of 'testimonial,'" it provided examples of those statements at the core of the definition, including prior testimony at a preliminary hearing, previous trial, or grand jury proceeding, as well as responses made during police interrogations. With respect to the last example, the Court observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Thus, the types of statements cited by the Court as testimonial share certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.
>
> By denominating these types of statements as constituting the "core" of the universe of testimonial statements, the Court left open the possibility that the definition of testimony encompasses a broader range of statements. See id. at 1370 (citing Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1039-43 (1998) (advocating that any statement made by a declarant who "anticipates that the statement will be used in the prosecution or investigation of a crime" be considered testimony)). Because the Court declined to delineate a more concrete definition of the outer limits of the concept of testimonial statements, however, it is unclear which of the characteristics listed above are determinative of whether a given statement constitutes testimony. The statements at issue in this case present an example of a situation not falling squarely within any of the *Crawford* examples. Beckham's statements were elicited by an agent of law enforcement officials, but without his knowledge, and not in the context of the structured environment of formal interrogation. The question, therefore, is whether Beckham served as a "witness" who bears

testimony within the meaning of the Clause, despite the fact that he was unaware that his statements were being elicited by law enforcement and would potentially be used in a trial.

Crawford at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial. The opinion lists several formulations of the types of statements that are included in the core class of testimonial statements, such as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." All of these definitions provide that the statement must be such that the declarant reasonably expects that the statement might be used in future judicial proceedings. Although the Court did not adopt any one of these formulations, its statement that "[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it" suggests that the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony. If this is the case, then Beckham's statements would not constitute testimony, as it is undisputed that he had no knowledge of the CI's connection to investigators and believed that he was having a casual conversation with a friend and potential co-conspirator.

We need not attempt to articulate a complete definition of testimonial statements in order to hold that Beckham's statements did not constitute testimony, however, because *Crawford* indicates that the specific type of statements at issue here are nontestimonial in nature. The decision cites *Bourjaily v. United States*, 483 U.S. 171 (1987), which involved a co-defendant's unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination. In *Bourjaily*, the declarant's conversation with a confidential informant, in which he implicated the defendant, was recorded without the declarant's knowledge. The Court held that even though the defendant had no opportunity to cross-examine the declarant at the time that he made the statements and the declarant was unavailable to testify at trial, the admission of the declarant's statements against the defendant did not violate the Confrontation Clause. *Crawford* approved of this holding, citing it as an example of an earlier case that was "consistent with" the principle that the Clause permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination. Thus, we conclude that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*. We therefore conclude that Beckham's statements to the CI were not testimonial, and *Crawford* does not bar their admission against Saget.

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: ***United States v. Logan,*** 419 F.3d 172 (2d Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The Court found no Confrontation Clause violation in admitting the alibi statements. The Court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

The *Logan* court declared in dictum that the false alibi statements were testimonial within the meaning of *Crawford.* The statements were made during the course of and in furtherance of a conspiracy, and ordinarily such statements are not testimonial, as the Court stated in *Crawford.* But in this case, the accomplices "made their false alibi statements in the course of a police interrogation, and thus should reasonably have expected that their statements might be used in future proceedings." The court concluded that in light of *Crawford's* "explicit instruction" that statements made during police interrogation are testimonial "under even a narrow standard, the government's contention that these statements were non-testimonial is unconvincing."

Note: 1) The court's not-for-truth analysis is unnecessarily complex. The accomplice statements are not hearsay because they were admitted to show that they were false, as shown by independent evidence. That is enough to take the statements outside the hearsay rule and therefore outside the protections of the Confrontation Clause.

2) The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection. This again shows the need to provide congruence between the hearsay rule and the Confrontation Clause. Otherwise there is a trap for the unwary, possibly resulting in an inadvertent waiver of the protections of the Confrontation Clause. Preventing such a trap was the rationale for proposing the amendment to Rule 804(b)(3). See the memorandum on Rule 804(b)(3) in this agenda book for a further discussion.

Statement found reliable under the residual exception is not testimonial: ***United States v. Morgan,*** 385 F.3d 196 (2d Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the

defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also held that grand jury testimony was testimonial, and therefore improperly admitted against the defendant.

Surreptitiously Recorded Statements of Coconspirators Are Not Testimonial: *United States v. Hendricks,* 395 F.3d 173 (3d Cir. 2005): The Court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford.* "First and foremost", such statements were not within the examples of statements found testimonial by the Court in *Crawford*—they were not grand jury testimony, prior testimony, plea allocutions or statements made during interrogations. Even under the broadest definition of "testimonial" discussed in *Crawford* — reasonable anticipation of use in a criminal trial or investigation — these statements were not testimonial, as they were informal statements among coconspirators.

Statements that are not hearsay do not violate the Confrontation Clause, even if they are testimonial: *United States v. Trala,* 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose.

Certificate Prepared By Government Officials For Purposes of Litigation Is NOT Testimonial: *United States v. Rueda-Rivera,* 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The Court found that the record was not "testimonial" under *Crawford*, declaring as follows:

> The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.

Thus, the Court interpreted *Crawford* to define "testimonial" not in terms of a test, but only to encompass the specific examples of testimonial hearsay described in the opinion, i.e., grand jury testimony, prior testimony, plea allocutions, and statement made during a police interrogation.

Note: The result in *Rueda-Rivera* would also apply to records offered under Rules 803(10) (absence of public record) and 803(6)/902 (affidavits authenticating business records). After *Crawford*, a question has been raised as to whether those exceptions should be amended because they might be unconstitutional as applied, in that the records qualifying under those exceptions would appear to be "testimonial" under some or all of the *Crawford* Court's definitions. But if *Crawford* is read to mean that only types of hearsay specifically mentioned by the Court are in fact "testimonial", then these records-based exceptions will remain constitutional. It appears, therefore, that there is no immediate need to amend these exceptions; at the least, more time is needed to determine whether other courts follow the lead of the *Rueda-Rivera* court.

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The Court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial

source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford.*

Statement admissible as co-conspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The Court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005).

Accomplice's Statements to a Friend, Implicating Both the Accomplice and the Defendant in the Crime, Are Not Testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The Court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Identification of a Defendant, Made to Police by an Incarcerated Person, Is Testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the Court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* for the following reasons:

> First, the statement was given during a police interrogation, which meets the requirement set forth in *Crawford* where the Court indicated that the term "testimonial" at a minimum applies to "police interrogations." Second, the statement is also considered testimony under *Crawford's* reasoning that a person who "makes a formal statement to government officers bears testimony." Third, we find that Shellee's statement is testimonial under our broader analysis in *United States v. Cromer,* 389 F.3d 662 (6th Cir. 2004). . . [w]e think that any reasonable person would assume that a statement that positively identified possible suspects in the picture of a crime scene would be used against those suspects in either investigating

or prosecuting the offense.

Reporter's Note: In *Cromer*, discussed in *Pugh*, the Sixth Circuit adopted the broad definition of "testimonial" suggested by the petitioner in *Crawford*, i.e., a statement is testimonial if a reasonable person would anticipate that his statement would be used against the accused in either prosecuting or investigating the crime. This test has the potential of expanding the protection of the Confrontation Clause after *Crawford*. So far, only the Sixth Circuit and the Tenth Circuit (discussed below) have explicitly adopted this expansive definition of "testimonial". In *Cromer*, the Court held that a statement of a confidential informant to police officers, identifying the defendant as being a drug dealer, was testimonial, because it was made to the authorities with the reasonable anticipation that it would be used against the defendant. *See also United States v. Arnold, 410 F.3d 895 (6th Cir. 2005)* (relying on *Cromer* to hold that accusations made in a 911 call, and thereafter to police who arrived in response to the call, were "testimonial":"Gordon could reasonably expect that her statements would be used to prosecute Arnold. Further, her statements, which were made knowingly to authorities, and described criminal activity.")

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The Court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the Court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The Court stated that its determination that the statement was not testimonial was not in conflict with its decision in *Cromer, supra*, in which an informant's statement to police officers was found testimonial: "Because the informant in *Cromer* implicated the defendant in statements to the police, the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant." ***See also United States v. Gibson,*** 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame.").

Accomplice confession to law enforcement is testimonial: ***United States v. Jones,*** 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against interest, its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: ***United States v. Price,*** 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert"identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The Court found no error in admitting the report for this purpose. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted."

911 calls and statements made to officers responding to the calls are not testimonial: ***United States v. Brun,*** 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she stated that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford v. Washington.* The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that

the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Statements Made By a Child-Victim To a Forensic Investigator Are Testimonial: ***United States v. Bordeaux,*** 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

Accomplice confession to law enforcement is testimonial: ***United States v. Rashid,*** 383 F.3d 769 (8th Cir. 2004): The court held that an accomplice's confession to law enforcement officers was testimonial and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference.

Statements of a victim's state of mind and statements made for medical treatment are not testimonial: ***Evans v. Luebbers,*** 371 F.3d 438 (8th Cir. 2004): The defendant was tried for murdering his wife. The prosecution admitted hearsay statements of the victim, indicating that she feared that the defendant would hurt her or murder her. Most of these statements were admitted under the state of mind exception, to rebut the defendant's contention that the victim committed suicide. Others were admitted as made for medical treatment. The court found that none of the victim's hearsay statements were testimonial as they did not fit the specific kinds of hearsay statements listed as testimonial by the Court in *Crawford*, i.e., "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made to loved ones. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found to be testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004).

Statements Made By a Child-Victim To a Detective Are Testimonial: *Bockting v. Bayer,* 399 F.3d 1010 (9th Cir. 2005): The court found that statements of a child-victim of sexual abuse, made in an interview with a police detective, were testimonial within the meaning of *Crawford.* The court also held that *Crawford* was retroactive to cases on habeas review — a ruling that is contrary to the results reached in every other circuit.

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford,* as it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave,* 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's

statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that even if *Crawford* were retroactive, the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. While the *Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it gave examples of the type of statements that are testimonial and with which the Sixth Amendment is concerned — namely, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." We do not think that Elg's statements to the police she called to her home fall within the compass of these examples. Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Thus, the *Leavitt* court holds that some hearsay statements are non-testimonial even though made to law enforcement.

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, since even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. The court held that even if *Crawford* were retroactive, it would not help the defendant. The victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for law enforcement or that it was prepared for trial.

Statement Made By an Accomplice After Arrest, But Before Formal Interrogation, Is Testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol

car, he said to the officer, "How did you guys find us so fast?". The Court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court reviewed the *Crawford* opinion in detail, including the three proffered tests for the term "testimonial" that were discussed by the Court. It stated that "the common nucleus present in the formulations which the Court considered centers on the reasonable expectations of the defendant." It held that "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." Thus, the court rejected the view that the term "testimonial" should be limited to the specific examples set forth in *Crawford*, i.e., grand jury testimony, prior testimony, plea allocution, and statements made during police interrogation.

Applying its test to the facts, the Court found that the accomplice's statement, "How did you guys find us so fast?", was testimonial. It explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement . . . implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford

Non-testimonial hearsay evaluated under the *Roberts* test: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): The court declared that hearsay statements offered under the state of mind exception were not testimonial. It further held that non-testimonial hearsay should be evaluated under the *Ohio v. Roberts* test to determine whether it violates the defendant's right to confrontation. The court found that the state of mind exception was "firmly-rooted" and therefore the admission of the statements under that exception satisfied the *Roberts* test. ***See also United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005) (statement made during the course and in furtherance of the conspiracy was not testimonial under *Crawford;* no violation of the Confrontation Clause because the statement fell within a firmly rooted exception under *Roberts*).

Non-testimonial hearsay is governed by the *Roberts* test: *United States v. Saget,* 377 F.3d 233 (2d Cir. 2004): As discussed above, an accomplice's statement to an undercover agent was admitted as a declaration against penal interest, and the court found it to be non-testimonial. The court noted that the *Crawford* Court was critical of the *Roberts* reliability test as a way to evaluate hearsay under the Confrontation Clause, and that this critique might well be applicable to non-testimonial hearsay. In the end, however, the court observed that *Crawford* did not explicitly overrule *Roberts* insofar as non-testimonial hearsay was concerned. The court therefore evaluated the admissibility of the accomplice's statement under the *Roberts* test.

The court noted that it had not yet held that declarations against penal interest were firmly rooted under *Roberts*. The question, therefore, was whether the statement carried particularized guarantees of trustworthiness. The court declared as follows:

> Under our precedents, Beckham's statements to the CI were made in circumstances that confer adequate indicia of reliability on the statements. In United States v. Sasso, 59 F.3d 341 (2d Cir. 1995), we explained that "[a] statement incriminating both the declarant and the defendant may possess adequate reliability if . . . the statement was made to a person whom the declarant believes is an ally," and the circumstances indicate that those portions of the statement that inculpate the defendant are no less reliable than the self-inculpatory parts of the statement. Thus, in *Mathews* we concluded that the declarant's statements to his girlfriend were sufficiently reliable to be introduced against the defendant, given the unofficial setting in which the remarks were made and the declarant's friendly relationship with the listener. See *Matthews*, 20 F.3d at 546. Beckham's statements were made under circumstances almost identical to those at issue in *Mathews*, as Beckham believed that he was speaking with a friend - their conversations involved discussions of personal issues such as child support as well as details of the gun-running scheme - in a private setting. See also *Sasso,* 59 F.3d at 349-50 (finding that declarant's statements to his girlfriend were reliable because they were not made in response to questioning or in a coercive atmosphere).

> Moreover, because Beckham was describing his and Saget's method of buying and transporting the guns, the majority of his statements were descriptions of acts that he and Saget had jointly committed. Thus, Beckham does not appear to have been attempting to shift criminal culpability from himself to Saget. The statements therefore contained sufficient guarantees of trustworthiness to be introduced against Saget.

See also United States v. Savoca, 335 F.Supp.2d 385 (S.D.N.Y. 2004) (accomplice's statement is admissible as a declaration against penal interest under *Williamson*, is non-testimonial under *Crawford*, and carries particularized guarantees of trustworthiness under *Roberts*, all for the same reasons: it was made under informal circumstances to a trusted person, and the declarant was not attempting to shift blame or to curry favor with the authorities).

Note: If the *Saget* analysis turns out to be correct, then the proposed amendment to Rule 804(b)(3) might be revived. That amendment, as written, would cover only non-testimonial statements because after *Williamson* these are the only kind that can be admisssible under the exception. And if such statements are still covered by *Roberts*, and the exception remains not firmly-rooted, then the government must make a showing of particularized guarantees of trustworthiness to satisfy the Confrontation Clause. That is precisely what the proposed amendment required. The amendment would still be necessary to assure that the exception (which currently imposes no trustworthiness showing on the government) will not be unconstitutional as applied. See the memorandum on Rule 804(b)(3) in this agenda book.

The *Roberts* test remains applicable to non-testimonial hearsay: United *States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The court stated that with respect to nontestimonial hearsay statements, "*Crawford* leaves in place the *Roberts* approach to determining admissibility."

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are admissible under the *Roberts* test : *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The Court found that these statements were not testimonial under *Crawford* because they were "spontaneous out-of-court statements made outside any arguably judicial or investigatorial context." The Court also noted that the statements were not barred under *Roberts* because, unlike the confession to police officers found infirm in *Lilly v. Virginia,* the accomplice's statements in this case were made to a friend under informal circumstances. Thus, they bore particularized guarantees of trustworthiness.

Declaration against penal interest, made to a friend, is admissible under the *Roberts* test as applied to a non-firmly-rooted hearsay exception : *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendants accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The Court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford.* But the court noted that "the Supreme Court did not explicitly overrule its prior Confrontation Clause jurisprudence with its holding in *Crawford*" insofar as it applied to nontestimonial hearsay. "Consequently, with respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents."

Applying *Roberts*, the court essentially rejected the government's argument that Rule 804(b)(3) is a firmly-rooted hearsay exception. It found, however, that Clarke's statements carried circumstantial guarantees of trustworthiness sufficient to satisfy the *Roberts* standards as applied to hearsay offered under an exception that is not firmly-rooted:

> First, Clarke made the self-inculpatory statements not to investigators, but to his close friend. Consequently, to the extent the statements inculpated Franklin, there is no basis to conclude that Clarke intentionally did so to curry favor with law enforcement. Further, the context of Clarke's admissions to Wright was not that of puffing or bragging . . . . In contrast to cases in which a declarant confesses to law enforcement but additionally implicates his accomplice in the crime, this case involves statements the declarant (Clarke) made in confidential exchanges with a long-time friend — a friend he had no reason to conclude would reveal those statements to law enforcement. Moreover, in his statements to Wright, Clarke did not minimize his role in the robbery; the most plausible conclusion to draw from the content of the statements is that Clarke and Franklin each played substantial roles in the commission of the offense. . . . Accordingly, we conclude that Clarke's statements to Wright— which implicated both Clarke and Franklin — bear particularized guarantees of trustworthiness and are therefore admissible under the confrontation clause . . .

Importantly, the *Franklin* Court noted that the constitutional requirement of particularized guarantees of trustworthiness was in addition to the requirements of admissibility under Rule 804(b)(3). As the court put it: "It is with respect to this requirement that the demands of the confrontation clause supplant those of the rules of evidence." Thus, the court is stating that a statement can be admissible under Rule 804(b)(3) and yet admission of that statement can violate the Confrontation Clause. This raises the question whether the proposed amendment to Rule 804(b)(3) remains necessary even after *Crawford.* Recall that the reason for that amendment was to prevent the possibility that a statement could be admissible under the Rule and yet its admission would violate the Confrontation Clause.

Statement admitted under the residual exception is analyzed under *Roberts*: *United States v. Mikos,* 2004 U.S. Dist. Lexis 13650 (N.D.Ill. 2004): The defendant was charged with health care fraud and murder. He received health insurance monies for, among other things allegedly performing a number of surgeries on a Mrs. Brannon. Shortly before being murdered, Mrs. Brannon reported to various friends and acquaintances that the defendant had asked her to lie for him when testifying before a grand jury, but she had told him that she was going to tell the truth. The court held that these statements were not testimonial as they were not made to government officials. The court then analyzed the admissibility of Mrs. Brannon's statements under the *Roberts* test. The statements were proffered under the residual exception, which of course is not firmly rooted in *Roberts* terms. But the court found sufficient particularized guarantees of trustworthiness to satisfy both the residual exception and the *Roberts* test for non-firmly rooted hearsay. The court analyzed the trustworthiness question as follows:

> There is no serious question as to Brannon's character for honesty and truthfulness. Brannon lived and worked at a church. She was not under investigation and had no apparent reason to lie about her conversation with Mikos or her intended testimony. Moreover, despite the defense's vague assertion, no one has suggested any conduct on Brannon's part that might implicate her in the fraud scheme or jeopardize her nurse's license. Brannon's relationship with the defendant is that of a former patient. Neither party has indicated why the doctor-patient relationship terminated, and there is no reason to believe that it ended badly or that Brannon had an axe to grind against Mikos for any reason. Brannon told the same story regarding Mikos from the time she was first contacted by HHS Agents until the day she was murdered. Moreover, the statements to her sister and Individual B were not elicited by law enforcement officers or government officials but were taken from conversations Brannon initiated with her sister and trusted friends because she wanted to talk about what had just happened. These conversations occurred shortly after she hung up with Mikos, so there was little or no time for reflection, embellishment or fabrication. Finally, the testimony the government is seeking to admit is based on Brannon's personal knowledge of the phone call from Mikos and the treatments she received from him while under his care. None of the statements pass judgment or seek to blame Mikos, to the contrary, it appears that Brannon was simply relaying what had just transpired. The Court finds Brannon's alleged conduct and statements are consistent with those of a disinterested third party who was simply cooperating with the authorities and was bent on telling the truth because it was the right thing to do. While Brannon's statements were not given under oath or subject to cross examination, the Court finds that the circumstances set forth above and the consistency of the statements renders them trustworthy.

Excited utterances are governed by, and properly admitted under, *Roberts*: *United States v. Brun,* 416 F.3d 703 (8th Cir. 2005): The court stated that the constitutional admissibility of non-testimonial hearsay continues to be governed by the *Roberts* reliability-based test, as the Supreme Court in *Crawford* had not abrogated that test insofar as it applies to non-testimonial

hearsay. Applying the *Roberts* test to 911 calls as well as statements to responding officers, the court found no constitutional error in admitting the statements, as they were excited utterances that fell within a firmly-rooted hearsay exception.

Accusatory statements in a victim's diary were properly admitted under the *Roberts* analysis: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. As discussed above, the court held that the diary entries were not testimonial. The court applied the *Roberts* analysis to the diary entries. The diary was admitted under a hearsay exception that is something like a residual exception for statements made by victims—called colloquially the "O.J. exception." The court found that the exception was not firmly rooted because it was based on a general trustworthiness standard rather than categorical admissibility requirements. The question therefore was whether the diary entries carried particularized guarantees of trustworthiness. The court found sufficient guarantees to exist. The diary entries were private, they discussed intensely personal and embarrassing information, and so there was no motive to falsify. The diary was regularly kept and recounted parts of the victim's life other than her relationship with the defendant. The court found it "entirely reasonable for the state court to find that Mary's diary was trustworthy because she kept it regularly and in it recorded the everyday experiences of her life."

Preliminary Conclusions on the Crawford Case Law So Far:

1. Differing Views on the Term "Testimonial": Some courts are defining the term "testimonial" more broadly than others. It appears that there are two views. One view is that a statement is testimonial whenever a reasonable person would foresee that the statement might be used in a criminal investigation or prosecution. The more narrow view is that the term is defined by (and limited by) the examples given by the Supreme Court in *Crawford*: prior testimony, grand jury testimony, plea allocutions, and statements made pursuant to police interrogation; under this narrow view a statement, to be testimonial, must either be one of the described kinds of testimony or else very much like one of those types.

2. What Is the Difference Between the Tests as a Practical Matter? Most importantly, the broader test will cover most 911 calls and other statements by victims to law enforcement, finding them inadmissible unless the declarant is cross-examined. Victims who report a crime to law enforcement can anticipate that their statements will be used in a criminal investigation or prosecution; but under the narrow test, these kinds of reports are not equivalent to any of the examples listed by the Court in *Crawford*, and so they would be admissible.. Another important difference is that ministerial affidavits prepared for trial (like a certification that no public record exists, or a certification of business records) are undoubtedly testimonial under the broader test, but at least one court has held such records not to be testimonial under the narrow test.

3. Statements That Are Clearly Not Testimonial: No matter the test employed, the courts have been clear that certain kinds of hearsay statements will not be considered testimonial. The most important class of non-testimonial statements are those made informally, outside any possible presence of law enforcement. The classic example is a statement by the declarant to his friend, which gives an account of a crime committed by the declarant and the defendant. That statement is admissible as a declaration against penal interest under *Williamson* (because it was not made to law enforcement) and it is non-testimonial for basically the same reason.

4. Continuing Vitality of the Roberts Test As Applied to Non-Testimonial Hearsay: Courts have uniformly held that if a hearsay statement is not testimonial, its admissibility under the Confrontation Clause remains governed by the *Roberts* test. These rulings make eminent sense, because while the Court in *Crawford* intimated that it might someday think about overruling *Roberts* entirely, it would not do so in *Crawford* because that case dealt only with testimonial hearsay. If *Roberts* is to be completely written out, that will have to be done by the Supreme Court. So if the hearsay is non-testimonial, its constitutional admissibility is governed in the first instance by whether it fits within a firmly-rooted hearsay exception. If that is not the case, the statement will still satisfy the Confrontation Clause if it carries particularized guarantees of trustworthiness (without consideration of any extrinsic corroborating evidence).

5. What Does This All Mean For Rulemaking?

It would not seem to make sense to try to incorporate any definition of "testimonial" into any of the hearsay exceptions, because there is no firm agreement on the term. It is true that some hearsay exceptions are subject to unconstitutional application, especially under the broader test, because they cover some statements that are testimonial. An example is an excited utterance by a victim, identifying the defendant to police officers responding to a 911 call. But it would not be prudent to amend the excited utterance exception at this point, because there is no agreement yet on whether such statements are testimonial.

Nor would it make such sense to add some general language to the hearsay exceptions such as "so long as the statement is not testimonial." It is true that such a generic change would mean that the rules could not be applied unconstitutionally applied; but because there is no agreement on the scope of the term "testimonial", such a change would not in fact be very helpful.

Rulemaking may, however, be useful at this point for hearsay exceptions that are raising problems, but that cover only non-testimonial hearsay. Those exceptions are governed by the relatively stable and consistently applied *Roberts* test. If problems are arising in the application of any of these exceptions, rulemaking may usefully remedy these problems. Examples include business records, statements made for purposes of medical treatment, ***and declarations against penal interest.*** The question of whether the proposed amendment to Rule 804(b)(3) exception for declarations against penal interest should be revived (and perhaps modified) is addressed in a separate memorandum included in this agenda book.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 804(b)(3)
Date: September 15, 2005

As you know, the Evidence Rules Committee proposed an amendment to Evidence Rule 804(b)(3) in 2004 that was approved by the Judicial Conference and referred to the Supreme Court. The amendment provided that statements against penal interest offered by the prosecution in criminal cases would be admissible under if the Rule only if the government could show (among other things) that the statements carried "particularized guarantees of trustworthiness." The intent of the amendment was to assure that statements offered by the prosecution under Rule 804(b)(3) would comply with constitutional safeguards imposed by the Confrontation Clause.

The amendment to Rule 804(b)(3) essentially codified the Supreme Court's Confrontation Clause jurisprudence as it existed at the time. That jurisprudence, known as the *Roberts* test, required a showing of "particularized guarantees of trustworthiness" for hearsay admitted under an exception that was not "firmly rooted."

But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford v. Washington. Crawford* modified the Supreme Court's prior jurisprudence, which had held that the Confrontation Clause demands that hearsay offered against an accused must be reliable. The *Crawford* Court held that the reliability-based standard was no longer controlling if the hearsay statement is "testimonial." Hearsay that is testimonial is now excluded under the Confrontation Clause even if it is reliable, unless the declarant is produced for cross-examination or the constitutional objection is forfeited. Importantly, though, the *Crawford* Court appeared to leave the *Roberts* test intact for hearsay that is not "testimonial." As indicated in another memo in this agenda book, the lower courts after *Crawford* have uniformly held that the *Roberts* test still governs the admissibility of non-testimonial hearsay. .

Shortly after the Supreme Court decided *Crawford*, it considered the proposed amendment to Rule 804(b)(3). The Court sent the amendment back to the Rules Committee for reconsideration in light of *Crawford.* This memorandum takes up that reconsideration, and provides background for

the Committee on whether the amendment should be revived and, if so, whether it needs to be modified.

This memorandum is in three parts. Part One discusses the history of the proposed amendment to Rule 804(b)(3). Part Two discusses whether an amendment to Rule 804(b)(3) serves any important purpose after *Crawford*. Part Three suggests that if the amendment is to be revived, it should be modified in light of *Crawford*. It is of course for the Committee to determine whether any amendment should be proposed.

I. Background of the Amendment to Rule 804(b)(3) Approved By the Judicial Conference

Introduction

Federal Rule of Evidence 804(b)(3) provides, in part, that statements tending to subject the declarant to criminal liability are not excluded by the hearsay rule. The Rule in its current form provides that a statement is not excluded by the hearsay rule if it is:

> 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.

The hearsay exception for statements against interest is based on the assumption that "a person is unlikely to fabricate a statement against his own interest at the time it is made." *Lilly v. Virginia*, 527 U.S. 116, 126-27 (1999). The hearsay exception covers two types of statements: 1) a third party's statement implicating himself in criminal activity and offered by the defendant as exculpatory evidence; and 2) a third party's self-inculpating statement, offered by the prosecution to establish the defendant's guilt. Accomplice confessions that are made to law enforcement and that inculpate the accused are singled out as particularly unreliable, according to the Court in *Williamson v. United States*, 512 U.S. 594, 603 (1994). This is because, when an accomplice confesses to law enforcement in a manner that incriminates the accused, there is the danger that the accomplice may be acting in his own interest, rather than against it. As the Court put it in *Williamson*, an accomplice who implicates the accused in a confession to law enforcement may be attempting to "shift blame or curry favor."

In *Lilly*, the Supreme Court held that the hearsay exception for statements against penal interest is not a firmly-rooted exception as defined in *Roberts*. Under the second prong of *Roberts*, then, statements against interest must be supported by particularized guarantees of trustworthiness, beyond the fact that they are disserving of the declarant's interest; and importantly, this trustworthiness must be found in the circumstances of the statement, and not by reference to other evidence at trial. (The Court in *Idaho v. Wright,* 407 U.S. 805 (1990), held that the reliability of non-firmly-rooted hearsay could not be established by reference to corroborating evidence extrinsic to the statement). As written, however, Rule 804(b)(3) requires only that the statement subject the declarant to criminal liability.

History Behind the Amendment

1. The 2001 Proposal: An Attempt at Symmetry. --- At its April 2001 meeting, the Advisory Committee agreed to propose an amendment to Rule 804(b)(3) that would apply the corroborating circumstances requirement to all declarations against penal interest offered in all cases. The Rule as currently written requires the accused in a criminal case to provide corroborating circumstances clearly indicating the trustworthiness of the statement, but it imposes no such requirement on the government or on the parties in a civil case. Under the proposal the government, as well as parties in civil cases, would have been subject to the same corroborating circumstances requirement that is currently applicable only when against-penal-interest hearsay is offered by the accused.

The primary stated purpose of the 2001 proposal was to provide for symmetry and fairness in criminal cases. But members of the Committee reasoned that it was also important to extend the corroborating circumstances requirement to civil cases: The stakes are often as high in civil as in criminal cases, and therefore the risks of admitting unreliable hearsay were thought to be just as profound. Committee members also saw a positive benefit to a unitary treatment of against-penal-interest statements.

The Standing Committee approved the 2001 proposal for release for public comment. But during the public comment period, the Department of Justice voiced substantial concerns about the proposal. Most importantly, the Department argued that imposing a corroborating circumstances requirement on government-proffered declarations against penal interest would be unduly burdensome and would actually make the rule asymmetrical in favor of the accused. Under existing law, the government must already show, under *Williamson,* that a declaration against penal interest is "truly self-inculpatory" of the declarant's interest. This requirement will not be met if the declarant implicates the defendant in a statement to a law enforcement officer. Moreover, the government after *Lilly* was required to show that a declaration against penal interest carried "particularized guarantees of trustworthiness," meaning reliability beyond the fact that the statement is disserving to the declarant's interests. The Department of Justice contended that if the government must also show that there are corroborating circumstances that clearly guarantee the trustworthiness of the statement, the combination of these three requirements would be so rigorous that it would be virtually impossible to admit an against-penal-interest statement. And at a minimum the Rule would not provide the symmetry intended by the Advisory Committee, because it would impose an admissibility requirement on the government that is not imposed on the accused.

2. The 2002 Proposal: Alleviating Constitutional Concerns. --- At its meeting in April 2002, the Committee carefully considered, and ultimately agreed with, the Justice Department's concerns about the original proposal to amend Rule 804(b)(3). Committee members were sympathetic to the government's argument that it would be burdensome to have to meet three separate admissibility standards (against-interest, particularized guarantees of trustworthiness, and corroborating circumstances). Committee members were also concerned about the futility of proposing a rule that was so vigorously opposed by the Justice Department.

But the Committee rejected the option of simply withdrawing the proposed amendment and doing nothing. Several Committee members noted that, under *Lilly*, Rule 804(b)(3) permits some hearsay statements to be admitted that would not be permitted under the Confrontation Clause as interpreted by *Roberts* and *Lilly*. This is because 1) after *Lilly*, Rule 804(b)(3) was not a firmly rooted hearsay exception; 2) Under the *Roberts* test, a statement offered under a hearsay exception that is not firmly rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness"; 3) the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. Thus under *Lilly*, the government must show particularized guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement.

The Committee found it unacceptable to retain an Evidence Rule that could be applied inconsistently with the Constitution. Other Evidence Rules are written to avoid a conflict with constitutional principles. Examples include Rule 412, which contains a provision that prohibits its application when to do so would violate the constitutional rights of the accused; Rule 803(8)(B) and (C), which prohibit the admission of police reports when to do so would violate the accused's right to confrontation; and Rule 201(g), which prohibits conclusive presumptions in criminal cases out of concern for the accused's constitutional right to jury trial. No other hearsay exception had the potential at that time of being applied in such a way that a statement could fit within the exception and yet would violate the accused's right to confrontation. Other hearsay exceptions, such as those for dying declarations, excited utterances and business records, had been found firmly rooted.

Some Committee members noted a major disadvantage of an Evidence Rule that does not comport with the Constitution: It poses a trap for the unwary. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. In doing so, counsel would have inadvertently waived any additional requirements imposed by the Confrontation Clause. *See, e.g., United States v. Dukagjini,* 326 F.3d 45, 60 (2d Cir. 2002) ("We adhere to the principle that, as a general matter, a hearsay objection by itself does not automatically preserve a Confrontation Clause claim."). If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements is eliminated.

In light of this discussion, a Committee member at the 2002 meeting suggested that the proposed amendment be reformulated to accomplish the following objectives:

1. Retain the corroborating circumstances requirement as applied to statements against penal interest offered by the accused.

2. Extend the corroborating circumstances requirement to declarations against penal

interest offered in civil cases.

3. Require that statements against penal interest offered against the accused must be "supported by particularized guarantees of trustworthiness."

The Committee unanimously adopted this proposal---including the voting member from the Department of Justice. Committee members recognized that the reformulated amendment would have to be submitted for a new round of public comment. The proposed amendment initially released for public comment was intended to provide symmetry and unitary treatment of declarations against penal interest---"corroborating circumstances" would be required for all such statements. The proposed reformulation would impose different admissibility requirements depending on the party proffering the declaration against penal interest. The prosecution would be required to show "particularized guarantees of trustworthiness" (i.e., the Confrontation Clause reliability standard), while all other parties would be required to show "corroborating circumstances," however that term is interpreted by the courts. This was a substantial change, so a new round of public comment was found warranted.

The Standing Committee, at its June 2002 meeting, unanimously approved the reformulated proposal, and authorized its publication for a new round of public comment. The proposed amendment, as issued for public comment, read as follows:

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~~ that 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. But a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only: (A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

3. Rejected Alternatives. --- In the course of its discussions on the amendment to Rule 804(b)(3) proposed for public comment and its reformulation of the proposal, the Evidence Rules Committee considered and rejected a number of other proposals for change suggested in the first

round of public comment. Those proposals included:

Deleting the corroborating circumstances requirement. Some public commentary to the initial proposal suggested that the corroborating circumstances requirement should be deleted from the Rule entirely. The Committee unanimously rejected this proposal. Members reasoned that this change would result in a rejection of years of case law and would be contrary to the legislative history of Rule 804(b)(3), in which Congress expressed strong concern about the reliability of against-penal-interest statements. The Committee found nothing to indicate that the reliability of against-penal-interest statements has increased over time in such a way as to justify dispensing with the corroborating circumstances requirement.

Defining the corroborating circumstances requirement: One public comment to the 2001 proposal suggested that the Committee amend the Rule to provide a textual definition of corroborating circumstances. The Committee considered and unanimously rejected this suggestion. Committee members noted that the factors supporting the reliability of a declaration against penal interest will vary with each case. In some cases corroborating evidence might be useful; in others the fact that the statement was spontaneous will be important; and in some cases a combination of independent evidence and reliable circumstances will be sufficient and appropriate. Any textual change also might lead to an unwarranted change in the case law that has developed over the meaning of corroborating circumstances. The Committee resolved that it would provide guidance to the bench and bar in the Committee Note to the proposed amendment.

4. Final Committee Consideration. --- After the second round of public comment, the Evidence Rules Committee considered, for a final time, the proposed amendment to Rule 804(b)(3). The Committee first considered the substantial public commentary that was critical of the proposed extension of the corroborating circumstances requirement to civil cases. Some Committee members determined, in response to the comments, that there in fact is a justification for distinguishing between civil and criminal cases insofar as the corroborating circumstances requirement is concerned. The corroborating circumstances requirement in criminal cases resulted from a considered decision by Congress. Congress was concerned that a criminal defendant could engineer a hearsay statement from an associate; that statement might admit responsibility for the crime and so would be technically "against penal interest" but under the circumstances the associate might not in fact be subject to a real risk of prosecution. Consequently, the corroborating circumstances requirement was added to alleviate concern over the potential unreliability of statements that were merely against the declarant's penal interest. That corroborating circumstances requirement in criminal cases has been applied in hundreds of cases over 30 years. In contrast, the extension of the corroborating circumstances requirement to civil cases would not adhere to the original intent of the Rule. To the contrary, the original intent of the Rule was to provide a clear distinction between criminal cases, in which the accused might generate an unreliable exculpatory statement, from civil cases, in which no such threat was perceived.

Committee members noted that the Advisory Committee, in its first proposal to amend Rule

804(b)(3), reasoned that extending the corroborating circumstances requirement to civil cases would provide for unitary treatment for all declarations against penal interest, no matter the case, no matter by whom offered. But the unitary treatment rationale no longer supported the extension of the corroborating circumstances requirement to civil cases. The revised proposed amendment that was issued for a new round of public comment did not provide for unitary treatment of all declarations against penal interest. It provided different admissibility requirements for statements offered by the prosecution and those offered by the accused. The Committee therefore unanimously agreed to delete the extension of the corroborating circumstances requirement to civil cases.

The Committee next discussed the proposed amendment's codification of the particularized guarantees of trustworthiness requirement for statements against penal interest offered by the prosecution. The Reporter suggested, based on the public comment, that there were three alternatives for the Committee to consider to address the potential unconstitutionality (under the then-controlling *Roberts* test) of the current Rule 804(b)(3). The most elaborate solution would be to define the terms "corroborating circumstances" (currently applicable to statements offered by the accused) and "particularized guarantees of trustworthiness" (applicable to statements offered by the prosecution) in the text of the Rule. The most flexible would be simply to state that a statement offered by the prosecution would not be admissible if it would violate the accused's right to confront adverse witnesses. A compromise approach would be the one chosen in the version issued for public comment: providing some specificity by codifying the term "particularized guarantees of trustworthiness" while avoiding an elaborate textual distinction between "corroborating circumstances" and "particularized guarantees."

The Department of Justice representative commented that the Department had a strong preference for the alternative chosen by the Committee in the proposal issued for public comment. That proposal was asserted to be a good compromise in that it gave more guidance than a simple reference to the Constitution would provide, and yet avoided the pitfalls of a lengthy description of applicable standards in the text of the Rule. Specifically, those pitfalls were thought to be: 1) possible inaccurate description of complicated standards; and 2) possible intervening changes in constitutional law that would render the text outmoded.

A trial judge on the Committee suggested that trial judges would probably prefer having more explication in the text of the Rule. The distinction between "corroborating circumstances" and "particularized guarantees" is that the former standard permits (and in some courts requires) a showing of independent corroborating evidence indicating that the hearsay statement is true, while the latter standard *prohibits* any reference to corroborating evidence. See *Idaho v. Wright*, 497 U.S. 805 (1990) (holding that "particularized guarantees of trustworthiness" cannot be found by way of corroborating evidence). This distinction is not evident in the nature of the terms used, and so it was thought that it could be helpful to provide such a distinction in the text. Other Committee members noted, however, the risks of adding such language to the Rule, including the danger of freezing common law development, and the danger of misdescription and over- and under-inclusiveness. They noted that any distinction between the two standards could be clarified in the Committee Note.

One Committee member suggested that general constitutional language (i.e., that a statement offered against the accused would not be admissible if in violation of the Constitution) would have the virtue of flexibility if the Supreme Court ever decided to change its approach to the Confrontation Clause. But after discussion, Committee members generally agreed that the chances of such a change were remote, especially if the particularized guarantees language were added to the text of Rule 804(b)(3), the exception that had received the most treatment in the Court's Confrontation Clause jurisprudence.

In retrospect, of course, the Committee (mainly the Reporter) was wrong in the prediction that the Supreme Court was unlikely to change its Confrontation Clause jurisprudence. To be fair though, the Court had not at that time granted certiorari in *Crawford.* The law of confrontation was not undergoing rapid change at the time that the proposed amendment to Rule 804(b)(3) was passed on to the Judicial Conference. The predominating test of *Roberts* appeared stable.

Ultimately, the Evidence Rules Committee unanimously approved the proposed amendment to Rule 804(b)(3), with two changes from the version issued for the second round of public comment: 1) deletion of the corroborating circumstances requirement as applied to civil cases; and 2) addition of a paragraph to the Committee Note that would explain the difference between "corroborating circumstances" and "particularized guarantees of trustworthiness." The text of the proposed amendment was as follows:

> (3) Statement against interest.--A statement ~~which~~ that 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. But in a criminal case a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered in a criminal case to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only:
>
> > (A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~.; or
> > (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

The Committee Note to the Final Proposed Amendment Read as follows:

> The Rule has been amended to confirm the requirement that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-

rooted" and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The amendment distinguishes "corroborating circumstances that clearly indicate" trustworthiness (the standard applicable to statements offered by the accused) from "particularized guarantees of trustworthiness" (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against penal interest offered against the accused. The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly v. Virginia, supra*) and a hearsay statement admitted under an exception that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia, supra,* 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(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;

(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.

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 in assessing corroborating circumstances. 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.

It was this proposed amendment that was unanimously approved by the Standing Committee, approved by the Judicial Conference and referred to the Supreme Court. It was this proposal that the Supreme Court sent back for reconsideration.

II. Is There a Need to Amend Rule 804(b)(3) In Light of *Crawford*?

A. Need for Explicit Exclusion of Declarations Made During Law Enforcement Interrogations.

In *Williamson v. United States*, 512 U.S. 594 (1994), the Court held that an accomplice statement made to law enforcement was not admissible under Federal Rule 804(b)(3) to the extent it directly identified the accused, because such a statement was not sufficiently against the accomplice's penal interest. However, Justice O'Connor, in a portion of the opinion for the Court joined only by Justice Scalia, also opined that an accomplice's statement would be admissible to the extent that it directly implicated only the declarant. According to Justice O'Connor, the government could then use that statement circumstantially to tie the accused to the crime.

An example shows how Justice O'Connor's view would apply. Assume the defendant is being tried for selling drugs to Joe. Joe is arrested and tells the police: "I bought drugs on the dock last night." This statement does not directly implicate the defendant. Under Justice O'Connor's view, the statement could be introduced in the defendant's trial as a declaration against Joe's penal interest, even though it is a product of interrogation by law enforcement. The statement would be probative of a sale between Joe and someone on the dock that night. Then the government would have to introduce connecting evidence indicating that the defendant was on the dock that night. In contrast, if Joe had said, "I bought drugs from the defendant last night", the statement would not be admissible under *Williamson*, because the identification of the defendant could have been part of an attempt to shift blame or curry favor with the authorities. Justice O'Connor's (and Scalia's) view, that an accomplice's statement to law enforcement could be admissible against the accused to the extent it did not identify him directly, was rejected by four Justices in *Williamson*, and was assumed implicitly to be correct by three others. Justices Blackmun, Stevens, Souter, and Ginsburg believed that statements made to law enforcement were barred under the exception, whether or not they directly implicated the accused. Justice Kennedy, joined by Justice Thomas and Chief Justice Rehnquist, concurred in the judgment, arguing for a broader exception than that adopted by the majority. Those three Justices would appear to accept Justice O'Connor's view of the scope of the exception, as they argued for an even broader scope.

A number of lower courts after *Williamson* (and before *Crawford*) followed Justice O'Connor's interpretation of Rule 804(b)(3), that statements by accomplices to law enforcement are inadmissible *only* to the extent that they directly identify the accused as having taken part in the crime. That was the rationale, for example, for admitting an accomplice's guilty plea allocution under Rule 804(b)(3). Some courts before *Crawford* allowed the allocution statements of an accomplice to be admitted against the defendant so long as the statements were redacted to excise any direct identification of the accused as taking part in the crime. *See, e.g., United States v. Aguilar*, 295 F.3d 1018, 1021--23 (9th Cir. 2002) (redacted plea allocution admissible under Rule 804(b)(3) to show the existence of a conspiracy); *United States v. Centracchio*, 265 F.3d 518, 527--30 (7th Cir. 2001) (same); *United States v. Dolah*, 245 F.3d 98, 104--05 (2d Cir. 2001). The

argument was that if a statement does not directly implicate the defendant, then it is reliable enough to fit within Rule 804(b)(3), as it is sufficiently against the declarant's penal interest to confess guilt and it is only the direct implication of the defendant that creates an inference that the declarant is currying favor with the authorities.

After *Crawford*, an accomplice's statement made to law enforcement during interrogation or as part of a plea allocution cannot be admitted against the accused, *whether or not it implicates the accused directly*. The constitutional question after *Crawford* is not whether the statement is sufficiently reliable or sufficiently against the declarant's interest. The question is whether the statement is testimonial, and the *Crawford* Court clearly held that accomplice statements knowingly made to law enforcement are testimonial. Indeed, the plea allocution cases that had adopted Justice O'Connor's view of Rule 804(b)(3) were specifically rejected in *Crawford* as a constitutional matter, the Court citing those cases as examples in which courts "have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine." *See also United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004) (post-*Crawford*, holding that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant).

The opening left by Justice O'Connor in the hearsay exception, for admissibility of some accomplice statements made to law enforcement, has therefore been closed as a constitutional matter by *Crawford*. Lower courts after *Crawford* have held that the Confrontation Clause is violated whenever *any* part of an accomplice statement made during interrogation by law enforcement is introduced against the accused. They hold it irrelevant under *Crawford* that the statement incriminated the accused indirectly rather than directly. For example, in *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004), an accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against penal interest (a question it found unnecessary to decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence." *See also United States v. Rashid*, 383 F.3d 769 (8th Cir. 2004) (an accomplice's confession to law enforcement officers was testimonial under *Crawford* and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference).[1]

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[1] Similarly, in *United States v. Nielsen*, 371 F.3d 574 (9th Cir. 2004), Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*. The court noted that even the first part of Volz's statement---that she did not have access to the floor safe---violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

In sum it appears that after *Crawford* Rule 804(b)(3) is subject to unconstitutional application—some hearsay statements can be admitted under Rule 804(b)(3) that will be considered testimonial under *Crawford*, specifically statements that are made to law enforcement that do not mention the defendant specifically, but yet are probative of the defendant's guilt. Thus, the major reason for proposing an amendment to Rule 804(b)(3) before *Crawford* arguably exists after *Crawford* as well.

B. The Need for Requiring Particularized Guarantees of Trustworthiness For Non-Testimonial Against-Penal-Interest Statements.

There is another oft-recurring situation in which Rule 804(b)(3) is subject to unconstitutional application after *Crawford*. It is, in fact, the same situation that created a constitutional problem before *Crawford*: a statement against penal interest, admissible under *Williamson* because incriminating to the declarant and not made to law enforcement, but with no showing of particularized guarantees of trustworthiness in the making of the statement. The problem can be shown by an example.

Assume that Bill is having dinner with his girlfriend. She asks how his weekend went. He says "Not bad; Jack and I robbed the bank on Fifth Street, and we got away with $50,000. So dinner is on me." This statement is offered against Jack at his trial for bank robbery. The statement is admissible under Rule 804(b)(3) and *Williamson* (assuming Bill is unavailable for trial) even though the statement directly implicates the defendant. This is because the statement was not made with the hope of currying favor with law enforcement, and a reasonable declarant would think it could be used against him in a criminal prosecution. *See, e.g., United States v. Mussare,* 405 F.3d 161 (3d Cir. 2005) (accomplice statement, bragging to friends that he and the defendant had beaten up a person the previous day while collecting a debt, was properly admitted under Rule 804(b)(3); the accomplice was not attempting to deflect criminal liability, and the statement was made to friends in informal circumstances).

Accomplice confessions made informally to friends and associates are also considered non-testimonial under *Crawford*. This is because they are not made to law enforcement, and under even the broadest view of "testimonial", the statements are not made with the contemplation that they would be used in a criminal prosecution or investigation of the accused. *See, e. g., United States v. Saget,* 377 F.3d 233 (2d Cir. 2004) (accomplice statement made to an associate who was, unbeknownst to the accomplice, a government informant, held properly admitted under Rule 804(b)(3) and not testimonial under *Crawford*); *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005) (statement by accomplice that he and defendant had committed a crime was held not testimonial, because the statement was made informally to friends, not to law enforcement officials) ; *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004) (accomplice's statement to his fiancee that he was going to burn down a nightclub for the defendant was properly admitted as a declaration against

penal interest, as it was not a statement made to law enforcement to curry favor; the statement also was not testimonial under *Crawford* as it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.").

Because declarations against penal interest made by an accomplice to a friend are non-testimonial, this means that they are still governed by the *Roberts* reliability-based test. (As stated above, the *Crawford* Court did not overrule the *Roberts* test insofar as it applied to non-testimonial hearsay, and lower courts have held that *Roberts* still applies to non-testimonial hearsay. See the outline on post-*Crawford* cases in this agenda book). And this means that the same constitutional infirmity that gave rise to the proposed amendment to Rule 804(b)(3) still exists after *Crawford*. Specifically:

> 1) Under *Lilly,* the hearsay exception for declarations against penal interest is not firmly-rooted. *See United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (post-*Crawford* case, rejecting the government's argument that Rule 804(b)(3) is a firmly-rooted exception).
>
> 2) The government must therefore show that the statement carries particularized guarantees of trustworthiness beyond the fact that the statement is disserving to the declarant.
>
> 3) But the Rule as written does not require such a showing — it only requires the government to show that the statement is disserving. *See United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) ("It is with respect to this requirement [circumstantial guarantees of trustworthiness] that the demands of the confrontation clause supplant those of the rules of evidence.")
>
> 4) Thus the Constitution imposes an extra evidentiary requirement, not required for admissibility under Rule 804(b)(3).

C. Questions about the Proposed Amendment

1. Is There a Real Risk of Unconstitutional Application of Rule 804(b)(3)?

It might be asked whether there is a serious risk of unconstitutional application of Rule 804(b)(3) insofar as it is applied to statements made to law enforcement officials. The possible constitutional infirmity is based on the premise that Rule 804(b)(3) permits statements made to law enforcement to be admissible so long as they do not implicate the defendant directly. It could be argued that *Williamson* can fairly be read as excluding *all* accomplice statements made to law enforcement. That is the reading of the Rule favored by four Justices in *Williamson.* But on the other hand, as seen above, lower courts before *Crawford* were reading Rule 804(b)(3) as allowing admission of statements made to law enforcement to the extent they did not directly implicate the

accused, so it can be argued that the language is necessary to remedy any ambiguity after *Crawford*. While it might be unlikely that a court will construe Rule 804(b)(3) as unconstitutional in these circumstances, it can be argued that any realistic chance of that result should be avoided by an amendment that would specifically reject Justice O'Connor's view that an indirect implication of the accused is permissible. That same thinking gave rise to the amendment in the first place: while many courts had avoided addressing the tension between Rule 804(b)(3) and the Confrontation Clause, the fact that the Rule was susceptible to unconstitutional interpretation was considered important enough to justify the costs of the amendment. This argument would appear to be even stronger *after Crawford* than before, because now there are two possible scenarios for an unconstitutional application of the Rule, rather than just one.

2. Is There a Risk of Change in the Law of Confrontation?

There are two possible developments that might derail an amendment to Rule 804(b)(3). The first is that the Court might define "testimonial" hearsay in such a way that would cover some statements that would be admissible under any amended rule. The second is that the Court might take the step of abrogating *Roberts* insofar as it applies to non-testimonial hearsay.

a. Changing (or deciding on) the definition of "testimonial"

As to the first concern, it does not appear that the viability of a proposed amendment to Rule 804(b)(3) is dependent on which of the possible definitions of "testimonial" proffered in *Crawford* ends up to be controlling. The rule as amended would admit accomplice statements only insofar as they were made informally to friends and associates. To avoid unconstitutional application, any statements made formally to law enforcement would be excluded, even if they do not implicate the defendant directly. As applied to such an amendment, it would appear that there is virtually no danger that any of the proffered definitions in *Crawford* could be read to include as "testimonial" a statement that 1) is disserving to the declarant; 2) is made other than pursuant to police interrogation; and 3) carries particularized guarantees of trustworthiness.

It is clear that the most limited, "core" definition of testimonial---that proposed by Justices Thomas and Scalia in *White v. Illinois*---would not find as testimonial anything that remotely satisfies those three requirements. Under the proposed amendment, the admissibility of against-penal-interest statements offered by the government would be limited to accomplice statements made informally to trusted friends, family members, and associates, i.e., under trustworthy circumstances. An example would be a statement from an accomplice to his wife that "defendant and I are going to rob a bank today." That kind of statement obviously does not fit within the narrow, core definition of "testimonial," which is limited to extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions pursuant to police interrogation. Therefore, the amendment would clearly be viable under the narrow, core definition. Similarly, applying the *Crawford* petitioner's definition of "testimonial," it is hard to think of a statement that could be testimonial and yet admissible under the proposed amendment. The

petitioner's definition covers all statements that declarants would reasonably expect to be used prosecutorially. When an accomplice admits criminal liability on the part of himself and another to a trusted friend, family member, or associate, it is hard to believe that he would reasonably expect that the statements would be used prosecutorially. Even if the Supreme Court were to choose the *Crawford* petitioner's broader definition of testimonial, then, the amendment would be viable.

Applying the NACDL's proposed definition of "testimonial" as described in *Crawford*, the amendment would likewise appear to be viable. The NACDL definition covers statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Again, it is hard to believe that when an accomplice confesses criminality to a trusted friend or associate under informal circumstances, that accomplice could reasonably believe that the statement would be available for use at a later trial.

On the other hand, the definitions proposed by petitioner and the NACDL in *Crawford* are nothing if not malleable. Reasonable people could probably argue that an accomplice who talks to his cousin and admits to, say, a robbery, could indeed reasonably believe that it might be used sometime later in some official way. After all, the reason for admissibility under the Rule is that the declarant could reasonably expect that the statement could be used against *him* in a criminal prosecution, even though it is made to a friend or associate. It could be argued that there is a similar expectation that the same statement could be used against another person whom the accomplice implicates in the statement. It could be argued in response that the courts after *Crawford* have had no trouble finding such statements admissible under Rule 804(b)(3), and yet non-testimonial under *Crawford* .

b. Abrogating the Roberts Test as to Non-Testimonial Hearsay

In *Crawford* the Court considered the possibility of abrogating the *Roberts* test even as it would apply to non-testimonial hearsay. But it found it unnecessary to reach the question. The Court recognized that if *Roberts* were abrogated, there would be no constitutional limitation on the admissibility of non-testimonial hearsay, with the possible exception of a due process "shock the conscience" test.

As stated above, the continuing applicability of the *Roberts* test means that the pre-*Crawford* possibility of unconstitutional application of Rule 804(b)(3) still exists after *Crawford*, i.e., non-firmly rooted hearsay, admitted under the Rule, without a showing of particularized guarantees of trustworthiness. But if *Roberts* is totally abrogated, there will be no constitutional requirement of a showing of particularized guarantees of trustworthiness. And accordingly there would be no need to amend the Rule to bring it up to constitutional standards on this ground.

The question that therefore must be addressed before an amendment is proposed is whether there is any likelihood that the Court will abrogate the *Roberts* test insofar as it applies to non-testimonial hearsay. Having been completely wrong about the Court's intention to change the law

of confrontation before it took *Crawford*, I am reticent to give a prediction on this question. But I can say that the chances of the Court's rejecting *Roberts* seem remote for at least three reasons:

1. The Court rejected *Roberts'* application to testimonial hearsay because the reliability-based test was *insufficiently protective* of the accused's right to confrontation. There is no similar motive to reject *Roberts* insofar as it applies to non-testimonial hearsay, where the alternative is virtually no protection at all.

2. The Court would probably attach a higher priority to clarifying the term "testimonial" than to abrogating the *Roberts* test. Whatever the merits of the *Roberts* test, there is really very little dispute on how to apply it. If non-testimonial hearsay fits a standard hearsay exception, as is true in most cases, the application of *Roberts* is straightforward and uncontroversial. In contrast, the courts are in dispute about how the term "testimonial" should be defined. See the cases set forth in the memorandum on *Crawford*, included in this agenda book.

3. The case in which the Court could abrogate the *Roberts* test would be a tough sell in terms of a cert grant. It would almost certainly have to be an appeal by the government, because the defendant would get no advantage in abrogating the *Roberts* test, given that the stated alternative is essentially no test at all. The case would have to be about a hearsay statement offered under a non-firmly rooted hearsay exception, because the government has no complaint with respect to statements admitted under standard hearsay exceptions. (Thus the case would be a rare one as most hearsay statements offered at a criminal trial fit within standard hearsay exceptions). The lower court would have to have excluded the statement on the ground that it did not carry particularized guarantees of trustworthiness, and the government would have to be arguing that it should not have to meet that requirement (not that the court erred in finding it not met, as that argument would seek to retain and apply the *Roberts* test). For the *Roberts* test to be abrogated, the Court would have to rule that the Constitution does not require the government to meet even the relatively low standards of reliability set by the *Roberts* test for non-firmly-rooted hearsay. Simply to state this scenario indicates its unlikelihood.

In sum, it seems that it is unlikely that there will be any change in the constitutional doctrine that would affect the proposed amendment as it goes through the rulemaking process or thereafter. But of course recent history shows that nothing is certain.

III. Possible Text for a Proposed Amendment to Rule 804(b)(3)

As discussed above, *Crawford* is not contiguous with Justice O'Connor's view—the apparent majority view — in *Williamson* about the admissibility of against-penal-interest statements made by accomplices to law enforcement. The model for a proposed amendment to Rule 804(b)(3) should probably be revised to take account of this discrepancy, because the stated goal of any amendment

is to assure that the Rule cannot be unconstitutionally applied.

The language of the previously-adopted proposed amendment might be construed to adopt Justice O'Connor's position that statements by accomplices to law enforcement are against penal interest to the extent they implicate the accused only indirectly. Under that construction, and in light of *Crawford*, the previously proposed amendment would be unconstitutional as applied: It would allow admission of some accomplice statements to law enforcement even though they are testimonial. It makes little sense to spend all the effort involved in a rule change to promulgate a rule that can be unconstitutional as applied.

The model set forth beginning on the next page arguably provides some protection against unconstitutional admission of testimonial accomplice statements that do not directly implicate the accused. And it retains the protection against the unconstitutional admission of statements that are non-testimonial and yet do not carry particularized guarantees of trustworthiness.

Proposed Amendment to Rule 804(b)(3) As Approved By the Judicial Conference

For the convenience of the Committee, the proposed amendment to Rule 804(b)(3), and the proposed Committee Note, is reproduced below.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804

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~~ that 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. But 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~~ under this subdivision in the following

[**] Matter to be added is underlined. Matter to be omitted is lined through.

circumstances only:

(A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~

(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness and is made other than in the course of interrogation by one or more law enforcement officers or in the course of a guilty plea allocution.

* * *

MODEL FOR COMMITTEE NOTE

The Rule has been amended to assure that any statement offered against an accused as a declaration against penal interest will also satisfy the accused's right to confrontation. *See generally Crawford v. Washington,* 541 U.S. 36 (2004). The Court in *Crawford* held that if a hearsay statement is "testimonial" its admission violates the accused's right to confrontation in the absence of cross-examination. As statements offered as declarations against penal interest are admitted without providing cross-examination of the declarant, it follows that if the exception were to permit the introduction of testimonial hearsay, the application of the exception would violate the accused's right to confrontation. The Rule accordingly is amended to prevent the admission of testimonial hearsay that might be thought to otherwise qualify under the exception.

The Court in *Crawford* left intact the reliability-based requirements of *Ohio v. Roberts*, 448 U.S. 56 (1980), for determining the admissibility under the Confrontation Clause of hearsay that is not "testimonial." *See also United States v. Saget,* 377 F.3d 233 (2d Cir. 2004) (holding that the *Roberts* test remains applicable to non-testimonial hearsay). The requirement that the prosecution must provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case is intended to assure that the exception meets constitutional requirements governing the admissibility of non-testimonial hearsay, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted" under the *Roberts* test, and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The amendment distinguishes "corroborating circumstances that clearly indicate" trustworthiness (the standard applicable to statements offered by the accused) from "particularized guarantees of trustworthiness" (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to non-testimonial statements against penal interest offered against the accused. The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly v. Virginia, supra*) and a non-testimonial hearsay statement admitted under an exception that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The "particularized guarantees" requirement assumes that the

court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia, supra,* 527 U.S. at 138 (the fact that the hearsay statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(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;

(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.

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 in assessing corroborating circumstances. 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.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Consideration of a possible addition of new Evidence Rule 107 or 1104 to accommodate electronic evidence.
Date: October 15, 2005

At its last meeting, the Evidence Rules Committee requested the Reporter to prepare a report addressing whether an amendment might be necessary to make the Rules compatible with technological developments in the presentation of evidence. Pursuant to that instruction, I have conducted a review of all of the reported federal cases concerning the admissibility of electronic evidence, broadly defined. I have also read most of the published literature on the subject. And I have reviewed some of the other legislative attempts to treat computerized evidence, including the Uniform Rules.

This memo is divided into four parts. Part 1 sets forth the Evidence Rules that use language that might be considered outmoded in light of technological advancements in the presentation of evidence, and discusses the problem of directly amending so many rules. Part 2 describes the case law on the admissibility of electronic evidence under the Federal Rules. Part 3 discusses various possibilities for amending the Evidence Rules to accommodate electronic evidence, and it concludes that the most attractive possibility is to add a new Rule 107 or 1104 that would work to broaden the paper-based language used throughout the Rules. Part 4 sets forth a possible version of a new Rule 1104.

This memo should be read with an important proviso: as the memo will indicate, it is not obvious that there is any pressing problem that needs to be addressed by updating the paper-based language of the Evidence Rules. I have not found a case in which a court refused to admit evidence that it otherwise wished to admit on the ground that the proffered evidence was electronic and therefore was not covered by the wording of an Evidence Rule. Basically, the courts appear to have little problem operating under the existing rules; the courts are analyzing the admissibility of electronic evidence in the same way as any other evidence. This is not to say that electronic evidence

does not sometimes present unique problems of establishing authenticity, regulating hearsay, etc. But it is to say that the principles of admissibility applied to electronic evidence are the same basic principles that are applied to all evidence.

Attached to this memorandum is a report by Greg Joseph, a former member of the Evidence Rules Committee, which indicates that the courts have analyzed electronic evidence using the same methods as applied to other evidence, e.g., by using Rules 403, 901, 1002 and the hearsay rule and its exceptions to determine admissibility. Thus, if a new Rule 107 or 1104 is to be added, it is not because it is necessary to resolve a major problem in the courts. The reasons for the amendment would essentially be 1) as part of the Committee's custodial function, to assure that the language of the Rules does not become outmoded, 2) to make the Rules more user-friendly, and 3) to avoid a trap for the unwary (i.e., to avoid the possibility that an unschooled counsel might read a rule and think that evidence is inadmissible simply because it is electronic.).

I. Rules That Do Not Explicitly Accommodate Electronic Evidence

Computerized evidence is evidence. Therefore, any reference in the Rules to "evidence" can accommodate any technological change without need for amendment. However, computerized evidence is not necessarily a "document" or a "writing" or a "record" or a "memorandum" or a "publication." That is, any reference to a paper or other tangible product might be considered in tension with evidence that is presented electronically (e.g., a computerized accident reconstruction, a presentation of a web page, etc.). Therefore, any Rule that uses one of those paper-based terms is, at least potentially, a rule that might need to be amended to accommodate electronic evidence. What follows is a list of the Rules containing these potentially problematic terms, with the problematic language in bold.

Note that the references to "writings" and "recordings" in Article 10 are not considered in this section, because those terms are expansively defined in Rule 1001 and 1002 to include "letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation." This definition has been held expansive enough to cover computer-generated information. See, e.g., *United States v. Seifert,* 351 F.Supp.2d 926 (D.Minn. 2005) (transfer of a photo from analog to digital format does not violate the best evidence rule because it is a mechanical or electronic rerecording within the meaning of Rule 1002) .

Rules That Refer to "Writing" or "Written"

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

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

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

* * *

(c) PROCEDURE TO DETERMINE ADMISSIBILITY –

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

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

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

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

Note: Three years ago, the Evidence Rules Committee considered a proposal to amend Rule 412. Among other things, the proposed amendment would have amended Rule 412(c) as follows:

(c) *Procedure to determine admissibility* —

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

(A) file a ~~written~~ motion in accordance with Rule 5 of the Federal Rules of Civil Procedure at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties in accordance with Rule 5 of the Federal Rules of Civil Procedure and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

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

The proposed revision set forth above was only one part of the proposed amendment. The more important part was a proposal to permit admission of evidence that the complainant made a false report of rape on a prior occasion. The Committee decided not to proceed with the amendment, because it determined that the courts were not having substantial problems with the admissibility of false complaints under the existing Rule; and the proposed change to Rule 412(c), to refer specifically to the possibility of electronic filing, was not considered so important as to justify the cost of an amendment.

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

* * *

(b) *Time limit.* — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance **written** notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

4. Rule 612. Writing Used to Refresh Memory

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

(1) while testifying, or

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

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

5. Rule 801. Definitions

The following definitions apply under this article:

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

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

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

6. Rule 901. Requirement of Authentication or Identification

* * *

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

* * *

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

Note that Rule 901(7) also refers to "records" and this could be problematic in light of computerization. However, the word "record" is grouped with "data compilation" and it is at least arguable that this term is comprehensive enough to accommodate advances in technology. The Committee might, however, consider the possibility of updating the term "data compilation" to encompass any electronically stored information. This possibility is addressed in the draft rule 107/1104, *infra.*

7. Rule 903. Subscribing Witness' Testimony Unnecessary

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

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

1. Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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

* * *

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

(6) *Records of regularly conducted activity.* — A **memorandum, report, record**, or **data compilation, in any form**, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the **memorandum, report, record, or data compilation**, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ``business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Note that while Rule 803(6) contains problematic references to memoranda, records and reports, it also includes "data compilations in any form". It is possible, though not certain, that this term is broad enough to cover any computerized evidence that would otherwise be admissible under this Rule. The Uniform Rules proposal would replace the term "data compilation" with the phrase "other technology in perceivable form". Another possibility is to update the term by referring to "electronically stored information." The draft of Rule 1104, *infra,* addresses this question.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* — Evidence that a matter is not included in the **memoranda, reports, records**, or **data compilations, in any form**, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a **memorandum, report, record, or data compilation** was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

See the note after Rule 803(6).

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

See the note after Rule 803(6).

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

See the note after Rule 803(6).

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

See the note after Rule 803(6).

(11) *Records of religious organizations.* — Statements of births, marriages, divorces,

deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept **record** of a religious organization.

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

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

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

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

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

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

(17) *Market reports, commercial **publications.*** — Market quotations, tabulations, lists, directories, or other **published** compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned **treatises.*** — To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in **published treatises, periodicals or pamphlets** on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

* * *

2. Rule 901. Requirement of Authentication or Identification

* * *

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

* * *

(8) Ancient **documents or data compilation.** — Evidence that a **document or data compilation**, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

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

3. Rule 902. Self-authentication

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

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

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

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

See the comment to Rule 902(1).

(3) *Foreign public* ***documents.*** — A **document** purporting to be **executed** or **attested** in an official capacity by a person authorized by the laws of a foreign country to make the **execution** or **attestation**, and accompanied by a final **certification** as to the genuineness of the **signature** and official position (A) of the **executing** or **attesting** person, or (B) of any foreign official whose **certificate** of genuineness of **signature** and official position relates to the **execution** or **attestation** or is in a chain of **certificates** of genuineness of **signature** and official position relating to the **execution** or **attestation**. A final **certification** may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official **documents**, the court may, for good cause shown, order that they be treated as presumptively authentic without final **certification** or permit them to be evidenced by an **attested** summary with or without final **certification**.

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

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

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

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

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

This rule clearly limits self-authentication to printed, as opposed to online, materials. It could be argued that an online publication becomes "printed" if it gets printed out. But even then, there may be real-time, streaming-type materials that might never be "printed" out in a conventional sense.

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

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

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

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

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

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

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

There are 31 rules set forth above that, if read literally, would prohibit the admission of at least some electronically stored information. If the term "data compilation" is considered sufficient to cover any kind of electronically generated evidence, then the number of rules that are arguably inhospitable to electronically restored information is reduced to 22. It goes without saying that it would be extremely difficult to make a case for amending 29 or even 22 rules all at once. The

Advisory Committee and the Standing Committee have been cautious in proposing amendments to the Evidence Rules, and with good reason; among other things, amendments can upset settled expectations and can create new problems of interpretation. It is fair to state that the Standing Committee has been more cautious about proposing amendments to the Evidence Rules than to any other body of national rules — as indicated by the fact that Civil, Criminal and Appellate rules have been restylized and Evidence Rules have not.

Thus, if there is a problem in the existing rules as applied to electronic evidence, it will probably have to be addressed in some way other than proposing to amend more that 20 rules.

II. Case Law on Electronic Evidence

The reported cases appear to indicate that the courts are not having trouble accommodating and regulating electronic evidence under the existing language of the rules. The following discussion describes the current use of electronic evidence, and the treatment of that evidence in the reported federal cases.

The following are the major questions of admissibility involving electronic evidence:

1. A business or public record is often presented in the form of a computer print-out. Courts have had little problem in using Rules 803(6)/803(8) and 901/902 to rule on the admissibility of computerized business records. Basically, a computerized business record is admissible whenever a comparable hardcopy record would be admissible. They are authenticated as are other records, and no special rule change seems to be required to allow the courts to rule on the admissibility or authenticity of business records. See *United States v. Whitaker,* 127 F.3d 595 (7th Cir. 1997) (authenticity and admissibility of computerized business records is established by general principles applicable to noncomputerized records); *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.,* 38 F.3d 627 (2d Cir. 1994) (computerized records were not admissible as business records where the underlying information was prepared in anticipation of litigation and would not itself have been admissible). *See also Monotype Corp. v. International Typeface Corp.,* 43 F.3d 443 (9th Cir. 1994) (no error in excluding e-mail from employee of Microsoft to a superior, because such a communication was not regularly conducted activity within the meaning of Rule 803(6)); *DirecTV, Inc., v. Murray,* 307 F.Supp.2d 764 (D.S.C. 2004) (emails admitted as business records, where they were kept in the ordinary course of business and authenticated by an affidavit from a qualified witness). See the cases collected by Greg Joseph at pages 9-11, attached to this memorandum.

2. A computerized presentation may be offered as proof of how an event occurred, the most prevalent example being an accident reconstruction. For this purpose, the use of a computer to recreate an event is no different in kind from videotaping a reconstruction of a an accident or a product failure. Courts consistently apply Rule 403 to determine whether the recconstruction is substantially similar to the original conditions. If the conditions are substantially different, the purported reconstruction, computerized or not, is excluded as substantially more prejudicial than probative. See, e.g., *Racz v. R.T. Merryman Trucking, Inc.,* 1994 WL 124857 (E.D.Pa. 1994) (computerized accident reconstruction held inadmissible under Rule 403, because not all data was taken into account). Any problems of authenticating such a computerized demonstration are handled by Rule 901(b)(9), which permits authentication for "[e]evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."See Greg Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations,* SB67 ALI-ABA 81 (1997) (noting ways in which authentication questions can be easily handled under current Rule 901(b)(9)). There might also be hearsay problems in the preparation of the demonstration, and there might be problems of reliability under *Daubert* due to the probable use of experts in the recreation process. But these problems are dealt with under standard evidentiary principles that apply to noncomputerized evidence. Fulcher, *The Jury as Witness,* 22 U.Dayton L.Rev. 55 (1996) (noting

that the admissibility of computerized recreations can be and has been handled by standard evidentiary principles). *See also Verizon Directories Corp. v. Yellow Book,* 311 F.Supp.2d 136 (E.D.N.Y. 2004) (admitting demonstratives after conducting a Rule 403 analysis).

3. A computerized presentation may be offered to illustrate an expert's opinion or a party's version of the facts. As with any other such illustration, a computerized presentation is admissible if it helps to illustrate the expert's opinion, or a party's version of the facts, and does not purport to be a recreation of the disputed event. Again, standard evidentiary principles such as Rule 403 and Rule 702 have appeared to work well. See *Hinkle v. City of Clarksburg,* 81 F.3d 416 (4th Cir. 1996) (finding no "practical distinction" between computer-animated videotapes and other types of illustrations; computer animation was properly admitted where the jury "fully understood this animation was designed merely to illustrate appellees' version of the shooting and to demonstrate how that version was consistent with the physical evidence."); *Datskow v. Teledyne Corp.,* 826 F.Supp.2d 677 (W.D.N.Y. 1993) (video simulation was properly admitted to illustrate the expert's opinion; jury was instructed that the electronic presentation was not to be used as proof of how the disputed event actually occurred).

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

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

5. A computerized presentation might be offered as a summary of otherwise admissible evidence that is too voluminous to be conveniently examined in court. Such a presentation would be treated as a summary under Rule 1006. Computerized summaries are treated no differently from non-computerized summaries for purposes of Rule 1006. *See, e.g., Verizon Directories Corp. v. Yellow Book,* 311 F.Supp.2d 136 (E.D.N.Y. 2004) (finding that summaries can be admissible under

Rule 1006, whether or not they are computerized).

6. Photos, videos and other "original" documents are sometimes digitally enhanced to make them easier to read, view, or hear, or to highlight some aspect that the proponent wishes to emphasize. The courts have held that the admissibility of such enhancements is governed by rules 403, 901 and 1002, with the basic question being whether it is a fair and accurate depiction of the original. The language of these Rules has not proved an impediment to analyzing electronic enhancements of an original. *See, e.g., United States v. Seifert,* 351 F.Supp.2d 926 (D.Minn. 2005) (digitally-enhanced surveillance videotape admitted because it was "a fair and accurate depiction of the original videotape"); *United States v. Luma,* 240 F.Supp.2d 358 (D.V. I. 2002) (admitting videotapes where enhancements "did not change the substance of the videotape, but merely clarified the tapes."); *United States v. Beeler,* 62 F.Supp.2d 136 (D.Me. 1999) (admitting videotapes where enhancements omitted extraneous frames and made the images larger, clearer, and easier to view).

7. Information found on web pages, and information found in emails, are routinely offered in a trial. As indicated in Greg Joseph's attached article, the admissibility of this electronic information is evaluated under standard evidentiary concepts of hearsay, authenticity, and Rule 403.

8. Sometimes a learned treatise is in electronic form. In this regard, the Second Circuit upheld the admission of a videotape under the learned treatise exception. *Costantino v. Herzog,* 203 F.3d 164 (2d Cir. 2000). The plaintiffs contested admissibility on the ground that the language of Rule 803(18) did not cover electronic information, because it is written in terms of printed publications; the plaintiffs relied on the "plain language" of the Rule and argued that to add electronic evidence to the list set forth in the Rule would constitute "judicial legislation." Judge McLaughlin responded as follows:

> Uttering the dark incantation of "judicial legislation" is to substitute a slogan for an analysis. Indeed, we are exhorted in Rule 102 to interpret the Rules of Evidence to promote the "growth and development of the law ... to the end that the truth may be ascertained."* * *
>
> In this case * * * we agree with [trial court] Judge Gleeson that it is just "overly artificial" to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape. We see no reason to deprive a jury of authoritative learning simply because it is presented in a visual, rather than printed, format. In this age of visual communication a videotape may often be the most helpful way to illuminate the truth in the spirit of Rule 102. * * * Accordingly, we hold that videotapes may be considered learned treatises under Rule 803(18).

It should be noted that electronic evidence, like any other evidence, has often been excluded in federal courts. But the exclusions have resulted from the application of basic evidentiary principles of Rule 403, hearsay and authenticity. The exclusions have not resulted from the fact that the language in the Rules is not flexible enough to accommodate technological changes in the presentation of evidence. *See, e.g., United States v. Jackson,* 208 F.3d 633 (7th Cir. 2000) (evidence of a web posting was properly excluded because the defendant did not provide a foundation that it was authentic); *Rotolo v. Digital Equipment Corp.,* 150 F.3d 223 (2d Cir. 1998) (videotape of a conversation, offered to prove that the statements therein were true, held inadmissible hearsay).

In conclusion, the case law does not appear to indicate that the Evidence Rules must be changed immediately to accommodate electronically-generated evidence. I could find no case holding that electronically-generated evidence was inadmissible because it was electronically-generated and therefore not within the language of a Federal Rule. The rules generally appear flexible enough (at least as construed by the courts) to permit the trial court to exercise its discretion to admit or exclude computerized evidence depending on its authenticity, probative value, prejudicial effect and reliability.

Some Problems Not Yet Encountered

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

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

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

2. A party seeks to admit a portion of a computerized presentation as substantive evidence.

Can the adversary admit another portion under the rule of completeness? Like Rule 612, Rule 106 is cast in terms of a "writing", and therefore is at least arguably inapplicable.

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

Whether these *potential* concerns, and others like them, warrant amendments to the Rules at this point is a question for the Committee to decide. It seems reasonable to believe, however, that these problems will be treated in the same manner as the questions of admissibility of any other electronic evidence, i.e., admissibility is governed by the standard evidentiary doctrines of authenticity, Rule 403, and hearsay.

The Committee may wish to consider, however, that even if the courts are not having a problem with electronic evidence under the existing rules, there might still be a sufficient reason to amend the rules to add language referring to electronic evidence. Such an amendment would be a recognition of the ubiquity and importance of electronic evidence, and would indicate that the rulemaking process is cognizant of technological developments affecting the courts. In that sense the amendment would be analogous to the recent electronic discovery amendments to the Civil Rules. Moreover, an amendment could be thought necessary to protect the unschooled practitioner, whose literal reading of the rules would indicate that much electronic evidence is not admissible. It is for the Committee to determine whether these justifications are sufficient to justify the costs of an amendment.

III. Possibilities for Amending the Evidence Rules to Accommodate Electronic Evidence

The discussion in this section proceeds under the following two assumptions: 1) That the Evidence Rules should be amended to permit, explicitly, the admission of electronically stored information; and 2) that directly amending 31 or so individual rules is not a workable solution. Given these two assumptions, there are four possible solutions for an amendment: 1) a simple amendment to Rule 1001; 2) a more detailed amendment to Rule 1001; 3) the addition of a definitions section in the Evidence Rules; and 4) the addition of a new Rule 107 or 1104. Each solution is discussed in this section.

1. The Solution of a Simple Amendment to Rule 1001

It has been suggested that it might be sufficient to expand the definitions set forth in Rule 1001 so that they would apply to all the rules. That simple proposal would look something like this:

Rule 1001. Definitions

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

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

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

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

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

Reporter's Comment on the Proposal:

This proposal has the virtue of simplicity. However, it appears to be quite limited in its impact on the rules that potentially create a problem with respect to electronic evidence. The only

term that is usefully modified by this change is the term "writing." The reference in rule 1001 to "recordings" doesn't match up with the rules, because the rules refer to "records". It is even a fair question whether expanding the definition of "writings" will cover the use of the term "written" in the other rules. For example, Rule 801 defines hearsay as an oral or "written" assertion. Will the definition of "writing" in Rule 1001 cover a "written" assertion? At the very least, the proposal, while simple, would create an ambiguity.

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

2. The Solution of a More Expansive Amendment to Rule 1001

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

Rule 1001. Definitions

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

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

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

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

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

(5) *Record, document, memorandum and certificate.* — A "record", "document",

"memorandum" or "certificate" includes information that is stored electronically.

(6) *Data Compilation* — A "data compilation" includes any collection or presentation of information stored in electronic form.

(7) *"Publication", "printed material" and material that is "published"* — Information that is a "publication", "printed material," or material that is "published" includes electronically stored information.

(8) *"Certification" and "signature"* — A "certification" and a "signature" includes the necessary information in electronic form.

Proposed Committee Note:

The Rule has been amended to clarify that the "paper-based" language of the Federal Rules of Evidence is to be construed to permit evidence in electronic form when that evidence otherwise meets the admissibility requirements of the rules. *See, e.g., Costantino v. Herzog,* 203 F.3d 164 (2d Cir. 2000) (videotape was properly admitted as a learned treatise, even though Rule 803(18) refers only "published treatises, periodicals or pamphlets"). The intent of the amendment is that electronic evidence is to be governed by the same evidentiary principles as any other evidence. While the amendment is located in Article X, it applies to every Evidence Rule that contains any of the terms defined. The rule precludes the possibility that electronic evidence will be excluded simply because the Federal Rules of Evidence, as originally drafted, understandably were written to address the admissibility of paper-based evidence.

Reporter's Comment on the Proposal:

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

1. It provides a technology-based definition of "record", "certificate" "data compilation", "printed" and "published" materials, and certifications. As such, the effect of the more expansive definitions is extended to virtually all of the rules with paper-based language.

2. The definition of "writings" is modified from the existing Rule 1001, to take account of possible technological advances. The reference in the current rule to "magnetic impulse" is probably outmoded and at least unduly limiting.

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

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

technological advances.

5. The amendment follows the same principle as the simpler proposal addressed above--instead of amending 31 rules, it amends only one.

The proposal has some disadvantages, however:

1. The definitional section is placed in the Best Evidence Rule. A lawyer researching the meaning of "writing" in Rule 106, for example, might not think of looking in Rule 1001 for guidance, because an admissibility question concerning electronic evidence will not always, or often, present a best evidence question. This same criticism is applicable, of course, to the proposal that would simply extend the current Rule 1001 definitions to the other rules.

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

On balance, however, the fact that an expanded Rule 1001 will leave unnecessary language in some of the affected rules is not a reason for rejecting the proposal. Assuming that an amendment is necessary to accommodate technological changes, the question really is how that can be done effectively with the fewest amendments to the fewest rules. The benefits of deleting unnecessary language from each of the affected rules is probably outweighed by the costs of having to amend so many rules. (Recall that the Committee decided not to propose an amendment to Rule 1101 that would have deleted unnecessary language). At any rate, extraneous language is hardly unheard of in federal legislation and rulemaking. The use of the phrase "right, title and interest" is common. Indeed, even without any amendments, the reference to "memorandum" in Rule 803(5) is probably superfluous, given the inclusion of "records" in the Rule. See also Rule 803(17) (referring to "tabulations, lists, directories, or other published compilations."). Thus, the Committee might wish to consider an expanded Rule 1001, despite the fact that some of the affected Rules will contain superfluous language--again assuming that it is worth it to amend the Rules at all.

3. It could be argued that the proposed amendment tends to equate all of the terms--"writing", "record", "document" and "certificate"--when in fact those terms were intended to and should have separate meanings. But the answer to this criticism is that the change made is only as to form—whatever the thing is, it can be admitted if in electronic form. It does not appear that the Rules were ever intended to create a meaningful distinction between a memorandum and a record,

for example. But if they did, the distinction is not altered by the amendment.

3. The Solution of a Separate "Definitions" Rule:

Another alternative to accommodating electronic evidence — without amending a large number of rules — is to place a separate "definitions" rule in the Federal Rules of Evidence. This might be a daunting task, however. It would seem awkward to set up a new article or rule for "definitions," when the only definitions would deal with computerized evidence. Yet it would be equally problematic to draft a definitions rule that goes beyond computerized evidence to cover other terms that are used in the rules—especially since Rules 401, 801 and 1001 are already definitional rules. What terms should be defined? What would be the benefit of such definitions? Given the entrenched understandings of most of the terms used in the Rules, based on 30 years of case law, there is probably little to be gained and much to be lost in adding a full-fledged definitions rule to the Evidence Rules that would somehow complement the definitional rules that currently exist.

4. The Solution of a New Rule 107 or 1104:

An alternative to a full-fledged definitions section is to provide a rule entitled something like "Electronic Evidence" or " Evidence in Electronic Form." This rule would refer to all the paper-based terms in the rules, and would provide that they are all to be construed to include electronically stored information. Thus the rule would look something like an amendment to Rule 1001 (see solution 2, above), but it would be located in a more general article, not placed in the specific context of the best evidence rule.

A new rule 107 or 1101, dealing solely with electronic evidence, would have the following comparative advantages to the other solutions discussed above:

1. It would clearly apply to all the rules, therefore avoiding the confusion of placing the amendment in the best evidence rule.

2. It would not be labeled a "definitions" section, avoiding the problem of underinclusiveness on the one hand and the impossibility of drafting all pertinent definitions on the other.

A new rule 107 or 1101 would not, of course, solve the problem of extraneous language remaining in the paper-based rules; but as discussed above under Solution #2, the retention (or creation) of extraneous language would not appear to be a substantial problem, and at any rate cannot be solved by anything less than an amendment of a large number of rules.

Where to place this Rule?

If the Committee decides that it is useful to consider a possible new rule to deal with electronic evidence, a question that must be decided is: where to put the rule? The possibilities are a new Rule 107, or a new Rule 1104. The best location for the rule is a question on which reasonable minds can differ, but on balance it would appear that the new rule would be better placed in Article I. Article I is entitled "General Provisions." Because so many rules have paper-based language, a rule that essentially revises all of them to embrace electronic evidence can fairly be found to be "general." Also, placement in Article I would give the rule a prominence that would not be provided by placing it in Article 11. It would seem more likely to get the attention of the practitioner if it is placed in Article I. Article 11 is entitled "miscellaneous rules" implying a kind of dumping ground, and the rules currently in Article 11 deal with the more technical aspects of applicability, amendment and what the rules are to be called. Indeed, it might seem odd to add a rule on electronic evidence after a rule that deals with the "title." A rule dealing with the "title" clearly seems to want to be the last rule in the bunch.

IV. Possible Version of a Freestanding Rule on Electronic Evidence

What follows is a suggestion of what a new Rule 107 or 1104 might look like.

Rule 107/1104. Evidence in Electronic Form

As used in these rules, the terms "written," "writing," "record," "recording," "report," "document," "memorandum," "certificate," "data compilation," "publication," "printed material," and "material that is published" include information in electronic form. Any "certification" or "signature" required by these rules may be made electronically.

Proposed Committee Note:

New rule 107/1104 makes clear that the "paper-based" language of the Federal Rules of Evidence is to be construed to permit evidence in electronic form when that evidence otherwise meets the admissibility requirements of the rules. *See, e.g., Costantino v. Herzog,* 203 F.3d 164 (2d Cir. 2000) (videotape was properly admitted as a learned treatise, even though Rule 803(18) refers only "published treatises, periodicals or pamphlets"). The intent of the rule is that electronic evidence is to be governed by the same evidentiary principles as any other evidence. The rule precludes the possibility that electronic evidence will be excluded simply because the Federal Rules of Evidence, as originally drafted, understandably were written to address the admissibility of paper-based evidence.

Internet & Email Evidence

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INTERNET AND EMAIL EVIDENCE

Gregory P. Joseph*

The explosive growth of the Internet and burgeoning use of electronic mail are raising a series of novel evidentiary issues. The applicable legal principles are familiar — this evidence must be authenticated and, to the extent offered for its truth, it must satisfy hearsay concerns. The novelty of the evidentiary issues arises out of the novelty of the media — thus, it is essentially factual. These issues can be resolved by relatively straightforward application of existing principles in a fashion very similar to the way they are applied to other computer-generated evidence and to more traditional exhibits.

I. Internet Evidence

There are primarily three forms of Internet data that are offered into evidence — (1) data posted on the website by the owner of the site ("website data"); (2) data posted by others with the owner's consent (a chat room is a convenient example); and (3) data posted by others without the owner's consent ("hacker" material). The wrinkle for authenticity purposes is that, because Internet data is electronic, it can be manipulated and offered into evidence in a distorted form. Additionally, various hearsay concerns are implicated, depending on the purpose for which the proffer is made.

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A. Authentication

Website Data. Corporations, government offices, individuals, educational institutions and innumerable other entities post information on their websites that may be relevant to matters in litigation. Alternatively, the fact that the information appears on the website may be the relevant point. Accordingly, courts routinely face proffers of data (text or images) allegedly drawn from websites. The proffered evidence must be authenticated in all cases, and, depending on the use for which the offer is made, hearsay concerns may be implicated.

The authentication standard is no different for website data or chat room evidence than for any other. Under Rule 901(a), "The requirement of authentication ... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *United States v. Simpson,* 152 F.3d 1241, 1249 (10th Cir. 1998); *Johnson-Wooldridge v. Wooldridge*, 2001 Ohio App. LEXIS 3319 at *11 (Ohio App. July 26, 2001).

In applying this rule to website evidence, there are three questions that must be answered, explicitly or implicitly:

1. What was actually on the website?
2. Does the exhibit or testimony accurately reflect it?
3. If so, is it attributable to the owner of the site?

In the first instance, authenticity can be established by the testimony of any witness that the witness typed in the URL associated with the website (usually prefaced with *www*); that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit fairly and accurately reflects what the witness saw.[1] This last

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1 *See Johnson-Wooldridge v. Wooldridge*, 2001 Ohio App. LEXIS 3319 at *11 (Ohio App. July 26, 2001). *See also Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002) (admitting on a preliminary injunction motion copies of pages from defendant's and

Footnote continued

testimony is no different than that required to authenticate a photograph, other replica or demonstrative exhibit.[2] The witness may be lying or mistaken, but that is true of all testimony and a principal reason for cross-examination. Unless the opponent of the evidence raises a genuine issue as to trustworthiness, testimony of this sort is sufficient to satisfy Rule 901(a), presumptively authenticating the website data and shifting the burden of coming forward to the opponent of the evidence. It is reasonable to indulge a presumption that material on a web site (other than chat room conversations) was placed there by the owner of the site.

The opponent of the evidence must, in fairness, be free to challenge that presumption by adducing facts showing that proffered exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the owner of the site. First, even if the proffer fairly reflects what was on the site, the data proffered may have been the product of manipulation by hackers (uninvited third parties).[3] Second, the

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third party websites (as to the latter of which the furnished "webpages contain[ed] ... the internet domain address from which the image was printed and the date on which it was printed") because "the declarations, particularly in combination with circumstantial indicia of authenticity (such as the dates and web addresses), would support a reasonable juror in the belief that the documents are what [plaintiff] says they are;" noting the "reduced evidentiary standard in preliminary injunction motions").

2 *See, e.g., Actonet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836, 848 (8th Cir. 2000) ("HTML codes may present visual depictions of evidence. We conclude, therefore, that HTML codes are similar enough to photographs to apply the criteria for admission of photographs to the admission of HTML codes").

3 *See, e.g., Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1064-1065 (C.D. Cal. 2002) ("Defendants have objected on the grounds that [counsel] has no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents" — objections sustained).

proffer may not fairly reflect what was on the site due to modification — intentional or unintentional, material or immaterial — in the proffered exhibit or testimony.

Detecting modifications of electronic evidence can be very difficult, if not impossible. That does not mean, however, that nothing is admissible because everything is subject to distortion. The same is true of many kinds of evidence, from testimony to photographs to digital images, but that does not render everything inadmissible. It merely accentuates the need for the judge to focus on all relevant circumstances in assessing admissibility under Fed.R.Evid. 104(a)[4] — and to leave the rest to the jury, under Rule 104(b).[5]

In considering whether the opponent has raised a genuine issue as to trustworthiness, and whether the proponent has satisfied it, the court will look at the totality of the circumstances, including, for example:

- The length of time the data was posted on the site.
- Whether others report having seen it.
- Whether it remains on the website for the court to verify.
- Whether the data is of a type ordinarily posted on that website or websites of similar entities (*e.g.*, financial information from corporations).

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4 Fed.R.Evid. 104(a) provides that:

> *Questions of admissibility generally.*—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

5 Fed.R.Evid. 104(b) provides that:

- Whether the owner of the site has elsewhere published the same data, in whole or in part.
- Whether others have published the same data, in whole or in part.
- Whether the data has been republished by others who identify the source of the data as the website in question.

A genuine question as to trustworthiness may be established circumstantially. For example, more by way of authentication may be reasonably required of a proponent of Internet evidence who is known to be a skilled computer user and who is suspected of possibly having modified the proffered website data for purposes of creating false evidence.[6]

In assessing the authenticity of website data, important evidence is normally available from the personnel managing the website ("webmaster" personnel). A webmaster can establish that a particular file, of identifiable content, was placed on the website at a specific time. This may be done through direct testimony or through documentation, which may be generated automatically by the software of the web server. It is possible that the content provider — the author of the material appearing on the site that is in issue — will be someone other than the person who installed the file on the web. In that event, this second witness (or set of documentation) may be necessary to

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Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

6 *See, e.g., United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("Jackson needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailing actually were posted by the groups, as opposed to being slipped onto the groups' web sites by Jackson herself, who was a skilled computer user.").

reasonably ensure that the content which appeared on the site is the same as that proffered.

Self-Authentication. Government offices publish an abundance of reports, press releases and other information on their official web sites. Internet publication of a governmental document on an official website constitutes an "official publication" within Federal Rule of Evidence 902(5).[7] Under Rule 902(5),official publications of government offices are self-authenticating.[8]

Chat Room Evidence. A proffer of chat room postings generally implicates the same authenticity issues discussed above in connection with web site data, but with a twist. While it is reasonable to indulge a presumption that the contents of a website are fairly attributable to the site's owner, that does not apply to chat room evidence. By definition, chat room postings are made by third parties, not the owner of the site. Further, chat room participants usually use screen names (pseudonyms) rather than their real names.

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7 Fed.R.Evid. 902(5) provides that the following are self-authenticating:

Official publications.--Books, pamphlets, or other publications purporting to be issued by public authority.

8 *See, e.g., Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 U.S.Dist.LEXIS 21748 at *10 n. 3 (S.D. Ohio March 31, 1999) ("The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under Rule 902(5) of the Federal Rules of Evidence"). *See also Elliott Assocs., L.P. v. Banco de la Nacion,* 194 F.R.D. 116, 121 (S.D.N.Y. 2000) (discussed below; holding that prime rates published on the Federal Reserve Board website satisfy the hearsay exception of Federal Rule of Evidence 803(17). *But see State v. Davis,* 141 Wash.2d 798, 854, 10 P.3d 977, 1010 (2000) (no abuse of discretion in excluding, in death penalty case, defendant's proffer of state population statistics obtained from official state website; affirming exclusion on hearsay grounds but stating that "[a]n unauthenticated printout obtained from the Internet does not ... qualify as a self authenticating document under ER 902(e) [the Washington State equivalent of Federal Rule of Evidence 902(5)]"). There is reason to believe, however, that *Davis* may be limited to its facts. *See* State v. Rapose, 2004 WL 585856 at *5 (Wash. App. Mar. 25, 2004) (unpublished opinion).

Since chat room evidence is often of interest only to the extent that the third party who left a salient posting can be identified, the unique evidentiary issue concerns the type and quantum of evidence necessary to make that identification — or to permit the finder of fact to do so. Evidence sufficient to attribute a chat room posting to a particular individual may include, for example:

- Evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question).
- Evidence that, when a meeting with the person using the screen name was arranged, the individual in question showed up.
- Evidence that the person using the screen name identified him- or herself as the individual (in chat room conversations or otherwise), especially if that identification is coupled with particularized information unique to the individual, such as a street address or email address.
- Evidence that the individual had in his or her possession information given to the person using the screen name (such as contact information provided by the police in a sting operation).
- Evidence from the hard drive of the individual's computer reflecting that a user of the computer used the screen name in question.

See generally United States v. Tank, 200 F.3d 627, 630-31 (9th Cir. 2000); *United States v. Simpson*, 152 F.3d 1241, 1249-50 (10th Cir. 1998); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002).

B. Hearsay.

Authenticity aside, every extrajudicial statement drawn from a website must satisfy a hearsay exception or exemption if the statement is offered for its truth. *See United States v. Jackson,* 208 F.3d 633, 637 (7th Cir.) ("The web postings were not statements made by declarants testifying at trial, and they were being offered to prove the truth of the

matter asserted. That means they were hearsay."), *cert. denied,* 531 U.S. 973 (2000); *Savariego v. Melman,* 2002 U.S. Dist. LEXIS 8563 at *5 (N.D. Tex. 2002) (excluding on summary judgment "unauthenticated hearsay from an Internet search").

To establish that material appeared on a website, it is sufficient for a witness with knowledge to attest to the fact that the witness logged onto the site and to describe what he or she saw. That obviates any hearsay issue as to the contents of the site. *Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000) ("The only remaining question is whether the content of the website is hearsay under FRE 801.... Here, [plaintiff], by his own account, personally viewed the website and submitted an affidavit detailing specifically what he viewed. Therefore, the contents of the website are not hearsay for purposes of this summary judgment motion"); *State v. Rapose*, 2004 WL 585856 at *5 (Wash. App. Mar. 25, 2004) (unpublished opinion) (affirming admission of Internet and email documents because "each exhibit was identified and authenticated by the person testifying from personal knowledge of the contents").

Data Entry. Some website data is entered into Internet-readable format in the same way that a bookkeeper may enter numbers into a computer. This act of data entry is an extrajudicial statement — *i.e.*, assertive nonverbal conduct within Rule 801(a) — which means that the product is hearsay, within Rule 801(c). Since each level of hearsay must satisfy the hearsay rule, under Rule 805 (Hearsay within Hearsay), the act of data entry must be addressed separately from the content of the posted declaration.

Data entry is usually a regularly-conducted activity within Rule 803(6) (or, in the context of a government office, falls within Rule 803(8) (public records exception)). It also often falls within Rule 803(1) (present sense impression exception).

The real question about the data entry function is its accuracy. This is, in substance, an issue of authenticity and should be addressed as part of the requisite authentication foundation whenever a genuine doubt as to trustworthiness has been raised. If the foundational evidence establishes that the data have been entered

accurately, the hearsay objection to the data entry function should ordinarily be overruled. *See also* Rule 807 (residual exception).

Much Internet evidence does not involve data entry, in the sense described above. If the webmaster is simply transferring an image or digitally converting an electronic file into web format, that is a technical process that does not involve assertive non-verbal conduct within Rule 801(a) and is best judged as purely an authentication issue. The difference, analytically, is between the grocery store clerk who punches the price into the check-out computer (this is assertive non-verbal conduct), and the clerk who simply scans the price into the computer (non-assertive behavior). Only assertive non-verbal conduct raises hearsay issues and requires an applicable hearsay exception or exemption.

Business and Public Records. Businesses and government offices publish countless documents on their websites in ordinary course. Provided that all of the traditional criteria are met, these documents will satisfy the hearsay exception for "records" of the business or public office involved, under Rules 803(6) or (8). Reliability and trustworthiness are said to be presumptively established by the fact of actual reliance in the regular course of an enterprise's activities. *Johnson-Wooldridge v. Wooldridge*, 2001 Ohio App. LEXIS 3319 at *12-*13 (Ohio App. July 26, 2001) (Internet public record). (Recall that public records which satisfy Rule 803(8) are presumptively authentic under Rule 901(b)(7) (if they derive from a "public office where items of this nature are kept") and even self-authenticating under Rule 902(5) (discussed above in note 6 and the accompanying text).)

As long as the website data constitute business or public records, this quality is not lost simply because the printout or other image that is proffered into evidence was generated for litigation purposes. Each digital data entry contained on the website is itself

a Rule 803(6) or (8) "record" because it is a "data compilation, in any form."[9] Consequently, if each entry has been made in conformance with Rule 803(6) or Rule 803(8), the proffered output satisfies the hearsay exception even if it: (a) was not printed out at or near the time of the events recorded (as long as the entries were timely made), (b) was not prepared in ordinary course (but, *e.g.*, for trial), and (c) is not in the usual form (but, *e.g.*, has been converted into graphic form).[10] If the data are simply downloaded into a printout, they do not lose their business-record character. To the extent that significant selection, correction and interpretation are involved, their reliability and authenticity may be questioned.[11]

While website data may constitute business records of the owner of the site, they are not business records of the Internet service provider (*e.g.*, America Online, MSN, ATT). "Internet service providers...are merely conduits.... The fact that the Internet service provider may be able to retrieve information that its customers posted...does not turn that material into a business record of the Internet service provider." *United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("The Internet service providers did not themselves post what was on [the relevant] web sites. [Defendant] presented no evidence that the Internet service providers even monitored the contents of those web sites.").

Rules 803(6) and (8) effectively incorporate an authentication requirement. Rule 803(6) contemplates the admission of hearsay, if its criteria are satisfied, "unless the

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9 *See, e.g., United States v. Sanders*, 749 F.2d 195, 198 (5th Cir. 1984) (dealing with computerized records); *United States v. Catabran,* 836 F.2d 453, 456 (9th Cir. 1988) (same).

10 *See, e.g , United States v. Russo*, 480 F.2d 1228, 1240 (6th Cir.), *cert. denied,* 414 U.S. 1157 (1973) (dealing with computerized records).

11 *See, e.g., Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 631, 633 (2d Cir. 1994) (dealing with computerized business records).

source of information or the method or circumstances of preparation indicate lack of trustworthiness." Rule 803(8) contains substantially identical language. This trustworthiness criterion parallels the Rule 901(a) requirement of "evidence sufficient to support a finding that the matter in question is what its proponent claims." As a result, untrustworthy proffers of business or public records may be excluded on hearsay as well as authenticity grounds.[12]

Market Reports & Tables. Rule 803(17) excepts from the hearsay rule "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." A number of cases have applied this rule to commercial websites furnishing such data as interest rates[13] and blue-book prices of used cars.[14] This rationale plainly extends to the other sorts of traditional information admitted under Rule 803(17), such as tables reflecting the prices of such items as stock, bonds and currency; real estate listings; and telephone books.

Admissions. Website data published by a litigant comprise admissions of that litigant when offered by an opponent.[15] Accordingly, even if the owner of a website may

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12 *United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("Even if these web postings did qualify for the business records hearsay exception, 'the business records are inadmissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness'") (citation omitted).

13 *Elliott Assocs., L.P. v. Banco de la Nacion,* 194 F.R.D. 116, 121 (S.D.N.Y. 2000) (prime rates published on the Bloomberg website satisfy the hearsay exception of Federal Rule of Evidence 803(17).

14 *See, e.g., State v. Erickstad,* 620 N.W.2d 136, 145 (N.D. 2000) (*citing Irby-Greene v. M.O.R., Inc.*, 79 F.Supp.2d 630, 636 n.22 (E.D.Va. 2000)).

15 *See, e.g., Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000) ("the representations made by defendants on the website are admissible as admissions of the party-opponent under FRE 801(d)(2)(A)"); *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845, at *16-17 (N.D. Ill. Oct. 14, 2004).

not offer data from the site into evidence, because the proffer is hearsay when the owner attempts to do so, an opposing party is authorized to offer it as an admission of the owner.[16]

Non-Hearsay Proffers. Not uncommonly, website data is not offered for the truth of the matters asserted but rather solely to show the fact that they were published on the web, either by one of the litigants or by unaffiliated third parties. For example, in a punitive damages proceeding, the fact of Internet publication may be relevant to show that the defendant published untruths for the public to rely on.[17] Or, in a trademark action, Internet listings or advertisements may be relevant on the issue of consumer confusion or purchaser understanding.[18] In neither of these circumstances is the website data offered for its truth. Accordingly, no hearsay issues arise.

Judicial Skepticism. As they were with computerized evidence prior to the mid-1990s, some judges remain skeptical of the reliability of anything derived from the Internet. *See, e.g., St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774-75 (S.D. Tex. 1999) ("While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large

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16 *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 631, 633-34 (2d Cir. 1994) (dealing with computerized business records).

17 *See, e.g., Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000).

18 *See, e.g. ,Microware Sys. Corp. v. Apple Computer, Inc.*, 2000 U.S.Dist.LEXIS 3653 at *7 n.2 (S.D. Iowa March 15, 2000) ("Microware's internet and e-mail submissions are not ideal proffers of evidence since their authors cannot be cross-examined. However, in a case involving an industry where e-mail and internet communication are a fact of life, these technical deficiencies must go to the weight of such evidence, rather than to their admissibility. In any case, to the extent any of these stray comments bear on the issue of confusion, they come in for that purpose...") (citations omitted); *Mid City Bowling Lanes & Sports Palace, Inc. v. Don Carter's All Star Lanes-Sunrise Ltd.*, 1998 U.S.Dist.LEXIS 3297 at *5-*6 (E.D.La. March 12, 1998).

catalyst for rumor, innuendo, and misinformation.... Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules found in Fed.R.Evid. 807"). While there is no gainsaying a healthy judicial skepticism of any evidence that is subject to ready, and potentially undetectable, manipulation, there is much on the web which is not subject to serious dispute and which may be highly probative. As with so many of the trial judge's duties, this is a matter that can only be resolved on a case- by-case basis.

II. Email Evidence

Like Internet evidence, email evidence raises both authentication and hearsay issues. The general principles of admissibility are essentially the same since email is simply a distinctive type of Internet evidence — namely, the use of the Internet to send personalized communications.

Authentication. The authenticity of email evidence is governed by Federal Rule of Evidence 901(a), which requires only "evidence sufficient to support a finding that the matter in question is what its proponent claims." Under Fed.R.Evid. 901(b)(4), email may be authenticated by reference to its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." *See generally United States v. Siddiqui*, 215 F.3d 1318, 1322 (11th Cir. 2000); *Bloom v. Comw. of Virginia*, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001).

If email is produced by a party from the party's files and on its face purports to have been sent by that party, these circumstances alone may suffice to establish authenticity.[19] Authenticity may also be established by testimony of a witness who sent or received the emails --- in essence, that the emails are the personal correspondence of the witness.[20]

It is important, for authentication purposes, that email generated by a business or other entity on its face generally reflects the identity of the organization. The name of the organization, usually in some abbreviated form, ordinarily appears in the email address of the sender (after the @ symbol). This mark of origin has been held to self-authenticate the email as having been sent by the organization, under Fed.R.Evid. 902(7), which provides for self-authentication of: "*Trade inscriptions and the like.*--Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin." *See Superhighway Consulting, Inc. v. Techwave, Inc.*, 1999 U.S.Dist.LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999). Where the email reflects the entire email name of a party (and not just the mark of origin), it has been held to comprise a party admission of origin.[21]

Independently, circumstantial indicia that may suffice to establish that proffered email were sent, or were sent by a specific person, include evidence that:

- A witness or entity received the email.
- The email bore the email address of a particular individual.

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19 *See, e.g., Superhighway Consulting, Inc. v. Techwave, Inc.*, 1999 U.S.Dist.LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999).

20 *Tibbetts v. RadioShack Corp.*, 2004 U.S. Dist. LEXIS 19835, at *44 (N.D. Ill. Sept. 30, 2004).

21 *Middlebrook v. Anderson*, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005) (jurisdictional motion).

- This email contained the typewritten name or nickname of this individual in the body of the email.[22]
- The email recited matters that would normally be known only to the individual who is alleged to have sent it (or to a discrete number of persons including this individual).
- Following receipt of the email, the recipient witness had a discussion with the individual who purportedly sent it, and the conversation reflected this individual's knowledge of the contents of the email.

See generally United States v. Siddiqui, 215 F.3d 1318, 1322-23 (11th Cir. 2000); *Bloom v. Comw. of Virginia*, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001); *Massimo v. State*, 144 S.W.3d 210, 215-16 (Tex. App. 2004) (unpublished opinion).

As with all other forms of authentication, the testimony of a witness with knowledge is prerequisite to authenticate email. It is insufficient to proffer email through a witness with no knowledge of the transmissions at issue, unless the witness has sufficient technical knowledge of the process to be in a position to authenticate the email through expert testimony. *See, e.g., Richard Howard, Inc. v. Hogg,* 1996 Ohio App. LEXIS 5533 at *8 (Ohio App. Nov. 19, 1996) (affirming exclusion of email where the authenticating witness "was neither the recipient nor the sender of the E-mail transmissions and he offered no other details establishing his personal knowledge that these messages were actually sent or received by the parties involved. Furthermore, the transmissions were not authenticated by any other means").

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22 Thus, courts have looked at the "electronic 'signature'" at the end of the email message identifying the name and business affiliation of the sender. *See, e.g., Sea-Land Serv., Inc. v. Lozen Int'l, LLC,* 285 F.3d 808, 821 (9th Cir. 2002) (held, email by one employee forwarded to party opponent by a fellow employee — containing the electronic signature of the latter — constitutes an admission of a party opponent and thus is not hearsay).

There are a variety of technical means by which email transmissions may be traced. *See, e.g., Clement v. California Dep't of Corrections,* 2002 U.S. Dist. LEXIS 17426 at *32 (N.D. Cal. Sept. 9, 2002) ("major e-mail providers include a coded Internet Protocol address (IP address) in the header of every e-mail.... The IP address allows the recipient of an e-mail to identify the sender by contacting the service provider"). Therefore, if serious authentication issues arise, a technical witness may be of assistance.[23] This may become important, for example, in circumstances where a person or entity denies receipt of an email and has not engaged in conduct that furnishes circumstantial evidence of receipt (such as a subsequent communication reflecting knowledge of the contents of the email). *See, e.g. Ellison v. Robertson,* 189 F.Supp.2d 1051, 1057 n.7 (C.D. Cal. 2002) ("Plaintiff has provided no evidence that AOL actually did receive the email. To the contrary, Plaintiff's former counsel states that while she received an acknowledgment of receipt for her April 17, 2000, email from [a local Internet provider], no such acknowledgment came from AOL"); *Carafano v. Metrosplash.com, Inc.,* 207 F.Supp.2d 1055, 1072 (C.D. Cal. 2002) ("Plaintiff provides no evidence that [defendant Internet service] ever received the reply email in response to its welcome confirmation email").

Hearsay. The hearsay issues associated with email are largely the same as those associated with conventional correspondence. The prevalence and ease of use of email, particularly in the business setting, makes it attractive simply to assume that all email generated at or by a business falls under the business-records exception to the hearsay rule. That assumption would be incorrect.

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23 Since authentication issues are decided by the court under Federal Rule of Evidence 104(a), live testimony from such a witness is not essential; an affidavit or declaration may be equally effective. Fed.R.Evid. 104(a) is set forth in n.4, *supra*.

What Is a Business Record? Or a Present Sense Impression? In *United States v. Ferber*, 966 F.Supp. 90 (D. Mass. 1997), the government offered into evidence a multi-paragraph email from a subordinate to his superior describing a telephone conversation with the defendant (not a fellow employee). In that conversation, the defendant inculpated himself, and the email so reflected. Chief Judge Young rejected the proffer under Fed.R.Evid. 803(6) because, "while it may have been [the employee's] routing business practice to make such records, there was not sufficient evidence that [his employer] required such records to be maintained.... [I]n order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type." *Id.*, 996 F.Supp. at 98. The *Ferber* Court nonetheless admitted the email, but under 803(1), the hearsay exception for present sense impressions.[24] *See also State of New York v. Microsoft Corp.*, 2002 U.S. Dist. LEXIS 7683 at *9 (D.D.C. April 12, 2002) ("While Mr. Glaser's email [recounting a meeting] may have been 'kept in the course' of RealNetworks regularly conducted business activity, Plaintiffs have not, on the present record, established that it was the 'regular practice' of RealNetworks employees to write and maintain such emails.") (separately holding the present sense impression exception inapplicable); *Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 707 (E.D. Va. 2004) ("Email is far less of a systematic business activity than a monthly inventory printout"), quoting *Monotype Corp. v. Intl. Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994).

Hearsay within Hearsay. Because business records are written without regard for the rules of evidence, they commonly contain multiple layers of hearsay. Under

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24 Fed.R.Evid. 803(1) sets forth the hearsay exception for present sense impressions, which are defined to include any "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

Federal Rule of Evidence 805,[25] each layer of hearsay must independently satisfy an exception to the hearsay rule. Absent that, any hearsay portion of an email that is offered for the truth[26] will be excluded. *See, e.g., State of New York v. Microsoft Corp.*, 2002 U.S. Dist. LEXIS 7683 at *14 (D.D.C. April 12, 2002) ("'If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). If the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have'") (citation omitted).

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25 Fed.R.Evid. 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

26 Email communications not offered for the truth are not subject to exclusion as hearsay. *See, e.g., Rombom v. Weberman,* 2002 N.Y. Misc. LEXIS 769 at *20 (Sup. Ct. Kings Cty. June 13, 2002) ("since plaintiff introduced the e-mails to establish their effect upon plaintiff, as opposed to the truth of their content, the e-mails did not constitute inadmissible hearsay").

Admission of Party Opponent. Under Fed.R.Evid. 801(d)(2),[27] emails sent by party opponents constitute admissions and are not hearsay. *See, e.g., Riisna v. ABC, Inc.*, 2002 U.S. Dist. LEXIS 16969 at *9-*10 (S.D.N.Y. Sept. 11, 2002). The email address itself, which reflects that it originates from a party, may be admissible as a party admission. *Middlebrook v. Anderson*, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005) (jurisdictional motion). Further, an email from a party opponent that forwards another email may comprise an adoptive admission of the original message, depending on the text of the forwarding email. *Sea-Land Serv., Inc. v. Lozen Int'l, LLC,* 285 F.3d 808, 821 (9th Cir. 2002) (one of plaintiff's employees "incorporated and adopted the contents" of an email message from a second of plaintiff's employees when she forwarded it to the defendant with a cover note that "manifested an adoption or belief in [the] truth" of the information contained in the original email, within Fed.R.Evid. 801(d)(2)(B)). If there is not an adoptive admission, however, the forwarded email chain may comprise hearsay-within-hearsay. *Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 707 (E.D. Va. 2004).

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27 Fed.R.Evid. 801(d)(2) provides that a statement is not hearsay if:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Excited Utterance. In dicta, the Oregon Court of Appeals has indicated that, in appropriate circumstances, an email message might fall within the excited utterance exception to the hearsay rule. *State v. Cunningham*, 40 P.3d 1065, 1076 n.8 (2002). (The federal excited utterance exception, contained in Fed.R.Evid. 803(2),[28] is identical to the Oregon exception, Oregon Rule 803(2).)

Non-Hearsay Uses. Not all extrajudicial statements are hearsay or, more precisely, need not be offered for hearsay purposes. The contents of an authenticated email may, for example, constitute a verbal act — *e.g.*, constitute defamation or the offer or acceptance of a contract. *Middlebrook v. Anderson*, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005) (jurisdictional motion); *Tibbetts v. RadioShack Corp.*, 2004 U.S. Dist. LEXIS 19835, at *45 (N.D. Ill. Sept. 30, 2004).

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28 Fed.R.Evid. 803(2) excepts from the hearsay rule "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

MEMORANDUM

DATE: September 8, 2005

TO: Time-Computation Subcommittee **CC:** John K. Rabiej

FROM: Judge Mark R. Kravitz

RE: Time-Computation Project

Thank you for agreeing to serve on the Time-Computation Subcommittee, which has been appointed by Judge David Levi and charged with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. I have been asked to chair the Subcommittee, and Prof. Patrick Schiltz, the Reporter to the Advisory Committee on Appellate Rules, has been asked to serve as the Subcommittee's reporter. The Subcommittee's main task, as I understand it, is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Thus, Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within 8 days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The Subcommittee will focus on time-computation rules, not on deadlines. If changes to the time-computation rules are recommended, it will be up to the individual advisory committees to decide whether their respective deadlines should be adjusted or whether changes should be made to other rules, such as the rules that give courts the authority to alter deadlines.[1] The Subcommittee will likely act as a "clearinghouse" for information about such changes and help to coordinate the work of the advisory committees, but the Subcommittee will not itself address such topics as whether a defendant should have more than 7 days to move for a judgment of acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A) should be longer than 21 days. Obviously, the expertise needed to address such questions resides in the advisory committees, not in the Subcommittee.

The ultimate goal of the Subcommittee is to recommend to the advisory committees a time-computation template containing uniform and simplified time-computation rules. Attached

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[1] *See, e.g.*, FED. R. APP. P. 26(b); FED. R. BANKR. P. 9006(b); FED. R. CIV. P. 6(b); FED. R. CRIM. P. 45(b).

please find a list of the time-computation rules that are presently found in the Appellate, Bankruptcy, Civil, and Criminal Rules, and that are obvious candidates for inclusion in the template. (The Evidence Rules have a few deadlines,[2] but no provisions about how to compute those deadlines.) Prof. Schiltz, who put together this list, has also identified three issues that are not now addressed by the rules of practice and procedure, but that might merit the attention of the Subcommittee.

John Rabiej from the Administrative Office will soon be contacting you to set up a teleconference for late September or early October. At that teleconference, I hope to get tentative agreement on how the issues identified by Prof. Schiltz should be resolved. Prof. Schiltz will then draft a template that reflects our agreement, and we will hopefully be able to review and approve that draft template before the Standing Committee meets in January. The template will then go to the advisory committees in time for their spring meetings, and, following those meetings, this Subcommittee will review any concerns raised by the Standing Committee or any of the advisory committees, and the advisory committees will begin work on reviewing their deadlines. The tentative plan for the time-computation project is thus as follows:

Fall 2005	Time-Computation Subcommittee drafts template
January 2006	Template reviewed by Standing Committee
Spring 2006	Template reviewed by advisory committees
Summer 2006	Time-Computation Subcommittee reviews comments from Standing Committee and advisory committees and approves template
Fall 2006	Advisory committees consider amendments to time-computation rules to reflect template and begin work on revising deadlines
Spring 2007	Advisory committees approve amendments to time-computation rules and deadlines for publication
June 2007	Standing Committee approves amendments to time-computation rules and deadlines for publication
August 2007	Amendments to time-computation rules and deadlines published for comment

[2]*See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

As you review the attachment, please let me know if you believe that we have missed any topics that might be addressed by the Subcommittee. Also, please feel free to share by e-mail any comments that you have on the issues identified by Prof. Schiltz. We certainly do not have to wait until the teleconference to begin our discussion.

Thank you for your assistance with this project.

I. SCOPE OF TIME-COMPUTATION RULES

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . .

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . .

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order . . . .

E. Comment

Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) make clear that their time-computation provisions apply to any "applicable statute," as well as to federal rules, local rules, and court orders. For some reason, Criminal Rule 45(a) does not mention "applicable statutes." I do not know why the newly restyled Criminal Rule is inconsistent with the other rules, but the Subcommittee may want to address this inconsistency.

II. EXCLUDING DAY OF EVENT

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.

E. Comment

Appellate Rule 26(a)(1), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(1) are consistent in substance and, as far as I know, have created no problems for the bench or bar. It appears that only "restyling" to make the language consistent may be needed.

III. 11-DAY RULE: EXCLUDING INTERMEDIATE SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is

less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(2) ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

E. Comment

Appellate Rule 26(a)(2), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(2) are consistent in substance, with two exceptions. First, the dividing line under the Bankruptcy Rule is 8 days, whereas the dividing line under the Appellate, Civil, and Criminal Rules is 11 days. Second, the Appellate Rule alone recognizes the concept of "calendar days." (More about calendar days below.)

The "11-day rule" (which I will call it, for the sake of simplicity) is the most criticized of the time-computation rules. The 11-day rule makes computing deadlines unnecessarily complicated and leads to counterintuitive results — such as parties sometimes having less time to file papers that are due in 14 days than they have to file papers that are due in 10 days.[3] The Subcommittee should consider eliminating the 11-day rule and providing instead that "days are days" — i.e., that intermediate Saturdays, Sundays, and legal holidays are always counted, no matter how long the deadline. A "days are days" rule would also moot the

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[3] If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days.

Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005). Ed Cooper points out that a 10-day deadline can actually extend to 17 days, if it begins running on a Friday, December 22.

inconsistency between the 8-day dividing line in the Bankruptcy Rule and the 11-day dividing line in the Appellate, Civil, and Criminal Rules.

IV. CALENDAR DAYS

A. Appellate Rule

As noted above, the Appellate Rules alone recognize the concept of "calendar days." Appellate Rule 26(a)(2) provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded *unless the deadline is stated in calendar days*. If the deadline is stated in calendar days, then "days are days," and intermediate Saturdays, Sundays, and legal holidays are counted.

Only one deadline in the Appellate Rules is stated in calendar days: Appellate Rule 41(b) requires that "[t]he court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later."

In addition, Appellate Rule 26(c) — the "3-day rule" (discussed below) — is stated in calendar days: "When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." (The equivalent provision in the Bankruptcy, Civil, and Criminal Rules is simply stated in "days.")

Finally, Appellate Rule 25(a)(2)(B)(ii) provides that a brief or appendix is timely filed if, on or before the last day for filing, it is "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days." And Appellate Rule 25(c)(1)(C) lists as an authorized method of service transmittal "by third-party commercial carrier for delivery within 3 calendar days."

B. Bankruptcy Rule

The Bankruptcy Rules do not refer to calendar days.

C. Civil Rule

The Civil Rules do not refer to calendar days.

D. Criminal Rule

The Criminal Rules do not refer to calendar days.

E. Comment

The use of calendar days by the Appellate Rules — but not by the Bankruptcy, Civil, or Criminal Rules — is a major inconsistency in the time-computation rules. The inconsistency would not exist but for the 11-day rule. If that rule were eliminated — if "days were days" — then the Appellate Rules would no longer need to use the concept of calendar days, as all days would be counted as calendar days. This is another reason for the Subcommittee to consider eliminating the 11-day rule.

V. LAST DAY OF PERIOD ON SATURDAY, SUNDAY, OR LEGAL HOLIDAY

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . . When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, [or] legal holiday . . . .

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, and, as far as I know, neither the bench nor the bar have had difficulty understanding that when a deadline ends on a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. It appears that only "restyling" to make the language consistent may be needed.

VI. LAST DAY OF PERIOD ON DAY CLERK'S OFFICE INACCESSIBLE

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless . . . if the act to be done is filing a paper in court — [it is] a day on which the weather or other conditions makes the clerk's office inaccessible.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a . . . day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, except that newly restyled Criminal Rule 45(a)(3) eliminates the "act to be done is filing" qualifier. The reason for this omission is not clear to me, but the Subcommittee may wish to address it.

The Subcommittee may also wish to consider whether to address the myriad problems that will arise as electronic filing becomes pervasive. For example, suppose that the clerk's office is physically open, but electronic filing is not possible because of problems with the clerk's computer system? Or because of problems with the filing attorney's or party's computer system? Or suppose the opposite: The clerk's office is physically closed, but electronic filing is possible 24 hours per day, 365 days per year. Should the rules provide that a paper that is filed electronically at 11:59 p.m. on the last day of a deadline is timely, even though it was filed after clerk's office had closed?

My summer research assistant looked at a sample of local and state rules, but was unable to find any provision directed specifically at electronic accessibility. It may be that attempting to address these issues now would be premature, and that we should instead give courts and local rulemakers a few years to identify the issues that electronic filing will present and experiment with various means of addressing those issues.

VII. DEFINITION OF "LEGAL HOLIDAY"

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

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(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:

(A) the day set aside by statute for observing:

(i) New Year's Day;

(ii) Martin Luther King, Jr.'s Birthday;

(iii) Washington's Birthday;

(iv) Memorial Day;

(v) Independence Day;

(vi) Labor Day;

(vii) Columbus Day;

(viii) Veterans' Day;

(ix) Thanksgiving Day;

(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

E. Comment

Appellate Rule 26(a)(4), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(4) are essentially consistent in substance, with the one difference reflecting the fact that most of the circuit courts to which the Appellate Rules apply encompass more than one state, whereas most of the bankruptcy and district courts to which the Bankruptcy, Civil, and Criminal Rules apply encompass only one state. As far as I know, this provision has not created any difficulties and needs only to be "restyled" to make the language consistent.

VIII. 3-DAY RULE: ADDING 3 DAYS UNLESS PERSONALLY SERVED

A. Appellate Rule

Rule 26. Computing and Extending Time

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(c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

B. Bankruptcy Rule

Rule 9006. Time

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(f) **Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P.** When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

C. Civil Rule

Rule 6. Time

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(e) ADDITIONAL TIME AFTER SERVICE UNDER RULE 5(b)(2)(B), (C), OR (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

D. Criminal Rule

Rule 45. Computing and Extending Time

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(c) **Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

E. Comment

Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c) are essentially consistent. The only differences reflect the fact that the service authorized under Appellate Rule 25(c) differs from the service authorized under Civil Rule 5(b) (which is incorporated by reference into the Bankruptcy Rules[4] and the Criminal Rules[5]). For example, Appellate Rule 25(c)(1)(C) authorizes service by third-party commercial carriers such as Federal Express, while Civil Rule 5(b)(2)(D) authorizes such service only if the party being served has consented.

The Subcommittee should consider whether the 3-day rule might be eliminated as part of a general effort to ensure that, to the extent possible, "days are days." The 3-day rule complicates time computation by forcing parties to figure out whether or not they get 3 extra days. In the past, parties have had particular difficulty grasping the fact that the 3-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order.

The 3-day rule harkens back to the time when almost all service was either in person or by mail. The concern was that a party facing, say, a 10-day deadline to respond to a paper would have 10 real days if the paper was served personally, but only about 7 real days if the paper was served by mail. The 3-day rule was designed to put all served parties in roughly the same position and thus to eliminate strategic behavior by serving parties.

Today, the 3-day rule has been expanded to cover every type of service except personal service, and thus it seems likely that 3 days are being added to the vast majority of service-triggered deadlines. Rather than continue to complicate time computation with the 3-day rule, the Subcommittee may want to consider abolishing the rule, leaving the advisory committees free to add 3 days to those service-triggered deadlines that need the extra time.

Abolishing the 3-day rule would simplify time computation. It might, however, introduce the type of strategic behavior that the 3-day rule was designed to curtail. For example, a party might opt for mail rather than electronic or personal service in order to give his or her opponent 2 or 3 fewer days to work on a response. Note, though, that similar incentives already exist under the present rule. For example, a party might opt for mail rather than electronic service because,

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[4]*See* FED. R. BANKR. P. 7005.

[5]*See* FED. R. CRIM. P. 49(b).

although both gain the benefit of the 3-day rule, mail service is likely to take 2 or 3 days, whereas electronic service is likely to be instantaneous.

IX. OTHER ISSUES

There are several issues that the rules of practice and procedure do not currently address but perhaps should. Those issues include the following:

A. Deadlines stated in hours

Congress is increasingly imposing (or considering imposing) deadlines stated in hours, without giving any instructions about how those deadlines should be computed. For example, the Justice for All Act of 2004 provides that, if a victim of a crime files a mandamus petition complaining that the district court has denied the victim the rights that he or she enjoys under the Act, "[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3).

Suppose such a petition is filed at 2:00 p.m. on Thursday. By when must the court of appeals "take up and decide" the petition? By 2:00 p.m. Sunday? By 9:01 a.m. Monday? By 2:00 p.m. Monday? By 2:00 p.m. Tuesday? By 5:00 p.m. Tuesday?

The Subcommittee may want to recommend new provisions describing how deadlines stated in hours should be computed. This would be a difficult drafting exercise — made more difficult by the fact that, as far as I can tell, no local rules or state rules address the computation of deadlines stated in hours.

B. "Backward-looking" deadlines

The rules are silent about how backward-looking deadlines are computed. For example, Civil Rule 56(c) provides that a summary judgment motion "shall be served at least 10 days before the time fixed for the hearing." If the 10th day falls on a Saturday, must the motion be served by the previous Friday or by the following Monday? The Subcommittee may want to consider proposing template language that would address this issue.

C. Deadlines stated in 7-day increments

Ed Cooper has suggested the possibility that all deadlines could be stated in 7-day increments — i.e., 7 days, 14 days, 21 days, etc. This would reduce the problem of deadlines ending on a Saturday or Sunday, although it would not eliminate the problem altogether (parties can be served on — and thus deadlines can run from — a Saturday or Sunday), nor reduce the problem of deadlines ending on legal holidays.

STYLE PROCESS
Standing Rules Committee
SEPTEMBER 21, 2005

1. Coordinating with the Style Consultant –

   The advisory-committee reporters are strongly encouraged to share rule drafts early in the process with Professor Joseph Kimble, the consultant to the Standing Committee's Style Subcommittee. The reporters should consider electronically copying the style consultant with preliminary drafts as they are being drafted.

2. Submitting a Draft to the Rules Office –

   The reporter submits the proposed rule amendment to the Rules Committee Support Office (ordinarily, three to four weeks before the scheduled meeting date).

3. Transmitting the Draft to the Advisory Committee and the Style Consultant –

   The Rules Office will format the proposed rule amendment for the advisory committee, copy and include it in agenda materials, and send a copy to the style consultant. Ideally, the consultant should receive the copy at least two weeks before the meeting.

4. Style Consultant's Suggestions –

   The style consultant may provide the reporter (copying the Style Subcommittee chair) with comments and suggested edits on the proposed rule amendment no later than one week before the scheduled advisory-committee meeting, unless the consultant had less than one week to review the proposal, in which case the period is split in half.

5. Reporter's Discretion –

   The reporter may accept, defer action on, or decline to accept the style consultant's suggested edits, with the understanding that style changes later proposed by the Style Subcommittee must be adopted by the advisory committee (see # 7).

6. Style Subcommittee Recommends Edits After Publication –

   The Style Subcommittee, in consultation with its consultants, will review rule amendments published for comment and submit its suggested edits to the advisory-

committee chair and reporter no later than 30 days before the public-comment period ends.

7. Style Changes –

Style Subcommittee edits that involve pure style issues ordinarily control. The advisory committee may recommend that the Standing Committee adopt different language on a matter of pure style (see # 10).

8. Substantive Changes –

The advisory committee may reject any edit that it believes will affect substantive meaning. Determining whether a specific edit represents a substantive change is solely within the advisory committee's judgment, subject to reconsideration by the Standing Committee.

9. Style Subcommittee's Review After the Advisory Committee's Final Action –

The agenda materials sent to Standing Committee members before their meeting will contain the rule amendment as approved by the advisory committee after public comment, with a recommendation that it be transmitted to the Judicial Conference for approval. The Style Subcommittee will review any changes made after publication by the advisory committee in light of public comment and submit suggested edits to the advisory-committee chair and reporter no later than one week before the Standing Committee meeting. The chair may accept style edits on behalf of the advisory committee.

10. Standing Committee's Final Review –

The Standing Committee will review any Style Subcommittee edits to the published version of the rule amendment. The Style Subcommittee chair may also request the Standing Committee to reconsider the advisory committee's determination to reject an edit because it represents a substantive change. The advisory-committee chair may ask the Standing Committee to reconsider edits recommended by the Style Subcommittee.