ADVISORY COMMITTEE
ON
EVIDENCE RULES

Santa Fe, NM
October 23 - 24, 2008

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Santa Fe, New Mexico

October 23-24, 2008

I. Opening Business

Opening business includes approval of the minutes of the Spring 2008 meeting; a report on the June 2008 meeting of the Standing Committee; and enactment of Rule 502.

II. Restyling Evidence Rules 501-706

The Style Subcommittee of the Standing Committee has reviewed and approved a draft of restyled Rules 501-706. At this meeting, the Evidence Rules Committee will review and finalize the draft so that it can be referred to the Standing Committee with the recommendation that it be released for public comment at a later date.

The agenda book contains the following pertinent materials:

1. A memorandum from the Reporter setting forth background information; restyled Rules 501-706, blacklined from the existing rules to show changes proposed to date; commentary on the changes by the Reporter, Committee Members, and Professor Kimble, the style consultant; a template for a Committee Note; and a discussion of the advisability of including a new rule for certain definitions.

2. A side-by-side version of Rules 501-706, with the left side being the existing rules and the right side a clean copy of the rules incorporating the changes proposed to date. The side-by-side version also contains a few footnotes on issues and questions raised by the Style Subcommittee.

III. Restyling Evidence Rules 101-415

These rules have already been approved for release for public comment. But there are a few outstanding issues for Committee consideration. Two of these issues are raised by the restyling of Rules 501-706 and the possible need for uniformity. Other issues have been raised by the Style Subcommittee of the Standing Committee. Moreover, if upon review of these rules Committee

members have new concerns or see new problems, they can be discussed at this Committee meeting.

The agenda book contains a short introductory memo from the Reporter and a side-by-side of Rules 101-415 with footnotes.

IV. Possible Amendment to Evidence Rule 804(b)(3)

At its last meeting, the Committee approved an amendment to Rule 804(b)(3) that would require the government to prove corroborating circumstances clearly indicating trustworthiness before a declaration against penal interest can be admitted against the accused. The Standing Committee approved the proposed amendment for release for public comment.

The agenda book contains a short memo on the status of the proposed amendment. No action is required on the proposed amendment at this meeting.

V. Rule 502

Rule 502 was signed into law by the President on September 19, 2008. The agenda book contains a memo setting forth the rule and some supporting materials, including statements made on the floor of the House of Representatives. This is for the information of Committee members. No action is required.

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

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

VII. Next Meeting

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:	**Reporter:**
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023
Members:	
Honorable Joseph F. Anderson, Jr. Chief Judge, United States District Court Matthew J. Perry, Jr. U. S. Courthouse 901 Richland Street Columbia, SC 29201	Honorable Joan N. Ericksen United States District Judge United States District Court 12W United States Courthouse 300 South Fourth Street Minneapolis, MN 55415
Honorable Andrew D. Hurwitz Justice Supreme Court of Arizona Suite 431 1501 West Washington Phoenix, AZ 85007	Honorable Anita B. Brody United States District Court 7613 James A. Byrne United States Courthouse 601 Market Street Philadelphia, PA 19106-1797
William W. Taylor, III, Esquire Zuckerman Spaeder LLP 1800 M Street, N.W. Washington, DC 20036-5802	William T. Hangley, Esquire Hangley, Aronchick, Segal & Pudin, P.C. One Logan Square, 27th Floor Philadelphia, PA 19103-6933
Marjorie A. Meyers Federal Public Defender 310 The Lyric Center 440 Louisiana Street Houston, TX 77002-1634	Ronald J. Tenpas Assistant Attorney General Environment and Natural Resources Division Department of Justice, Room 2139 950 Pennsylvania Avenue, N.W. Washington, DC 20530

ADVISORY COMMITTEE ON EVIDENCE RULES (CONT'D.)

Elizabeth J. Shapiro Assistant Director, Federal Programs Branch Civil Division U.S. Department of Justice 20 Massachusetts Avenue, N.W., Room 7152 Washington, DC 20530	
Liaison Members: Honorable Michael M. Baylson United States District Judge United States District Court 4001 James A. Byrne U. S. Courthouse 601 Market Street Philadelphia, PA 19106	Honorable Jeffery P. Hopkins United States Bankruptcy Court Atrium Two, Suite 800 221 East Fourth Street Cincinnati, OH 45202
Honorable John F. Keenan United States District Court 1930 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312	Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

ADVISORY COMMITTEE ON EVIDENCE RULES

				Start Date	End Date
Robert L. Hinkle Chair	D	Florida (Northern)	Member: Chair:	2002 2007	---- 2010
Joseph F. Anderson, Jr.	D	South Carolina		2005	2008
Michael M. Baylson**	D	Pennsylvania (Eastern)		2006	2010
Anita Brody	D	Pennsylvania (Eastern)		2007	2010
Joan N. Ericksen	D	Minnesota		2005	2008
William T. Hangley	ESQ	Pennsylvania		2006	2009
Andrew D. Hurwitz	JUST	Arizona		2004	2010
John F. Keenan**	D	New York		2007	2010
Marjorie A. Meyers	FPD	Texas (Southern)		2006	2009
William W. Taylor III	ESQ	Washington, DC		2004	2010
Ronald J. Tenpas*	DOJ	Washington, DC		----	Open
Daniel J. Capra Reporter	ACAD	New York		1996	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Rules

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 16, 2008

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

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At its September 16, 2008 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 2008.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2010, 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 establish a Capital Investment Fund pilot program for a four-year period beginning in fiscal year 2009, subject to congressional approval, which would allow participating court units to —

a. Voluntarily return funds for deposit into the fund up to a maximum at any given time of $50,000;

b. Utilize funds deposited into the Capital Investment Fund in subsequent fiscal years, once the Executive Committee has approved the national Salaries and Expenses financial plan and final allotments have been transmitted to the courts; and

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Agreed to seek legislation adjusting the time periods in 29 statutory provisions affecting court proceedings to account for the proposed changes in the time-computation rules.

Approved proposed amendments to Appellate Rules 4(a)(4), 22, and 26(c), and new Rule 12.1 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 Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 as part of the project to improve the time-computation rules 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 Bankruptcy Rules 2016, 4008, 7052, 9006, 9015, 9021, 9023, and new Rule 7058 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 revisions to Bankruptcy Official Forms 8, 9F, 10, 23, and Exhibit D to Form 1 to take effect on December 1, 2008.

Approved new Bankruptcy Official Form 27 to take effect on December 1, 2009.

Approved proposed amendments to Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 as part of the project to improve the time-computation rules 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 13(f), 15(a), 48(c), and 81(d), and new Rule 62.1 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 Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81, Supplemental Rules B, C, and G, and Illustrative Forms 3, 4, and 60 as part of the project to improve the time-computation rules 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 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 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 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 as part of the project to improve the time-computation rules 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 RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2008
Washington, DC
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, DC, on Monday and Tuesday, June 9 and 10, 2008. All the members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N. George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General Mark R. Filip attended part of the meeting as the representative of the Department of Justice. In addition, the Department was represented throughout the meeting by Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division.

Also participating in the meeting were committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor Jeffrey W. Morris, Reporter
Professor S. Elizabeth Gibson, Assistant Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that Professor Morris was completing his service as reporter to the Advisory Committee on Bankruptcy Rules, noting that he would be honored formally at the January 2009 committee meeting. She pointed out that Professor Morris had made extraordinary contributions to the rules process during the hectic periods preceding and following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The far-reaching legislation, she noted, had required him to devote an enormous amount of time and effort to researching, analyzing, and drafting a great many new rules and forms. She said that Professor Morris truly had accomplished the work of several people, and the committee would greatly miss him.

Judge Rosenthal presented a resolution signed by the Chief Justice to Judge Kravitz recognizing his service as a member of the committee from 2001 to 2007. She noted that he had been at the center of several important projects during that time, had coordinated development of the time-computation amendments now before the committee for final approval, and had served as the committee's liaison to the Advisory Committee on Criminal Rules. And she was delighted that Chief Justice Roberts had appointed him as the new chair of the civil rules committee.

Judge Kravitz, in turn, presented Judge Rosenthal with a resolution from the Chief Justice recognizing her service as chair of the civil advisory committee from 2003 to 2007. During her tenure, she had shepherded many landmark rules changes dealing with such important matters as class actions, electronic discovery, and restyling of the civil rules.

Judge Rosenthal asked the committee to recognize the many contributions of the late Judge Sam Pointer, who had served as chair of the Advisory Committee on Civil Rules from 1990 to 1993. Among other things, he had coordinated the major package of amendments to the civil rules needed to implement the Civil Justice Reform Act of 1990. She noted that Judge Pointer had also led the committee's initial efforts to restyle the Federal Rules of Civil Procedure. He consistently had set high standards in everything he did and had been a very influential leader of the federal judiciary.

Judge Rosenthal noted that Chief Judge Anthony Scirica, former chair of the standing committee, had just been elevated by the Chief Justice to the position of chair of the Executive Committee of the Judicial Conference. She said that the appointment would serve the rules process and the entire federal judiciary very well.

Judge Rosenthal reported that the March 2008 session of the Judicial Conference had been uneventful for the rules process, as no rules matters had been placed on the discussion calender. She noted that she and Professor Coquillette had had very productive meetings with both Chief Justice Roberts and Administrative Office Director

James Duff. Both are very appreciative of the work of the rules committees. The Chief Justice, she said, was supportive of the effort to restyle the evidence rules and was keenly aware of the need for the rules committees to address problems regarding cost and delay in civil cases, victims' rights in criminal cases, and privacy and security concerns in court records.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 14-15, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported briefly on two pieces of legislation affecting the rules process, both of which have been opposed consistently by the Judicial Conference. First, legislation had been introduced in the last several congresses, at the behest of the bail bond industry, to limit the authority of a judge to revoke a bond for any condition other than failure of the defendant to appear in court as directed. The legislation had not moved in the past, but had now passed the House of Representatives and been introduced in the Senate.

Second, protective-order legislation had been reintroduced by Senator Kohl. It would require a judge, before issuing a protective order under FED. R. CIV. P. 26(c), to make findings of fact that the discovery sought: (1) is not relevant to protect public health or safety; or (2) if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a substantial interest in keeping the information confidential, and the protective order is narrowly drawn to protect only the privacy interest asserted. Mr. Rabiej noted that the Senate Judiciary Committee had reported out the bill, but it had not been taken up by the full Senate. It has also been introduced in the House.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a detailed written report on the various activities of the Federal Judicial Center (Agenda Item 4). He also reported on the Center's extensive research on local summary judgment practices in the district courts as part of the committee's discussion of the proposed revision of FED. R. CIV. P. 56 (summary judgment).

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Amendments for Final Approval by the Judicial Conference

Judge Rosenthal and Judge Huff, chair of the time-computation subcommittee, explained that the committee was being asked to approve:

(1) a uniform method for computing time throughout the federal rules and statutes, as prescribed in the proposed revisions to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a);
(2) conforming amendments to the time provisions set forth in 95 individual rules identified by the respective advisory committees; and
(3) a proposed legislative package to amend 29 key statutes that prescribe time periods.

Judge Rosenthal explained that the time-computation project had proven to be more complicated than anticipated, and the subcommittee and advisory committees had worked very well together in resolving a number of difficult problems. In the end, she said, the package that the committees had produced is very practical and elegant.

Judge Huff stated that the purpose of the amendments is to simplify and make uniform throughout all rules and statutes the method of calculating deadlines and other time periods. She noted that the public comments had been generally positive and had helped the committees to refine the final product. She noted that the subcommittee and the advisory committees had identified the 29 most relevant and significant statutory deadlines that should be adjusted to conform to the proposed new rules. She pointed out, too, that local rules of court will also have to be amended to conform to the new national rules. The rules committees will work with the courts to accomplish this objective.

Professor Struve reported that there had not been a great deal of public reaction to the published amendments. The comments, she said, had been mixed but mostly positive and very useful. She noted that a few changes had been made following the comment period. For example, the definition of the term "state" had been deleted from proposed FED. R. APP. P. 26(a) and FED. R. CIV. P. 6(a) because it would be added elsewhere.

She reported that the principal issues discussed by the subcommittee following the public comment period concerned the interaction between the backward time-counting provision in the proposed rules and the definition of a "legal holiday," which includes all official state holidays. For example, in counting backwards to ascertain a filing deadline, the proposed rule specifies that when the last day falls on a weekend or holiday, one must continue to count backwards to the day before that weekend or holiday. The problem, as the public comments pointed out, is that the definition of a "legal holiday" may cause a trap for the unwary because some state holidays are obscure and not generally observed either by courts or law firms. A filer unaware of an obscure state holiday, for example, might file a paper on the holiday itself only to learn at that

time that the filing is untimely.

Professor Struve explained that the subcommittee had considered potential fixes for the problem. One would be to provide that a state holiday is a "legal holiday" for forward-counting purposes, but not for backward-counting purposes. She said, though, that the subcommittee had rejected the fix because a majority of members believed that it would make the rule too complex. On the other hand, the Advisory Committee on Bankruptcy Rules has complained that the rule will cause serious problems in bankruptcy practice and that state holidays must be excluded from the backwards-counting provision – either across-the-board for all the rules, or at least in the bankruptcy rules.

Professor Struve emphasized that the advisory committees were recommending changes in the specific deadlines contained in many individual rules to make the net result of time-computation changes essentially neutral as to the actual amount of time allotted for parties to take particular actions.

Professor Struve noted, for example, that the 10-day appeal deadline in FED. R. BANKR. P. 8002 would be revised to 14 days. In addition, she said, the civil and appellate advisory committees had worked together to address post-judgment tolling motions filed under FED. R. CIV. P. 50, 52, or 59. They decided to lengthen the deadline for filing such motions from 10 days to 28 days.

CIVIL RULES TIME COMPUTATION

Judge Kravitz stated that, as published, the Advisory Committee on Civil Rules had recommended extending the deadline to file a post-judgment motion under FED. R. CIV. P. 50 (judgment as a matter of law), 52 (amended or additional findings), or 59 (new trial) from 10 days to 30 days. But the Advisory Committee on Appellate Rules pointed out that extending the deadline to 30 days could cause problems because FED. R. APP. P. 4 (appeal as of right – when taken) imposes the same 30-day deadline to file an appeal in a civil case not involving the federal government. Accordingly, as the deadline to file a notice of appeal looms, an appellant may not know until the last minute whether a post-judgment tolling motion will be filed.

As a result, he said, the civil rules advisory committee considered scaling back the proposed deadline for filing a post-trial motion from 30 days to 21 days or 28 days. The committee concluded that 21 days was simply not a sufficient increase from 10 days, and that a substantial increase is in fact needed to help the bar. Therefore, the committee decided upon 28 days, even though that might seem like an odd time period. Yet it would give the appellant at least two days before a notice of appeal must be filed to learn whether any other party has filed a post-judgment motion tolling the time to file a notice of appeal. The appellate rules committee found this change acceptable.

Judge Kravitz reported that the Advisory Committee on Civil Rules had found only one statute that needs to be amended to conform with the proposed rule changes.

CRIMINAL RULES TIME COMPUTATION

Judge Tallman reported that the Advisory Committee on Criminal Rules was recommending several changes in individual rules to extend deadlines from 10 days to 14, a change that is essentially merits-neutral. He noted that Congress had deliberately established very tight deadlines in some statutes, some as short as 72 hours, and he suggested that it might be difficult to persuade Congress to change these statutes.

APPELLATE RULES TIME COMPUTATION

Professor Struve stated that some public comments had suggested eliminating or revising the "three-day rule," which gives a party additional time to file a paper after service. She said that the advisory committee thinks the suggestion is well worth considering and had placed it on its agenda. But it had decided not to recommend elimination as part of the current time-computation package.

BANKRUPTCY RULES TIME COMPUTATION

Judge Swain stated that the proposed amendments to the bankruptcy rules include a recommendation to extend from 10 days to 14 days the deadline in FED. R. BANKR. P. 8002 (time for filing notice of appeal) to file an appeal from a bankruptcy judgment. She noted that the proposal had been controversial because it would change a century-old tradition of a 10-day appeal period in bankruptcy. She noted that the advisory committee had made special efforts to reach out to the bar on the issue.

Judge Swain pointed out that the proposed rules pose special challenges for the bankruptcy system in dealing with backward-counting deadlines because the Federal Rules of Bankruptcy Procedure rely heavily on a notice and hearing process and use a good deal of backwards counting. Moreover, because of the national nature of bankruptcy practice, it is not expected that bankruptcy practitioners would be aware of all state legal holidays.

The advisory committee, she said, was strongly of the view that state holidays should not be included in backwards counting. She recognized the importance of having uniformity among all the rules, and urged that state holidays be excluded from backwards counting in all the rules. If this approach is not possible, an exception to uniformity should be made in this particular instance for the bankruptcy rules.

Professor Morris explained that the Bankruptcy Code specifies more than 80 statutory deadlines. Another 230 time limits are set forth in the Federal Rules of

Bankruptcy Procedure, including 18 that require counting backwards. Accordingly, he said, backward-counting deadlines are dramatically more common in bankruptcy than in the other rules. State holidays, he explained, pose no problem in counting forward because they give parties an extra day. But in counting backwards, a filing party is given less time to file a document if a deadline falls on any state holiday. Judges, he said, can usually deal with inadvertent mistakes made in backwards counting. But when a deadline is statutory, a court is less likely to be generous.

He suggested adopting the approach set forth in Judge Swain's memorandum of June 4, 2008, to the standing committee recommending that FED. R. BANKR. P. 9006(a)(6)(C) be added to define a state holiday as a "legal holiday" only in counting forward. The advisory committee would also state in the committee note to the rule that this limiting provision would apply only in the bankruptcy rules.

A member emphasized the importance of uniformity among all the rules and stated that he was concerned about having different standards in the different sets of rules. Nonetheless, he said, the bankruptcy advisory committee had made persuasive points. He wondered whether there might be another solution, such as to make distinctions among different types of state holidays. Some, he said, are important, with government offices, courts, and law firms closed throughout the state. Others, however, are hardly known at all. He suggested that the rule might be revised to provide that only those state holidays that are listed in local court rules be included in the definition of "legal holidays."

Another member agreed that the rule would clearly create a trap for the unwary. He argued that the proposal to exclude state holidays from backward counting is not too complicated, and it should be implemented across the board in all the rules, not just in the bankruptcy rules. Several other participants concurred.

A member argued, though, that the proposed rule is clear, and states do in fact announce all their official holidays. The main problem appears to be that state officials cannot act on days when their offices are closed. If they file a paper on the following day, it will be untimely under the rule. As a practical matter, they will have to file a day early.

A member noted that the committee simply cannot achieve national uniformity in this area and suggested that state holidays be dealt with by local rules. Another responded, though, that reliance on local rules would not address the concerns of the Advisory Committee on Bankruptcy Rules that many bankruptcy lawyers have a national practice and represent far-flung creditors. Lawyers and creditors are largely unaware of state holidays and state issues. Judge Swain added that many creditors in bankruptcy cases do not have counsel. Their involvement is often limited to filing a proof of claim.

It would be unreasonable to expect them to be aware of local court rules referring to state holidays.

Several participants recommended extending the bankruptcy committee's proposed exclusion of state holidays in backwards counting to all the rules. Judge Huff and Professor Struve pointed out that the agenda book contained the text of an alternate rule that would accomplish that objective by including state holidays only in counting forwards. They said that it would be an excellent starting point for revising the rule.

The committee without objection by voice vote approved the proposed amendments to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a) for approval by the Judicial Conference, using the alternate rule language set forth in the agenda book, together with a committee note incorporating language from the bankruptcy committee's memorandum of June 4, 2008, except for its last sentence, and some improved language by Professor Cooper regarding the inaccessibility of the clerk's office. Judge Rosenthal added that the text would be subject to final review by the style subcommittee and recirculation to the standing committee.

Following approval of the uniform time-computation rule, Judge Rosenthal turned the discussion to the specific time adjustments in individual rules proposed by the advisory committees to account for the changes in the time-computation method.

One member argued that the proposed amendments to FED. R. CIV. P. 50 (motion for judgment as a matter of law), 52 (motion for amended or additional findings), and 59 (motion for a new trial) go well beyond conforming the three rules to the new time-computation methodology. Rather, they would substantially expand the time for filing post-judgment motions and add cost and delay to civil litigation. She suggested that trial judges may not support extending the time because they want to resolve their cases promptly and have post-trial motions made without delay. In addition, if a lawyer does not have enough time to fully prepare a polished post-trial motion, the matter can be fixed later, and the parties will still enjoy their full appellate rights. Extending the time to file motions from 10 days to 28 days will slow down the whole litigation process.

Judge Kravitz pointed out, though, that trial judges often bend the rules to give lawyers more time to file post-trial motions, especially after a long trial when the lawyers are exhausted and a transcript is not yet available. Judges, for example, may hold up the entry of judgment. Or they may let lawyers file a skeletal post-judgment motion to meet the deadline and then have them supplement it later. The problem, he said, is that 10 or 14 days is simply not enough time in many cases for a lawyer to prepare an adequate motion. Under the rules, moreover, the court cannot extend the deadline, even though some judges routinely do so by procedural maneuvers. In addition, there is case law holding that issues not raised in the original filing cannot be raised later. All in all, Judge

Kravitz concluded, it is unreasonable to require lawyers to file quick post-trial motions, especially in large cases. Extending the deadline to 28 days may result in some delays, but on balance, the advisory committee believes that it is the right thing to do.

A member asked whether trial judges could impose a deadline shorter than the 28 days specified in the proposed rule. Professor Cooper responded that the matter had not been considered by the advisory committee. But it had considered amending FED. R. CIV. P. 6(b) (extending time) to allow judges to extend the time for filing post-trial motions. It was concerned, though, about the interplay between the civil and appellate rules and the jurisdictional nature of the deadline for filing a notice of appeal. Therefore, it declined to take any steps that might be applied ineptly in practice and lead to a loss of rights.

Judge Kravitz explained that scholars are concerned that permitting a judge to extend the time to file post-motion judgments would not fully protect the parties, given the jurisdictional and statutory nature of the time to appeal. A party might still lose its right to appeal if it fails to meet the jurisdictional deadline, even though the trial judge has extended the time to file a post-judgment motion.

A member suggested that 10 or 14 days to file a post-trial motion should be sufficient for lawyers in most cases. He asked how often the short deadline actually presents problems for lawyers. If not frequent, the procedural devices that trial judges now use to give lawyers more time may be sufficient to address the problems.

Judge Kravitz responded that the advisory committee had concluded that it was common for lawyers to need additional time, especially in circuits where the case law holds that claims are waived if not raised in the original motion. He said that he had presided over a number of cases in which the parties needed a transcript to file a motion. He pointed out that there had been no negative public comments on extending the deadline from 10 days to 28 days, either from judges or the bar. Professor Struve added that the E.D.N.Y. Committee on Civil Litigation had been critical of the time-computation project in general, but had come out strongly in favor of this particular extension.

A member added that lawyers are uncomfortable with the devices that trial judges now use, such as deferring entry of judgment or allowing a bare-bones post-judgment motion. The 10-day deadline, he said, is notoriously inadequate because many issues require careful briefing, even after a relatively short trial. Moreover, there may be a change in counsel after the trial, making the current deadline virtually impossible to meet. The proposed extension to 28 days, he said, is badly needed and will not cause unreasonable delays.

The lawyer members of the committee all agreed that the current 10-day deadline is much too short. They said that it is not safe for lawyers to rely on procedural maneuvering, such as delaying the entry of judgment. Lawyers, moreover, are bound by what they write in the original filing, and they may need a transcript to prepare a proper motion. One added that it is not uncommon for appellate counsel to be brought in after the trial and have to be brought up to speed by exhausted trial counsel.

A member pointed out that notices of appeal are normally filed only after disposition of a post-judgment motion, usually a Rule 59 motion for a new trial. Under the proposed extension, more parties may file prophylactic notices of appeal before any post-judgment motions are filed. This practice may impose some administrative burdens on the court of appeals, but Professor Struve suggested that it would likely arise only in multi-party cases. Judge Kravitz added that even 28 days may not be sufficient for lawyers to prepare post-judgment motions in some cases. Therefore, the proposed change may not altogether end the procedural devices that are now being used.

A member suggested that the committee consider the fundamental purpose of post-trial motions. As originally conceived, they were designed to allow a trial judge to promptly fix errors in the trial record. But they have evolved into full-blown motions to reconsider a whole host of issues raised at pretrial, by motion, and at trial and to relitigate all the decisions made by the trial judge in the case. In all, post-trial motions lead to a misuse of judicial time.

Judge Rosenthal stated that the advisory committees, and district judges generally, are troubled by the procedural subterfuges now used to circumvent the current rule. They are not worried about waiting a few more days if the result is better-prepared motions.

A motion was made to adopt all the proposed rule changes in the time-computation package.

Judge Tallman pointed out that FED. R. CRIM. P. 5.1 (preliminary hearing) and 18 U.S.C. § 3060(b) both specify that a preliminary hearing must be held within 10 days of the defendant's first appearance if the defendant is in custody. He explained that the proposed amendment to Rule 5.1 would extend the deadline to 14 days, but the statute will also have to be amended to keep the two consistent. If Congress does not extend the statutory deadline to 14 days, it would make no sense to amend the rule.

A member asked whether the committee should approve the rule contingent upon Congress amending the statute. Judge Rosenthal reported that representatives of the rules committees had already discussed a timetable with congressional staff to synchronize the effective date of the new rules with the needed statutory changes. She said that staff had been very sympathetic to the objective, and it did not appear that there would be

significant obstacles to accomplishing this objective. There is certainly no guarantee of success, but the committees are hopeful. Professor Coquillette added that the problem of synchronization could also be addressed by delaying the effective date of all the rules, or selected rules, to coincide with the statutory changes.

A member noted that under the Rules Enabling Act, rule changes supersede inconsistent statutes (except for changes to the bankruptcy rules). So even if Congress were not to act, the revised rules would override the inconsistent statutes. Judge Rosenthal responded that the committee, as a matter of comity with the legislative branch, tries to avoid reliance on the supersession clause of the Act. It also seeks to avoid the confusion that results when a rule and a statute are in conflict. The member agreed, but noted that if Congress simply does not act in time, as opposed to refuses to act, the extended deadlines in the new rules would govern in the interim until Congress acts.

The committee without objection by voice vote approved all the proposed time-computation amendments for approval by the Judicial Conference.

The committee without objection by voice vote approved the advisory committees' recommendations that the Judicial Conference seek legislation to adjust the time periods in 29 statutes affecting court proceedings to conform them to the proposed changes in the time-computation rules.

Judge Rosenthal asked the committee to concur in her view that the changes made in the time-computation amendments following publication were not so extensive as to require republication of the proposals.

The committee without objection by voice vote agreed that there was no need to republish any of the proposed time-computation amendments.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of May 13, 2008 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

FED. R. APP. P. 4(a)(4)(B)(ii)

Professor Struve reported that the proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would resolve an inadvertent ambiguity that resulted from the 1998 restyling of the Appellate Rules. The current rule might be read to require an appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. She reported that the public comments on the proposed amendment had raised some additional issues, which had been placed on the future agenda of the advisory committee.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. APP. P. 12.1

Judge Stewart explained that the proposed new Rule 12.1 (remand after an indicative ruling by the district court) was designed to accompany new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal). It had been coordinated closely with the Advisory Committee on Civil Rules.

Judge Stewart reported that the Department of Justice had expressed concern about potential abuse of the indicative ruling procedure in criminal cases. As a result, the advisory committee modified the committee note after publication by editing the note's discussion of the scope of the rule's application in criminal cases. Professor Struve added that the Advisory Committee on Criminal Rules might wish to consider a change in the criminal rules to authorize indicative rulings explicitly. Accordingly, the appellate

advisory committee had included language in the committee note to anticipate that possible development.

A member questioned the language that had been added to the second paragraph of the committee note stating that the advisory committee anticipates that use of indicative rulings "will be limited to" three categories of criminal matters – newly discovered evidence motions under FED. R. CRIM. P. 33(b)(1), reduced sentence motions under FED. R. CRIM. P. 35(b), and motions under 18 U.S.C. § 3582(c). He worried that the language might be too restrictive and recommended that it be revised to state that "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for [those matters]."

Professor Struve explained that the advisory committee had been reluctant to limit the rule to the three situations suggested by the Department of Justice because there may be other situations when indicative rulings are appropriate. A member added that the procedure could be useful in handling § 2255 motions, as appellate courts have said that a district court should rarely hear a § 2255 motion when an appeal is pending. He noted that a three-judge panel of his court recently had permitted use of the indicative ruling procedure in a § 2255 case. But Mr. Tenpas responded that the Department was particularly concerned about systematic use, and abuse, of the procedure by pro se inmates in § 2255 cases.

A member pointed out that the principal safeguard against abuse is that the court of appeals has discretion to deny any request for an indicative ruling and may refuse to remand a matter to the trial court. The discretion vested in the court of appeals safeguards against excessive use of the procedure.

Judge Stewart and Professor Struve agreed that the recommended substitute language for the committee note, "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for . . ., " would be acceptable. A motion was made to approve the proposed new rule, with the revised note language.

The committee without objection by voice vote approved the proposed new Rule 12.1 for approval by the Judicial Conference.

FED. R. APP. P. 22(b)(1)

Judge Stewart explained that the proposed amendment to FED. R. APP. P. 22(b)(1) (certificate of appealability) would conform the rule to changes being proposed by the Advisory Committee on Criminal Rules in Rule 11 of the Rules Governing § 2254 Cases and § 2255 Proceedings. The amendment would delete from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue, because the matter is more appropriately

handled in Rule 11. Professor Struve added that approval of the amendment would be contingent on approving the tandem amendments proposed by the criminal rules committee.

A member questioned the language of the proposed amendment stating that "(t)he district clerk must send the certificate and the statement . . . to the court of appeals," suggesting that the district clerk should be required to send the certificate only when it has been issued by a district judge. The certificate may be also issued by the court of appeals or a circuit justice, but a district clerk should bear no noticing obligation in those situations. The limitation on the clerk's obligation may be implicit in the rule, but it would be preferable to substitute language such as, "If the district court issues the certificate, the district clerk must send . . . ."

Professor Struve explained that the principal concern of the advisory committee had been to make sure that the certificate is included in the case file. She noted, though, that under CM/ECF, the courts' comprehensive electronic records system, there should be few problems with filing and transmitting documents. Nevertheless, the district clerk should have no obligation to handle a certificate issued by a circuit judge.

Judge Rosenthal suggested that the committee defer further consideration of the proposed amendment to FED. R. APP. P. 22(b)(1) until after the committee considers the parallel rule amendments proposed by the Advisory Committee on Criminal Rules.

Later in the meeting, the committee approved the parallel rule amendments proposed by the Advisory Committee on Criminal Rules. At that time, it approved without objection by voice vote the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference. (See page 46.)

FED. R. APP. P. 26(c)

Judge Stewart explained that the proposed amendments to FED. R. APP. P. 26(c) (additional time allowed after mail and certain other service) would clarify the method of computing the additional three days that a party is given to respond after service. The amendment would make the language of the rule parallel to that of FED. R. CIV. P. 6(d). He also pointed out that the advisory committee had received a comment from Chief Judge Frank Easterbrook recommending that the "three-day rule" be eliminated entirely, and the committee would place the matter on its agenda for a full discussion.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 1(b)

Professor Struve explained that proposed new FED. R. APP. P. 1 (definition) would define the term "state" throughout the Federal Rules of Appellate Procedure to include the District of Columbia and any U.S. commonwealth or territory. The definition, she explained, is consistent with a proposed amendment to FED. R. CIV. P. 81(d).

FED. R. APP. P. 29(a)

The proposed amendments to FED. R. APP. P. 29(a) (when an amicus curiae brief is permitted) would eliminate the current language referring to a state, territory, commonwealth, or the District of Columbia because new FED. R. APP. P. 1(b) would make it unnecessary.

The committee without objection by voice vote approved the proposed amendments for publication.

FORM 4

Professor Struve reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) had already been updated informally to conform to the new privacy rules that took effect on December 1, 2007, and had been posted by the Administrative Office on the Judiciary's web-site. The proposed revisions to the form would delete the full names of minor children and the home address and full social security number of the applicant. She explained that the advisory committee had also concluded that the term "minor" could be ambiguous because the definition varies from state to state, and pro se petitioners who normally fill out Form 4 should not be placed in the position of worrying about who is a "minor." Instead, the committee decided to substitute the language "under 18."

The committee without objection by voice vote approved the proposed amendments in the official form for publication.

Informational Item

Judge Stewart reported that the advisory committee was continuing to monitor case law developments following *Bowles v, Russell,* 551 U.S. ___ (2007), regarding the jurisdictional and statutory dimensions of the time limits to appeal.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professors Morris and Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of May 14, 2008 (Agenda Item 10).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. BANKR. P. 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Bankruptcy Procedure.

FED. R. BANKR. P. 1017.1

Judge Swain noted that proposed new FED. R. BANKR. P. 1017.1 (individual debtor's exemption from the pre-petition credit counseling requirement) would have revised the process for granting an extension of time for the debtor to complete the credit-counseling required by the 2005 amendments to the Bankruptcy Code. It had been published for public comment in August 2007, but the comments had shown that a rule is unnecessary because very few cases arise in which there is a request for an extension. Therefore, the advisory committee decided to withdraw it from further consideration.

FED. R. BANKR. P. 4008

Judge Swain noted that the proposed amendment to Rule 4008 (discharge and reaffirmation hearing) would require that a new official form cover sheet be filed with a reaffirmation agreement. (See OFFICIAL FORM 27 below.)

FED. R. BANKR. P. 7052, 7058, and 9021

Judge Swain explained that the new rule and the proposed rule amendments deal with clarifying the requirement that a judgment be set forth in a separate document. New FED. R. BANKR. P. 7058 (entry of judgment) would make FED. R. CIV. P. 58 (entering judgment) applicable in adversary proceedings. FED. R. BANKR. P. 7052 (findings by the court) and 9021 (entry of judgment) are conforming amendments to accompany new Rule 7058.

The committee without objection by voice vote approved the proposed amendments to the rules for approval by the Judicial Conference.

OFFICIAL FORMS 1, 8, and 27

Professor Morris reported that the amendments to Exhibit D of OFFICIAL FORM 1 (individual debtor's statement of compliance with the credit counseling requirement) and OFFICIAL FORM 8 (individual Chapter 7 debtor's statement of intention) would become effective on December 1, 2008. New OFFICIAL FORM 27 (reaffirmation agreement cover sheet) would take effect on December 1, 2009, to coordinate it with the proposed revision to Rule 4008 that would require the form to be filed with a reaffirmation agreement. The form will give the court basic information about what is contained in the agreement. He noted that the advisory committee had received comments on the form and had made minor changes after publication.

The committee without objection by voice vote approved the proposed amendments to the forms for final approval by the Judicial Conference.

TECHNICAL CHANGES

FED. R. BANKR. P. 2016, 7052, 9006(f), 9015, and 9023

Professor Morris reported that the advisory committee recommended that the proposed amendments to the five rules be approved and sent to the Judicial Conference for final approval without publication because they involve only technical changes, such as correcting cross-references or implementing provisions in the other sets of rules.

He said that the proposed amendment to FED. R. BANKR. P. 2016 (compensation for services rendered and reimbursement of expenses) merely corrects a cross-reference to a subsection of the Bankruptcy Code changed by the 2005 omnibus bankruptcy legislation.

The amendment to FED. R. BANKR. P. 9006(f) (additional time allowed after service by mail or certain other means) would correct a cross-reference to subparagraphs in FED. R. CIV. P. 5 (service), which had been renumbered as part of the civil rules restyling project.

The other three amendments would implement the proposed new 14-day deadline to file a notice of appeal from a bankruptcy judgment. Professor Morris explained that the proposed 28-day time to file a post-judgment motion in civil cases would not work in bankruptcy cases because the deadline to file a notice of appeal, currently 10 days, will be 14 days once the time-computation amendments take effect.

The committee without objection by voice vote approved the proposed amendments to the rules for approval by the Judicial Conference.

OFFICIAL FORMS 9F, 10, and 23

Professor Morris reported that the proposed amendments to the forms were technical in nature and did not merit publication. He explained that the advisory committee inadvertently had retained a requirement in OFFICIAL FORM 9F (initial notice in a Chapter 11 corporation or partnership case) that debtors provide their telephone numbers. That item of personal information has been removed from the other forms.

The change in OFFICIAL FORM 10 (proof of claim) would remind persons filing claims based on health-care debts that they should limit the disclosure of personal information. Two changes in the definition section of the forms would tie the words "creditor" and "claims" more closely to the definitions set forth the Bankruptcy Code.

The proposed amendment to OFFICIAL FORM 23 (debtor's certification of completing the required post-petition financial-management course) would add a reference to § 1141(d)(5)(B) of the Bankruptcy Code.

The committee without objection by voice vote approved the proposed amendments to the forms for final approval by the Judicial Conference.

Amendments for Publication

Professor Morris explained that the proposed amendments and new rule would implement new Chapter 15 of the Bankruptcy Code, added by the 2005 legislation.

FED. R. BANKR. P. 1004.2

Under proposed new FED. R. BANKR. P. 1004.2 (Petition in Chapter 15 cases), an entity must state on the face of the petition the country of the debtor's main interests.

FED. R. BANKR. P. 1014 and 1015

FED. R. BANKR. P. 1014 (dismissal and change of venue) and 1015 (consolidation or joint administration of cases) both deal with multiple cases involving the same debtor. A question had been raised as to whether these rules are applicable in Chapter 15 cases. The advisory committee would resolve the ambiguity by making the two rules specifically applicable.

FED. R. BANKR. P. 1018

The amendments to FED. R. BANKR. P. 1018 (contested involuntary and chapter 15 petitions, etc.) would clarify the scope of Rule 1018 to the extent it governs

proceedings contesting an involuntary petition or Chapter 15 petition for recognition. There is some confusion now as to the applicable procedures in injunctive actions. The amendments clarify that the rule applies to contests over the involuntary petition itself, and not to matters that arise in or are merely related to a Chapter 15 case or an involuntary petition. Such other matters are governed by other provisions of the Rules, as explained in the proposed committee note.

FED. R. BANKR. P. 5009

FED. R. BANKR. P. 5009 (case closing) would require a foreign representative to file and notice a final report in a Chapter 15 case describing the nature and results of the representative's activities in the United States court. In the absence of timely objection, a presumption will arise that the case has been fully administered and may be closed. Another amendment would require the clerk to send a notice to individual debtors in Chapter 7 and Chapter 13 cases that their case will be closed without a discharge if they have not timely filed the required statement that they have completed a financial-management course.

FED. R. BANKR. P. 5012

New FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in Chapter 15 cases) would establish a motion procedure in Chapter 15 cases for obtaining approval of an agreement or "protocol" under § 1527(4) of the Code for the coordination of Chapter 15 proceedings with foreign proceedings.

FED. R. BANKR. P. 9001

The amendment to FED. R. BANKR. P. 9001 (general definitions) would incorporate into the rule the definitions set forth in § 1502 of the Code, added by the 2005 bankruptcy legislation.

The committee without objection by voice vote approved the proposed amendments to the rules for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of May 9, 2008 (Agenda Item 6).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81
SUPPLEMENTAL RULES B, C, and G
FORMS 3, 4, and 60

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Civil Procedure, the Supplemental Rules, and the illustrative Civil Forms.

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee had published a proposed amendment to FED. R. CIV. P. 8(c) (affirmative defenses) that would remove a "discharge in bankruptcy" from the list of defenses that a party must affirmatively state in responding to a pleading. The Bankruptcy Code makes the exception unnecessary as a matter of law because a discharge voids a judgment to the extent that it determines the debtor's personal liability on the discharged debt. He said, though, that the Department of Justice had voiced opposition to the change. As a result, the advisory committee decided to postpone seeking final approval of the change in order to discuss the matter further with the Department.

FED. R. CIV. P. 13(f)

Judge Kravitz reported that FED. R. CIV. P. 13(f) (omitted counterclaim) would be deleted from the rules as largely redundant and misleading. Instead, an amendment to a counterclaim would be governed exclusively by FED. R. CIV. P. 15 (amended and supplemental pleadings).

FED. R. CIV. P. 15(a)

The amendments to FED. R. CIV. P. 15 (amended and supplemental pleadings) would revise the time when a party's right to amend its pleading once as a matter of course ends.

FED. R. CIV. P. 48(c)

Judge Kravitz said that new FED. R. CIV. P. 48(c) (polling the jury) is based on FED. R. CRIM. P. 31(d), but has minor revisions in wording to reflect that the parties in a civil case may stipulate to a non-unanimous verdict.

A member noted that the proposed amendment referred to "a lack of unanimity or assent" on the part of the jury and asked whether "unanimity" and "assent" are different requirements. Professor Cooper responded that they are, in fact, different concepts. If the parties in a civil case stipulate to accepting a less-than-unanimous verdict, only the "assent" of the jury is required, not "unanimity." Professor Cooper added that Professor Kimble had suggested restyling the language to read: "a lack of unanimity or a lack of assent."

FED. R. CIV. P. 62.1

Judge Kravitz reported that proposed new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal) was the most important rule in the package being forwarded to the Judicial Conference for approval. He noted that the language had been refined following the public comment period to emphasize that the remand from the court of appeals to the district court is for the limited purpose of deciding a motion.

A member suggested that the rule's language was awkward in referring to "relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." He suggested rephrasing the rule to read: "because an appeal has been docketed and is pending." Professor Cooper responded that there are several situations in which docketing of an appeal does not oust the district court's jurisdiction. The advisory committee, moreover, had tried to avoid getting into the morass over whether docketing an appeal is jurisdictional.

FED. R. CIV. P. 81(d)

Judge Kravitz pointed out that the proposed amendment to FED. R. CIV. P. 81(d) (law applicable) would define a "state" for purposes of the Federal Rules of Civil Procedure, where appropriate, as the District of Columbia and any U.S. commonwealth or territory.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 56

Judge Kravitz reported that the advisory committee had made additional refinements in the proposed amendments to FED. R. CIV. P. 56 (summary judgment) as a result of the comments made by standing committee members at the January 2008 meeting. In addition, the committee note had been shortened significantly.

Judge Kravitz explained that the project to revise FED. R. CIV. P. 56 had been challenging and, understandably, it had taken a great deal of time to complete. He extended special thanks to Judge Michael Baylson for his excellent leadership and insight in chairing the subcommittee that had developed the summary judgment proposal. He also thanked Professor Cooper, Andrea Kuperman, Joe Cecil, James Ishida, and Jeffrey Barr for their significant research efforts in support of the project.

Judge Kravitz explained that actual summary judgment practice has grown apart from the current text of Rule 56. The deficiencies of the current national rule have left space that has been filled by experimentation at the local level. Accordingly, he said, in fashioning a new national rule, the advisory committee had enjoyed the unique opportunity of drawing upon the best practices contained in local court rules.

Judge Kravitz reported that the bar is largely supportive of moving towards a more uniform national summary judgment practice under Rule 56. He noted that the advisory committee had conducted two mini-conferences on the proposed amendments with lawyers, law professors, and judges, and he had spoken personally to several bar groups. At the same time, however, he said that there may be resistance to the proposed rule from courts that do not presently use the three-step process embodied in the new rule.

He explained that the proposed rule would provide a uniform framework for handling summary judgment motions throughout the federal courts, but it would also give judges flexibility to prescribe different procedures in individual cases. The procedure that the new rule lays out will work well in most cases, he said, but trial judges will be free to depart from it when warranted in a particular case.

Judge Kravitz emphasized that there is nothing radical about the three-step, point-counterpoint procedure prescribed in the proposed rule. Clearly, a party should be required to give citations to the record to support its assertion that an issue is disputed or not. That, he said, is precisely what the amendments are designed to accomplish.

Judge Kravitz emphasized that the advisory committee had adhered to two basic principles in drafting the rule. First, it decided not to change the substantive standards governing summary judgment motions. Second, it decided that the revised rule must be neutral – not favoring either plaintiffs or defendants. He pointed out that the last time the advisory committee had proposed making changes to Rule 56, in the early 1990s, it had attempted to make substantive changes, and the effort had failed.

Judge Kravitz reported that the advisory committee had also worked with the Federal Judicial Center to verify empirically that the proposed rule would not run afoul of either of the two fundamental principles.

Mr. Cecil explained that 20 districts now require the point-counterpoint procedure in their local rules. The Center had compared summary judgment practice in those districts with practice in two other categories of districts: (1) the 34 districts that require movants to specify all the undisputed facts in a structured manner, but do not require any particular form of response from opponents; and (2) the remaining districts that have no local rule requiring either party to specify undisputed facts.

The Center's research, he said, had uncovered little meaningful difference among the three categories of districts, except in two respects. First, in districts having a point-counterpoint process, judges take somewhat longer to decide summary judgment motions. Those districts, however, generally have lengthier disposition times. Therefore, the longer times cannot be ascribed to the point-counterpoint procedure. Second, in districts that do require a structured procedure, motions for summary judgment are more likely to be decided. But there appears to be no difference as to the outcome of the motions – whether they are granted or denied. Mr. Cecil cautioned, however, that the current court data concerning termination by summary judgment may not be sufficiently reliable.

Judge Kravitz proceeded to highlight those provisions of the proposed rule that either have prompted comment from bench and bar or have been changed by the advisory committee since the January 2008 standing committee meeting.

RULE 56(a)

Judge Kravitz pointed out that proposed Rule 56(a) specifies that a court "should" grant summary judgment if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. He said that the advisory committee had heard a great deal about whether the appropriate verb should be "should," "must," or "shall." He noted that the rule had used the term "shall" until it was changed to "should" as part of the 2007 general restyling of the civil rules.

He said that the advisory committee, after lengthy consideration, had decided that it would be best to retain the language of the rule currently in effect, *i.e.*, "should." Professor Cooper added that there continues to be some nostalgic support for returning to "shall," but that usage would violate fundamental rules of good style. Therefore, he said, the choice lies between "should" and "must." Earlier drafts of the committee note, he said, had undertaken to elaborate on the contours of "should," but the advisory committee decided that it would be improper to risk changing the meaning of a rule through a note. Thus, the 2007 committee note to the restyled Rule 56 remains the final word on the subject.

Professor Cooper added that the verb "should" is clearly appropriate when a motion for summary judgment addresses only part of a case. Under certain circumstances, he explained, it is wise as a practical matter for a judge to let the whole case proceed to trial, rather than grant partial summary judgment. He suggested that one possible approach might be to use "must" with regard to granting summary judgment on a whole case, but "should" for granting a partial summary judgment. That formulation, however, appears unnecessarily complicated.

Judge Kravitz noted a Seventh Circuit case suggesting that summary judgment must be granted when warranted on qualified immunity grounds, although the decision appears to have more to do with qualified immunity than summary judgment. He explained that the advisory committee tries to avoid providing legal advice in the committee notes. The committee, moreover, did not want to mention qualified immunity in the note as an example of a particular substantive area in which summary judgment may come to be indeed mandatory when the proper showing is made, for fear that it might miss other substantive areas.

Judge Kravitz noted that, at the January 2008 standing committee meeting, a member had pointed out a discrepancy between proposed Rule 56(a), which specifies that summary judgment "should" be granted in whole or in part, and Rule 56(g), specifying that partial summary judgment "may" be granted. He reported that the discrepancy had been fixed and the two provisions now work well together.

A member expressed concern that using the word "should" in Rule 56(a) would signal to the bar that the committee is retrenching from the substantive standard that had prevailed before the restyling of the civil rules, thereby making summary judgment less readily available. For decades, he said, Rule 56 had specified that a judge "shall" grant summary judgment if a party is entitled to it. In the restyling effort, though, the verb "shall" was changed to "should" as part of the policy of eliminating the use of "shall" throughout the rules. At the time, the committee specified that no substantive change had been intended.

He recommended that the committee signal to the bar once again that no substantive change had been intended by the change to "should." Accordingly, a judge

should have no discretion to deny summary judgment when a party is entitled to it as a matter of law.

Another member suggested that the relevant sentence in proposed Rule 56(a) is incoherent because it specifies that a court "should" grant summary judgment if a party is "entitled" to it. If a party is "entitled" to summary judgment, by definition the grant of summary judgment is mandatory. Other members endorsed this view.

A member argued that the appropriate verb to use in the rule is "must." In his state, for example, the state court trial judges are concerned that the intermediate appellate courts frequently reverse their grants of summary judgment. The consequence is that they are chilled from granting summary judgment, believing that it is safer to just let a case proceed to trial. Another member noted that some trial judges in his federal circuit grant summary judgment even when there is clearly a credibility dispute between the parties because they believe that they know how a case will turn out in the end.

Judge Kravitz explained that the advisory committee believes that the substance of the proposed rule is identical to the way it was before December 1, 2007, when "should" replaced "shall." There was no intention to make any substantive change. He pointed out that the committee note, for example, states that discretion should seldom be exercised. That point, he said, would continue to be emphasized in the materials that are published. A judge would exercise discretion to deny summary judgment only in a rare case.

He added that under prevailing summary judgment standards, a trial judge who decides a summary judgment motion must resolve all reasonable inferences in favor of the non-moving party. That, he said, leaves a good deal of latitude to the judge, even before deciding whether the moving party is "entitled" to summary judgment as a matter of law. He suggested that even if the rule were to specify that summary judgment "must" be granted if the moving party is "entitled" to it, the trial judge would have some flexibility in determining whether the moving party is "entitled."

A member complained that a number of trial judges avoid granting summary judgment, no matter how strong the moving party's entitlement to it. But there is no empirical evidence on the point because the cases go to trial, and there is no way to appeal the denial of summary judgment. To avoid the stark choice between "should" and "must," he suggested that the language might be revised to specify that "summary judgment is required if . . .," or "summary judgment is necessary if . . . ."

Judge Kravitz responded that the advisory committee had indeed considered an alternative formulation along these lines, but had abandoned the effort because it would change the substantive standard for granting summary judgment. He added that while the civil defense bar is nervous about the 2007 change from "shall" to "should," the

plaintiffs' bar is concerned about other aspects of the proposed rule and would be strongly opposed to changing "should" to "must."

A member suggested that the committee publish the rule for comment as currently drafted and solicit comments from the bar. She also observed that the proposed rule would explicitly authorize a court to grant partial summary judgment, and it would not make sense to specify that a judge "must" grant partial summary judgment.

Judge Kravitz pointed out that it was clear from the discussion that several committee members believe that a substantive change had been made inadvertently during the course of the restyling process. But he pointed out that the term "shall" had been interpreted in the pertinent Rule 56 case law as not requiring a judge to grant summary judgment in every case even though a party may be "entitled" to it.

He also noted that the committee would have to republish the rule for further public comment if it were to: (1) publish the proposal using "should"; (2) receive many negative public comments on the choice; and (3) then decide to revert to "must." He suggested that it might make more sense – although he did not specifically advocate the idea – to publish the rule using "should" and "must" as alternatives and specifically invite comment on the two.

A member observed that the bar had been informed that the change from "shall" to "should" during the restyling process was merely a style change. Therefore, the change from "should" back to "shall" would also be a mere style change.

Judge Kravitz noted that a change from "should" to "must" would clearly be more than a style change. He explained that the style subcommittee had made clear that "shall" is an inherently ambiguous word that should be changed wherever it appears. Therefore, in drafting the proposed revisions to Rule 56, the advisory committee had carefully researched how courts had interpreted the word "shall" in Rule 56. It concluded that "shall" had largely been read to mean "should" within the context of Rule 56.

Professor Kimble added that "shall" is so ambiguous that it can mean just about anything. It has been interpreted to mean "must," "should," and "may" in different circumstances. A cardinal principle of sound drafting, he said, is that ambiguous terms must be avoided. He said that "shall" should indeed normally mean "must," but in actual usage it often does not.

A member stated that she had always assumed that "shall" meant "must" and had been surprised to learn about the inherent ambiguity of "shall." She said that if the committee wants to solicit public comment on the choice between "should" and "must," it should make clear in the publication exactly what the committee intends for the rule to

mean as a matter of substance, describe the underlying issues, and ask for specific advice on those issues.

Judge Kravitz stated that the advisory committee will certainly highlight the issue for public comment. He reiterated that there are sound reasons for giving a trial judge discretion regarding partial summary judgment. One common problem, he noted, is that parties often move for summary judgment on the whole action, but may only be entitled to it on one count. In some cases, granting partial summary judgment may be warranted, but it may make more sense for the judge to go ahead and try the whole case.

A participant observed that these issues are critically important because few civil cases now go to trial. Summary judgment today lies at the very heart of civil litigation and is key as to how counsel perceive and evaluate a case. He recommended publishing the proposed rule using the alternative formulations of "should" and "must" and inviting specific comments on the alternatives. Judge Kravitz noted, by way of example, that the recent electronic discovery amendments had also been published with alternative formulations.

A member stated that, on initial reading, the change from "shall" to "should" did not appear to be substantive. But, on further reflection, the matter is not so clear. He pointed out that the 2007 change from "shall" to "should" is perceived by some as a substantive change, even though the committee is convinced that it is not. For that reason the proposal should be published with "should" and "must" in the alternative to solicit thoughtful comments. Several other members concurred.

A member suggested that some judges may refuse to grant summary judgment, even when warranted, because they are overworked. They can simply deny summary judgment with a one-line order and proceed to trial. But under the committee's proposal, the trial judge "should" give reasons for denying summary judgment. The requirement to give reasons may impact the willingness of some judges to grant summary judgment. Judge Kravitz added that the Federal Judicial Center's research shows that a disturbing number of summary judgment motions are still undecided when cases go to trial.

Judge Kravitz observed that it would be complicated to draft a provision specifying that a trial judge "must" grant complete summary judgment, but "should" grant partial summary judgment. It may be that some other formulation could avoid the drafting problems, but he suggested that it would be better just to tackle the issue head on and use either "should" or "must." He also noted that the choice of words could affect appellate review of summary judgment determinations because the word "must" conjures up the prospect of mandamus.

A member stated that if the committee were to change the verb to "must," it would clearly be a substantive change. Judge Kravitz responded that the committee

would have to conclude that "shall" had meant "must" all along, that it would not be a substantive change, and that the committee had made a mistake in the restyling process.

A member argued, however, that most lawyers and judges believed that "shall," formerly used in Rule 56, had meant "must." Therefore, the 2007 restyling change to "should" was substantive. Judge Kravitz responded, though, that research had revealed cases where courts of appeals had held that district courts had discretion not to grant summary judgment, even though the operative language of the rule was "shall."

A motion was made to publish the Rule 56(a) amendments for comment in a form that sets out and highlights "should" and "must" as alternatives and also solicits comment on the concept of treating complete summary judgment differently from partial judgment in this regard.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(a) for publication, subject to further refinement in language.

RULE 56(b) and (c)(1)-(2)

A member observed that the term "response" appears in several places in proposed Rule 56(b) and (c), but it is confusing because Rule 56(c) intends it to include only a factual statement, and not the response in full. He recommended that the language be modified to make it clear that a "response" does not include a brief.

A member noted that proposed Rule 56(c)(2)(A) specifies that a party must file a motion, response, and reply. Then Rule 56(c)(2)(B) refers to a response that includes a statement of facts. He suggested that the language state that the party must file a response and a separate statement of facts, rather than have the statement included in the response.

A participant noted that proposed Rule 56(b)(2) states that "a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later." But the filing of the summary judgment motion means that an answer is not due. Thus, there will never be a responsive pleading "21 days after . . . a responsive pleading is due."

Professor Cooper explained that the impetus for the provision had come from the Department of Justice. The Department pointed out that a plaintiff may serve a summary judgment motion together with the complaint. This is common, for example, in collection actions. The Department has 60 days to answer a complaint. Under the proposed rule, however, it would have to respond to a plaintiff's summary judgment motion before its deadline for filing an answer to the complaint. For that reason, the

advisory committee added the language "or a responsive pleading is due, whichever is later." What the committee meant to say was something like: "or if the party opposing summary judgment has a longer time to file an answer to the complaint." Mr. Tenpas concurred, noting that the Department did not want to be required to respond to a motion for summary judgment before even being required to answer the complaint. He suggested that perhaps the provision could be fixed by saying, "or a responsive pleading is due from that party."

A participant pointed out that the problem is that the provision was intended to cover summary judgment motions filed by plaintiffs, but as written it covers all parties. Several participants suggested improvements in language, including breaking out the provision into parts to specify how it will operate in each situation. Judge Rosenthal recommended that Professor Cooper and Judge Kravitz consider the suggestions and return to the committee with substitute language.

Judge Kravitz explained that Rule 56(c) spells out the primary feature of the revised rule – its three-step, point-counterpoint procedure. He reported that the advisory committee had made a number of improvements since the last standing committee meeting, and he thanked Professor Steven Gensler, a member of the advisory committee, for devising a more logical, clearer format for the rule.

Judge Kravitz pointed out that one of the criticisms of the three-step process comes from lawyers who have had to defend complex cases where a moving party may list 500 or so facts in a summary judgment motion. It is just too difficult, he said, for the opposing party to go through them all and respond to each. Most local rules, moreover, do not give a party the right to admit a fact solely for purposes of the summary judgment motion. Accordingly, the proposed rule specifies that a party need not admit or deny every allegation of an undisputed fact, but may admit a fact solely for purposes of the motion. This, he said, was an important improvement.

He also noted that the words "without argument" had been deleted from proposed Rule 56(c)(5) because they were confusing and unnecessary. The committee note, moreover, explains that argument belongs in a party's brief, not in its response or reply to a statement of fact.

A member reported that, in his experience, the procedure contemplated in proposed Rule 56(c) is essentially standard practice in many districts already. He pointed out, though, that the proposed language of Rule 56(c)(2)(B) was confusing in part because it specifies that a party opposing a motion "must file a response that includes a statement." The "response" and the "statement" accepting or disputing specified facts are two separate things. Another member agreed and pointed out that the confusion results in part because the rule requires a moving party to file three documents and the opposing party to file two.

Another explained that a party opposing a motion must actually file four things: (1) a statement opposing the motion for summary judgment; (2) a "counterpoint" response, *i.e.*, a response to each of the undisputed facts enumerated by the moving party; (3) a statement pointing out any other facts that the opposing party contends are disputed; and (4) a brief. It is not intended, though, that the opposing party actually file four separate documents. But it would be useful for the rule to flag for opposing parties that the second and third items are separate concepts.

Another member agreed that the current formulation needs to be refined and suggested devising a new term that would denominate the whole package that the moving party must file and the whole package that the responding party must file. Lawyers should be given clear directions as to exactly what they are expected to provide.

A motion was made to approve proposed Rule 56(b) and 56(c)(1-2) for publication, subject to Judge Kravitz, Professor Cooper, and the Rule 56 Subcommittee making further improvements in the language consistent with the committee's discussion.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(b) and (c)(1-2) for publication, subject to further refinement in language.

RULE 56 (c)(3)-(6)

A member noted that proposed Rule 56(c)(3) specifies that "a party may accept or dispute a fact" for purposes of the motion only. It makes perfect sense for a party to accept a fact for purposes of the motion only, but for what purpose would a party ever dispute a fact for purposes of the motion only? Judge Kravitz responded that the advisory committee had focused only on "accepting" a fact for purposes of the motion, and had not considered "disputing" a fact for purposes of the motion.

A member noted that, under proposed Rule 56(c)(4), the court may consider other materials in the record to grant summary judgment "if it gives notice under Rule 56(f)." He suggested that the reference to Rule 56(f) is unnecessary because that rule itself covers the notice that the court must give.

In addition, he noted that proposed Rule 56(c)(6) states that an affidavit or declaration must "set out facts that would be admissible in evidence." The affidavit itself, though, would be admissible in evidence only if the affiant were testifying at trial. The language may cause some confusion because an affidavit submitted in support of or in opposition to summary judgment need not itself be admissible in evidence, but the facts do have to be admissible. Courts often receive affidavits that set out hearsay, but hearsay evidence is not enough to defeat summary judgment.

A participant noted that "facts" are not admissible in evidence and suggested that it would be better to say "facts that can be proven by admissible evidence." Another pointed out, though, that the language had been taken directly from the current Rule 56(e)(1), even though the terminology is not accurate. No court will be misled, and it does not appear to present a serious problem in practice that needs to be fixed. Another member recommended that no change be made because it might appear to signal a substantive change.

A member suggested that proposed Rule 56(c)(5), specifying that "a response or reply . . . may state without argument," should be revised to refer explicitly to a party's brief, where "argument" should be made. Another member suggested, though, that the rule should not go into detail as to how parties should combine their papers. It is an area where trial judges will want flexibility to prescribe procedures.

A motion was made to approve the rest of proposed Rule 56(c) for publication, with appropriate revisions in language to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(c)(3)-(6) for publication, subject to further refinement in language.

RULE 56(e)

Judge Kravitz explained that proposed Rule 56(e) enumerates the actions that a trial judge may take if the party opposing a summary judgment motion does not properly respond to the motion. He pointed out that if a party does not cite support to show that a particular fact is disputed, the court may deem the fact undisputed for purposes of the motion. But that by itself does not automatically entitle the moving party to summary judgment.

He noted that the advisory committee had decided not to spell out in detail what a judge should do with defective motions. There is a good deal of case law on the subject, and judges have experience in dealing with them. A member added that the committee note should explain that giving the opposing party notice and a further opportunity to respond will often be all that a court needs to do.

RULE 56(f)

A member asked whether the language of proposed Rule 56(f)(2), allowing a judge to "grant or deny the motion on grounds not raised by the motion or response," refers only to legal grounds not raised, or also to other facts not raised. Judge Kravitz responded that the language is intended to be broad and cover both.

RULE 56(g)

Judge Kravitz reported that proposed Rule 56(g) had been revised substantially since the last standing committee meeting. It would give a court substantial discretion when it does not grant all the relief requested by a motion for summary judgment.

A member pointed out that the committee note sets out several reasons why a trial court might not want to grant partial summary judgment. He suggested that the note would be more balanced if it also stated the reasons why a court should grant partial summary judgment, as set forth in Judge Kravitz's memorandum accompanying the proposed rule.

A member pointed out that the committee note refers to the trial of facts and issues at "little cost," and suggested that the words be deleted because there are always substantial costs to a trial.

Judge Kravitz observed that if the committee were to decide that there should be a revised section addressing partial summary judgment – in response to the suggestions that judges should have discretion to deny a worthy partial summary judgment motion but not a worthy summary judgment on the whole case – proposed Rule 56(g) would need to be folded into that section.

A participant suggested that the language of proposed Rule 56(g) that "any material fact – including an item of damages or other relief – that is not genuinely in dispute" is confusing. An item of damages is not a material fact. He suggested that the provision would be clearer if it referred to "any material fact, item of damages, or other relief." Judge Kravitz pointed out that the advisory committee had merely retained the language of the current rule, though it might be improved.

A member noted that proposed Rule 56(c)(3) permits a party to accept a fact for purposes of the motion only. But then proposed Rule 56(g) allows a court to treat the fact as established in the case. Would the party have to be given notice if the court is considering treating the fact as established in the case?

Judge Kravitz responded that this should not happen because the party has accepted the fact for purposes of the motion only. The judge should not be able to use the party's limited admission for any other purpose. The member speculated, though, that a party might try to prevent a trial judge from finding a fact established in the case under Rule 56(g) precisely by using the stratagem of admitting the fact for purposes of the motion only. Another member agreed, suggesting that the rule seemed to present a paradox. Judge Kravitz noted, though, that judges rarely enter a Rule 56(g) order anyway.

A member stated that it might be advisable to delete proposed Rule 56(g). Under the current proposal, if a party admits a fact for purposes of the motion only, some further procedure should be required before the judge may enter an order under Rule 56(g) finding the fact established in the case. Judge Kravitz noted that the proposed Rule 56(g) material is in the current rule, and he suggested that it remain in the rule for publication and that public comment might be solicited on whether it is still needed.

RULE 56(h)

Judge Kravitz reported that defense counsel had urged that the rule specify that sanctions be imposed when a summary judgment motion is made or opposed in bad faith. But, he said, the advisory committee had decided to avoid the inevitably controversial issue of sanctions.

A motion was made to approve for publication the remainder of proposed Rule 56, with drafting improvements to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to the remainder of FED. R. CIV. P. 56 for publication, subject to further refinement in language.

FED. R. CIV. P. 26

Judge Kravitz reported that both plaintiffs' and defendants' lawyers have voiced strong support for the proposed amendments to FED. R. CIV. P. 26(a)(2) (disclosure of expert testimony) and FED. R. CIV. P. 26(b)(4)(A) (trial preparation protection for experts' draft reports, disclosures, and communications with attorneys). He pointed out that lawyers commonly opt out of the current rule by stipulation. The proposed amendments, he said, do not go as far as some may want in shielding all expert materials from discovery. For example, they do not place an expert's work papers totally out of bounds for discovery.

Under the current regime, he explained, lawyers engage in all kinds of devices to make sure that little or no preparatory material involving experts is created that could be discovered. Among other things, lawyers may hire two experts – one to analyze and one to testify. They may also direct experts to take no notes, prepare no drafts, or work through staff whenever possible.

Judge Kravitz noted that lawyers expend a great deal of time and expense in examining experts about their communications with lawyers and the extent to which lawyers may have contributed to their reports. But the outcome of cases rarely turns on these matters. Although some benefit may accrue to the truth-seeking function by having

more information available about lawyer-expert communications, the benefits are far outweighed by the high costs of the current system.

He emphasized that it is very important for the proposed amendments to Rule 26 to be clearly written. If the rule is vague, it will not succeed in reducing the high costs of the current rule because lawyers will not feel secure about the extent of the rule's protections. It would lead to unnecessary litigation over the meaning of the text, and lawyers will continue to engage in the kinds of artificial behavior regarding their experts that the advisory committee is trying to avoid.

RULE 26(a)(2)

Judge Kravitz explained that the proposed amendments to Rule 26(a)(2)(C) would require lawyers to provide a summary of a non-retained expert's testimony. The advisory committee, he said, had deliberately used the word "summary," rather than "report," to make it clear that a detailed description is not needed. The committee, he said, was concerned about placing additional burdens on attorneys.

A member asked whether the provision is intended to cover a lay witness described by FED. R. EVID. 701. Judge Kravitz responded that a witness under Rule 701 – one who is not an expert witness – is not covered by the amendments, and a lawyer would not be required to provide a summary of the testimony of a non-expert witness.

The member added that some witnesses do not testify as experts, but nonetheless have specialized knowledge. Judge Kravitz pointed out that proposed Rule 26(a)(2)(C) does in fact cover witnesses who are both fact-witnesses and expert-witnesses, and a summary must be provided of their expert testimony.

RULE 26(b)(4)(A)

Judge Kravitz said that under current Rule 26 anything told to or shown to an expert is discoverable. But under proposed Rule 26(b)(4)(A), work-product protection would be extended both to an expert's draft reports and to the communications between a party's attorney and the expert, with three exceptions: (1) compensation for the expert's study or testimony; (2) facts or data supplied by the attorney that the expert considered in forming the opinions to be expressed; and (3) assumptions supplied by the attorney that the expert relied upon in forming the opinions to be expressed. Under current Rule 26(b)(3), work-product protection is limited to "documents and tangible things." But the work-product protection proposed in the amendment would be broader, in the sense that it would cover all lawyer-expert communications not within any of the three exceptions, even if not "documents or tangible things."

A member stated that the proposed changes are excellent. He noted that lawyers now opt out of the current rule by stipulation or play games to avoid discovery of experts' draft reports and communications. He asked whether an attorney who deposes an expert and has a copy of the expert's report may ask the expert whether the attorney who has retained him or her had helped write the report or had made any changes in it. Judge Kravitz said that the question could not be asked under the proposed rule because inquiries about lawyer-expert communications would be out of bounds for discovery. The proposal, he said, is fair because it applies to drafts and communications on both sides.

A member suggested that the key question for the jury to decide is whether it can rely on an expert's opinion because it is based on the expert's own personal expertise. Therefore, the opposition should be permitted to pursue inquiries that could establish that the expert's opinion is not really an independent assessment reflecting the expert's own expertise, but the views of the attorney hiring the expert. Judge Kravitz pointed out, though, that the expert's report itself is not in evidence. The opposition can probe fully into the basis for the expert's opinions, but it just cannot ask whether the lawyer wrote the report. Who wrote the report is not important to the jury, and the jury does not even see the report. The key purpose of the report is really to apprise the opposition of the nature of the expert's testimony.

A member stated that he always enters into stipulations opting out of the current expert-witness provisions of Rule 26 because the current rule leads to a great deal of needless game-playing, discovery, and cross-examination. He explained that he always provides an outline for an expert to use at trial in order to help organize the testimony for the witness. The testimony, though, is that of the expert, not the lawyer. Requiring the outline to be turned over creates largely irrelevant disputes over authorship and distracts from the substance of the expert's testimony. The proposed rule, he concluded, is a major improvement over current practice and is consistent with what good lawyers on all sides are doing right now. And it does not favor one side or the other.

Professor Coquillette agreed and reported that he has often served as an expert witness in attorney-misconduct cases. Under the Massachusetts state rule, which is similar to the advisory committee's proposal, state trial judges do not allow inquiry into who wrote an expert's report. The cases go to trial, and the experts are cross-examined at the trial, but there are no long cross-examinations or interrogations. The jury bases its decision in the final analysis on what the expert says on substance. The state rule, he said, does not take away anything important from the truth-finding process.

On the other hand, in professional malpractice cases in the federal court in Massachusetts, it is routine for an expert to be deposed for an entire day. In the end, though, almost all the cases are settled without trial.

A member asked what the advisory committee had meant by using different language in the last two bulleted exceptions. One would allow discovery of facts and data that an expert "considered," while the other allows inquiry into assumptions that the expert "relied upon." Professor Cooper explained that it is legitimate for the opposition to ask whether an expert considered a particular fact provided by an attorney. But a more restrictive test is appropriate regarding "assumptions" provided by the attorney.

A participant argued that proposed Rule 26(a)(2)(B) explicitly requires an expert report to be "prepared and signed by the witness." Thus, the opposition should be able to ask whether the witness actually prepared the report and whether any part of it had been written by a lawyer. Judge Kravitz responded that the advisory committee had considered removing the word "prepared" from the rule and simply require that a report be signed by the witness. The committee note states clearly that a lawyer may provide assistance in writing the report, but the report should reflect the testimony to be given by the witness. The signature of the expert witness on the report means that he or she embraces it and offers it as his or her own testimony.

At trial, the opposing party may ask whether the expert agrees with the substance and language of the report, but it does not matter who actually drafted it. The current rule uses the word "prepared" and anticipates that a lawyer will provide assistance in drafting the report. But discovery should not be allowed into who wrote which parts of the report or who suggested which words to use. That is what has led to all the excessive costs and artificial gamesmanship that the proposed amendments are designed to eliminate.

A member stated that the proposed amendments are a great idea that will save the enormous time and expense now wasted on discovery into draft reports and lawyer-expert communications. He said that the litigation process should not be cluttered up with the extraneous and expensive issues of who "prepared" expert reports and opinions.

A member noted that under FED. R. EVID. 705 (disclosure of facts or data underlying expert opinion) and other provisions, experts routinely rely on other people, such as lab technicians. Much expert testimony is really the assimilation of much background information, rather than the work of one person. Perhaps a better word could be used than "prepared," but it should be understood that an expert's report will often involve collaboration. An expert could not function properly without speaking with others. If the expert signs the report, and by so doing stands by its substance, it really does not matter who supplied the actual words.

Another member observed that the rule deals with discovery, not trial. But the net effect of it will be to keep some evidence away from a jury, on the theory that it involves work product worthy of protection. Generally, expert witnesses have no direct knowledge of the facts of a case. They bring their own specialized knowledge to the

case, based on their professional expertise, not the lawyer's. A report is required in order for the expert to testify. It is different from a lawyer's communications with an expert. The opposition should be able to inquire into the circumstances of the production of a report that the court requires to be filed.

A member pointed out that most cases settle, and the proposed amendments will clearly reduce the costs of litigation by not allowing discovery of draft reports or inquiry into whether lawyers contributed to preparation. She noted that the three bulleted exceptions in Rule 26(b)(4)(A) draw a distinction between facts or data "considered" and assumptions "relied upon" that will likely lead to litigation over whether something was considered versus relied upon. She suggested that the distinction be eliminated and that in all cases the reference should be to matters "considered, reviewed, or relied upon."

A participant also questioned the validity of the distinction between "facts and data" and "assumptions," suggesting that the third bulleted exception be eliminated and the rule refer only to "facts and data."

The lawyer members of the committee were asked about the contents of the stipulations they use in opting out of the current rule. One responded that the stipulations he negotiates specify that neither party may ask for the drafts of experts, and no discovery will be allowed of lawyer-expert communications leading up to the expert's report. He added that his stipulations, though, allow the other party to ask whether the expert actually drafted the entire report.

Another member, however, said that his stipulations prohibit any inquiry into authorship. He emphasized that if questions of that nature were allowed, it would make more sense just to let the draft reports themselves be discovered because they will establish more reliably whether the expert wrote the whole report. The opposing party, he said, should only be allowed to ask whether the expert's opinion is his or her own, how the expert reached that opinion, and what supports the opinion. All the questions concerning the role of counsel in preparing the report, although not technically irrelevant, are largely pointless. There is no end to the inquiries, and they lead to endless, needless expense. Therefore, in the absence of a stipulation, lawyers and experts are forced to engage in artificialities, put nothing in writing, and avoid communications. As a result, it takes the expert much longer to draft a report, adding another large expense.

Judge Kravitz reiterated that it was important to keep in mind that the central purpose of the report is to provide the other side with notice of what the expert is going to testify about at the trial. It is not to find out who wrote each word.

A member emphasized that the real debate is over how much can be asked of the witness in cross-examination. There is a trade-off between what the other side may find out during cross-examination and the sheer cost of the exercise. Judge Rosenthal added

that the minimal benefits of the information that would be lost under the proposed amendments are simply not worth the expense of the current system.

A member stated that, under the current rule, if he cannot reach a stipulation with the other side to bar discovery of drafts and lawyer-expert communications, he will fight to obtain all the drafts. Unless an attorney knows what the other party can or cannot do, as set forth in a rule or stipulation, he or she will want all reports and communications. It would be best for the committee to cut off this kind of discovery entirely. The proposed amendments, he said, reflect the best of current practice. Without them, though, he will continue to negotiate stipulations.

A member stated that in testing an expert, the opposing party will probe for any inconsistencies between the expert's testimony and what is set forth in the report. The expert may explain an inconsistency by admitting that the particular point in the report had been written by the lawyer. The opposing party should not have to wait to learn about the inconsistency for the first time when the expert is on the witness stand. Inquiry into the inconsistency should be allowed during the discovery process.

In addition, a witness may be impeached by inquiry into the methodology used. It is important to know whether an attorney channeled the methodology for the expert. In other parts of the law, for example, it is common to have statements prepared by lawyers and signed by others, such as affidavits. Law-enforcement agents, for example, do not always write their affidavits in support of search warrants. Moreover, cross-examination is allowed in criminal cases. Issues of inconsistency may arise between a criminal defendant's testimony and a suppression report written by the lawyer. There should not be a different rule for civil and criminal cases.

A member asked why, in proposed Rule 26(b)(4)(A)(iii), the protections and restrictions apply only to a witness who is "required to provide a report." A treating physician, for example, who is not required to file a report under rule 26(a)(2)(B), should be entitled to the same work-product protection. Professor Cooper explained that if the treating physician is not retained by counsel, the work-product protection is really not needed. The relationship with the lawyer for a retained expert is not the same. Therefore, the protection applies only to retained witnesses.

Judge Kravitz suggested the example of an expert witness who is a state trooper, not retained by counsel. There is no need for the lawyer's communications with the trooper to receive work-product protection because there is no special relationship between the two. Troopers and family physicians testify essentially as fact witnesses, although they give some expert advice. The professional witness, on the other hand, is part of the litigation team.

A motion was made to approve the proposed amendments to Rule 26 for publication and to solicit specific public comment on the issues identified during the committee's discussions. Judge Kravitz added that the proposed amendments were still subject to style and format improvements.

The committee, with one member opposed, by voice vote approved the proposed amendments to Rule 26 for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2008 (Agenda Item 9).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, and 59 and HABEAS CORPUS RULE 8

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Criminal Procedure and the Rules Governing §2254 Cases and § 2255 Proceedings.

FED. R. CRIM. P. 7, 32, and 32.2

CRIMINAL FORFEITURE

Judge Tallman reported that the proposed amendments to FED. R. CRIM. P. 7 (indictment and information), FED. R. CRIM. P. 32 (sentencing), and FED. R. CRIM. P. 32.2 (forfeiture), dealing with criminal forfeiture, had been initiated at the request of the Department of Justice. They were drafted by an ad hoc subcommittee that had enjoyed significant input from lawyers who specialize in forfeiture matters, both from the Department and the National Association of Criminal Defense Lawyers. The amendments essentially incorporate current practice as it has developed since the forfeiture rules were revised in 2000.

Judge Tallman explained that in some districts the government currently includes criminal forfeiture as a separate count in the indictment and specifies the property to be

forfeited. The proposed rule would specify that the government's notice of forfeiture should not be designated as a count of the indictment. The indictment would only have to provide general notice that forfeiture is being sought, without identifying the specific property to be forfeited. Forfeiture, instead, would be handled through the separate ancillary proceeding set forth in FED. R. CRIM. P. 32.2.

Professor Beale pointed out that the proposal was not controversial and represents a consensus between the Department of Justice and private forfeiture experts. She walked the committee through the details of the amendments and pointed out that they elaborate on existing practice and eliminate some uncertainties regarding the 2000 forfeiture amendments.

A member pointed to language in the committee note cautioning against general orders of forfeiture (where the property to be forfeited cannot be readily identified), except in "unusual circumstances," and asked what those circumstances might be. Judge Tallman suggested that a general order might be appropriate when the government demonstrates that funds derived from narcotics have been used to buy other property. The defendant, in essence, tries to hide assets and the government seeks to forfeit an equivalent amount of property.

Professor Beale pointed out that other examples are found in the cases cited in the note. She noted that the 2000 amendments allowed a forfeiture order to be amended after property has been recovered. Thus, some flexibility in forfeiting property is already accepted in the rules and in case law, although the outer boundary of forfeiture law is still somewhat ambiguous.

Judge Tallman added that the concept of forfeiture is driven by the "relation-back" doctrine, under which the sovereign acquires title to the property obtained by wrongdoing at the time of the wrong. The rule follows the money and perfects the sovereign's interest in an equivalent value of property. A participant recommended using the term "tracing" in the rule, and Judge Tallman suggested that the committee note might add the words "to identify and trace those assets."

A member pointed to an inconsistency in the proposed rule that needed to be corrected. Under proposed Rule 32.2(b)(6)(A) publication by the government is mandatory. But Rule 32.2(b)(6)(C) specifies that publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

Professor Beale suggested changing the heading of Rule 32.2(b)(6)(C) to make it clear that there are exceptions to (A)'s mandatory publication requirement. She noted that the style consultant had advised against adding a cross-reference to subparagraph (C) in

Rule 32.2(b)(6)(A). A member suggested turning the proposed last sentence of (C) into a separate subparagraph (D), but Professor Kimble suggested that it would be better to pull the proposed last sentence of (C) back into (A). Professor Beale recommended that the committee approve the rule subject to further drafting improvements.

A participant noted that proposed Rule 32.2(b)(4)(C) specifies that "a party may file an appeal regarding that property under FED. R. APP. P. 4(b)" and asked whether it applies to an appeal by a third party. Professor Beale responded that the advisory committee had intended the language to refer only to the defendant or the government, not to third parties. It was suggested, therefore, that the rule might be amended to read: "the defendant or the government may file an appeal." A member noted that third parties are not atypical in forfeiture proceedings, and they need to be considered. The defendant takes an appeal from the judgment of conviction, but that obviously does not apply to a third party. So some guidance would be appropriate. Professor Struve added that third parties are not specifically mentioned in FED. R. APP. P. 4.

A member noted that the provision deals only with an appeal of the sentence and judgment. Forfeiture, on the other hand, is an ancillary proceeding governed by Supplemental Rule G. Therefore, no separate provision is needed in the criminal rules. A member added that proposed Rule 32.2(b)(4)(A) states that an order "remains preliminary as to third parties until the ancillary proceeding is concluded."

A member emphasized the need to have the rule make clear when third parties are included and when they are not. He moved to replace the term "a party" with "the defendant or the government" throughout Rule 32.2(b)(6)(A) and (B). Another member suggested that consideration be given to making a global change, such as by adding a new definition in FED. R. CRIM. P. 1 that would define the term "party" for the entire Federal Rules of Criminal Procedure. Judge Rosenthal agreed that the suggestion may have merit, but it would take considerable time to accomplish. She suggested, therefore, that the committee ask Judge Tallman, Professor Beale, the style subcommittee, and the forfeiture experts to refine the language of the amendments in light of the committee's discussion. Judge Tallman added that the advisory committee would favor changing the terminology in Rule 32(b)(6)(2)(C) from "a party" to "the defendant or the government."

Judge Rosenthal recommended that the committee approve the proposed forfeiture rules, subject to the advisory committee, working with others, further refining the exact language of the amendments.

The committee without objection by voice vote approved the proposed forfeiture amendments for approval by the Judicial Conference, subject to revisions by the advisory committee along the lines discussed at the meeting.

FED. R. CRIM. P. 41

Judge Tallman stated that the amendments to FED. R. CRIM. P. 41 (search and seizure) had been drafted to address challenges that courts are facing due to advances in technology. They would establish a two-step procedure for seizing electronically stored information. He noted that a huge volume of data is stored on computers and other electronic devices that law-enforcement agents often must search extensively after probable cause has been established.

Judge Tallman reported that the advisory committee had seen a demonstration of the latest technology at its April 2007 meeting. He noted, for example, that technology now on the market can prevent anyone from making a duplicate image of electronically stored information. Thus, agents in some cases must seize entire computers because they cannot duplicate the contents for off-site review. The Department of Justice, he said, reports that this process requires substantial additional time to execute warrants properly.

To address problems of this sort, the proposed rule sets out a two-step process. First, the data-storage device may be seized. Second, the device may be searched and the contents reviewed. The court may designate a magistrate judge or special master to oversee the search. Maximum discretion is given to judges to provide appropriate relief to aggrieved parties.

Professor Beale stated that the law on particularity under the Fourth Amendment is inconsistent and still evolving. The proposed rule, she said, is not intended to govern the developing case law on the specificity required for a warrant, but merely sets up a procedure. The warrant would authorize both seizure of the device and later review of the contents. The owner of the device may come into the court and seek return of the device or other appropriate relief.

A member stated that the rule makes a great deal of sense, but asked whether the advisory committee had considered how likely it is that a Fourth Amendment challenge will be brought to the proposed procedure. Professor Beale responded that the challenge would not be to the rule per se, but to particular orders or warrants issued under it. In other words, there will be the usual challenges to the breadth of the warrants, but the rule will not be invalidated.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

HABEAS CORPUS RULES 11 and 12

Judge Tallman explained that the Rules Governing §§ 2254 Cases and 2255 Proceedings conform to the Anti-Terrorism and Effective Death Penalty Act. The statute aims to narrow the focus of issues that might justify issuance of a writ of habeas corpus. When the district court denies a petition for a writ of habeas corpus, it enters a judgment. Under the statute, a certificate of appealability must then be entered before an appeal may be taken by the petitioner, but it is unclear how and by whom it is issued. The Act, in fact, allows it to be issued by a district judge, the court of appeals, or a circuit justice.

Judge Tallman explained that the great majority of petitioners are pro se inmates, and the rules create a potential trap for them. District judges normally will first enter a judgment denying a habeas corpus petition and then later issue a certificate of appealability. But in waiting for the certificate to issue (and often seeking reconsideration of the denial of the certificate), inmates may fail to file a timely appeal. They are generally unaware that motions for a certificate of appealability do not toll the time for filing an appeal.

Judge Tallman said that the advisory committee had attempted to draft new Rule 11 in a way that spells out as clearly as possible, both in § 2254 cases and § 2255 proceedings what inmates have to do. The judges on the committee, he said, believe that district judges should normally issue or deny the certificate at the end of the case, when the facts and issues are still fresh in the judge's mind.

Professor Beale reported that the public comments had expressed some differences of opinion on this issue. Some had suggested that it would be better to bifurcate the two court decisions and allow a district judge to decide on the certificate later than ordering entry of the judgment. But, she said, the advisory committee had concluded that it is important for the court to make the two decisions together, both to promote trial court efficiency and to avoid misleading prison inmates. The committee, however, did revise the proposal after publication to give a trial judge the option of ordering briefing on the issues before deciding on the certificate of appealability. The court may also delay its ruling, if necessary, and include the two actions in a joint ruling. Judge Tallman added that the advisory committee had tried to make it clear in the last sentence of proposed Rule 11(a) that a motion for reconsideration of the denial of a certificate of appealability does not extend the time to appeal.

A member agreed that the revisions to Rule 11 will provide better information to pro se litigants, but questioned the companion amendment to FED. R. APP. P. 22(b). The appellate rule, he suggested, assumes that the district court's decision on issuing the certificate of appealability will be made after the notice of appeal has been filed and sent to the court of appeals. But under the proposed revisions to Rule 11, the certificate of appealability will usually be issued before a notice of appeal is filed.

Judge Tallman responded that it was not necessarily true that the certificate will issue before the notice of appeal is filed. Under the governing statute, an appeal cannot be filed without a certificate of appealability. Thus, if the court of appeals receives a notice of appeal without a certificate of appealability, it must consider asking the district court to decide on issuing a certificate or granting one itself. Several participants suggested possible improvements in the language of the proposed amendment. One noted that if a habeas petitioner files a notice of appeal without a certificate of appealability, his circuit deems the notice of appeal to be a motion for a certificate of appealability.

A member pointed out that proposed Rule 11 specifies that the district court "must" issue or deny a certificate of appealability when it enters a final order. She suggested that the verb be changed to "should" in order to give district judges discretion in appropriate circumstances. Judge Tallman reported that the advisory committee had deliberately chosen the word "must," believing that a district judge could delay issuing the joint order and certificate to allow time for briefing, if necessary. He said that the advisory committee would be amenable to changing the language if the standing committee preferred to give trial judges greater discretion.

Current Rule 11 of the Rules Governing § 2254 Cases would be renumbered as Rule 12.

A motion was made to approve proposed Rule 11, retaining the verb "must."

The committee, with one objection, by voice vote approved the proposed amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings for approval by the Judicial Conference.

A motion was made to approve the proposed amendment to FED. R. APP. P. 22(b)(1), with a change in language to read, "If the district court issues a certificate, the district clerk must send the certificate . . . ."

The committee without objection by voice vote approved the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 6 (grand jury) had been brought to the advisory committee's attention by magistrate judges, who noted that in some districts no judge is present in the city where the grand jury sits. Therefore, a magistrate judge may have to travel hundreds of miles just to receive the return of an indictment. The proposed amendment would authorize a magistrate judge to take the return by video teleconference.

A participant questioned the language of the amendment that specifies that a judge may take the return "by video teleconference in the court where the grand jury sits." He suggested that the proper phrasing might be "from the court . . . ." Alternatively, the sentence might end after the word "teleconference." Professor Beale responded that the advisory committee wanted to have the return by the grand jury made in a courtroom in order to maintain the solemnity of the proceedings.

A member pointed out that the committee note states that the indictment may be transmitted to the judge in advance for the judge's review. She said that it is surprising that the matter is addressed in the note, rather than the rule itself, because it is essential that the indictment be sent to the judge in advance by reliable telegraphic means.

Judge Tallman agreed that the judge should have a copy of the indictment in hand. The judge would conduct the proceedings remotely by videoconference, and a deputy clerk would be physically present in the courtroom with the grand jury to receive and file the indictment.

A member pointed out that he had served as an assistant U.S. attorney in three different districts, and the practice of receiving grand jury returns varied in each. Nevertheless, there is always at least a deputy clerk present to receive and file the indictment. Judge Tallman emphasized that the thrust of the proposed rule is merely to authorize a judge's participation by video teleconference, not to regularize grand jury practices.

The committee without objection by voice vote approved the proposed amendments for publication.

Judge Rosenthal stated that there may be some advantage to deferring publication of the proposed amendment to Rule 6 because it may be an unnecessary burden to couple it for publication with the potentially controversial proposed amendments to Rule 15. She suggested that it might be better to publish the amendments to Rule 15 in August 2008, review the public reaction to them, and then publish the amendment to Rule 6 at a later date. She emphasized that no decision had been made on the matter, but asked the committee's approval to delay publication if she deems it appropriate.

The committee without objection by voice vote agreed that the chair of the committee may decide on the timing of publication of the proposed amendment.

FED. R. CRIM. P. 15

Judge Tallman stated that the proposed amendments to FED. R. CRIM. P. 15 (depositions) would authorize, in very limited circumstances, the taking of depositions outside the United States and outside the presence of the criminal defendant, when the presence of a witness for trial cannot be obtained. The procedure, for example, would be permissible when the presence of the witness in the United States cannot be secured because the witness is beyond the district court's subpoena power and the foreign nation in which the witness is located will not permit the Marshals Service to bring the defendant to the deposition.

Judge Tallman noted a recent decision of the Fourth Circuit upholding the taking of depositions in Saudi Arabia in an al-Qaeda case. The Saudi Arabian government would not permit the witnesses to come to the United States. So the district court authorized a video conference where the defendant was in Virginia and the witnesses in Saudi Arabia. The witnesses could see the defendant, and the defendant could see the witnesses. The procedures contained in the proposed amendments, he said, mirror what the Fourth Circuit approved in that case.

Judge Tallman pointed out that the advisory committee was particularly sensitive in this area because the Supreme Court had reviewed earlier proposed amendments in 2002 and had declined to transmit a proposed amendment to FED. R. CRIM. P. 26 to Congress. At that time, Justice Scalia questioned the constitutionality of this kind of procedure, but said it might be permissible if there were case-specific findings that it is necessary to further an important public policy. Judge Tallman explained that the advisory committee had tried to meet Justice Scalia's concerns. Thus, proposed Rule 15(c)(3) lists in detail all the factors that the court must find in order for a deposition to be taken without the defendant's physical presence.

Professor Beale added that the proposed rule would require a court to determine, on a case-by-case basis, what technology is available and whether the technology permits reasonable participation by the defendant. The rule, she said, clearly establishes a preference for the witness to be brought to the United States and covers only those situations where the witness cannot come.

A member stated that certain nations would regard this procedure as a serious abuse of extraterritorial judicial authority by the United States and a violation of their sovereignty. Therefore, it might be helpful to state in the committee note that the

committee takes no position on whether the procedure might be legal in particular foreign nations.

A participant pointed out that the proposal was, in effect, a rule of evidence and suggested tying it to the language of FED. R. EVID. 807(b) (residual exception to the hearsay rule) and its comparative requirement. Under the proposed amendments to FED. R. CRIM. P. 15, for example, the government might have many similar witnesses available in the United States, but their presence is not a listed factor that the court must consider. FED. R. EVID. 807(b), he said, would provide a better, tougher standard. He also questioned the reference in proposed Rule 15(c)(3)(A) to "substantial proof of a material fact." Professor Beale responded that the phrase had been taken from the case law.

A member suggested that the standard in the rule need not be as narrow as FED. R. EVID. 807(b) because the testimony of the witness may not be hearsay evidence. In any event, though, she expressed doubts that the evidence produced by a deposition conducted under the proposed rule would be admissible.

Professor Beale agreed that the proposed rule does not address whether the information obtained from the witness will actually be admissible in evidence. But, she said, several circuits now have allowed district judges to craft specific arrangements in individual cases. The rule, she explained, had been drafted carefully to meet the constitutional standards and provide some structure that would make it possible in appropriate circumstances to have the evidence admitted. Of course, there is little point in conducting the deposition if it produces evidence that cannot be admitted.

A member pointed out that there are many procedural issues that the proposed rule does not address, such as the location of the prosecutor and defense lawyer during the deposition and the transmission of exhibits. She noted that the rule only addresses the initial approval and justification for conducting the deposition at all. Judge Tallman agreed that the advisory committee had intended to leave the logistical arrangements to the individual courts. Mr. Tenpas added that it is wise for the rule to avoid the technology issues because the technology is changing rapidly. It is appropriate that the rule simply focuses on when a court may allow a deposition to be taken. The Department of Justice, he said, supports the committee's best efforts on the matter and hopes that the Supreme Court will accept the rule.

A member suggested adding another circumstance to the list of case-specific findings that support taking a deposition – the physical inability of a criminal defendant to travel to another country. Mr. Tenpas responded that that circumstance may fall within proposed Rule 15(c)(3)(D)(ii), "secure transportation . . . cannot be assured," or proposed Rule 15(c)(3)(D)(iii), "no reasonable conditions will assure an appearance."

A member asked whether the committee planned to ask specifically for public comments on the constitutional issues, especially since the Supreme Court had rejected a similar proposal in the past. Judge Rosenthal responded that the committee would solicit comments on the constitutionality of the proposed procedure, and it must be up front in the publication regarding the history of the earlier amendments submitted to the Supreme Court.

A member pointed out that in some cases the criminal defendant may request a deposition. In that event, the defendant's confrontation-clause rights are not implicated by the deposition. She suggested that the proposed rule would be useful in that situation.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. CRIM. P. 32.1

Judge Tallman stated that the proposed amendment to FED. R. CRIM. P. 32.1(a)(6) (revoking or modifying probation or supervised release) had been brought to the committee's attention by magistrate judges. The current rule, he said, provides that a person accused of a violation of the conditions of probation or supervised release bears the burden of establishing that he or she will not flee or pose a danger, but it does not specify the standard of proof that must be met.

The Bail Reform Act specifies that a "clear and convincing evidence" standard applies at a defendant's initial appearance. Case law establishes that the same standard should be used in determining whether to revoke an order of probation or supervised release. The proposed amendment would explicitly state that the "clear and convincing evidence" standard of proof would apply in revocation proceedings.

The committee without objection by voice vote approved the proposed amendments for publication.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 12, 2008 (Agenda Item 8).

Amendments for Publication

RESTYLING THE FEDERAL RULES OF EVIDENCE

FED. R. EVID. 101-415

Judge Hinkle reported that the advisory committee was restyling the Federal Rules of Evidence in the same way that the appellate, criminal, and civil rules had been restyled to make them easier to read and more consistent, but without making any substantive changes. He pointed out that the committee was requesting approval at this meeting to publish the first third of the rules, FED. R. EVID. 101-415, but not to publish them immediately. The second third of the rules would be presented for approval at the January 2009 meeting, and the final third at the June 2009 meeting. All the restyled evidence rules would then be published as a single package in August 2009.

Judge Hinkle pointed out that additional changes may be needed in the first third of the rules because the advisory committee will have to go back later in the project to revisit all the rules for consistency. He also pointed to some global issues, such as whether the restyled rules should use the term "criminal defendant" or "defendant in a criminal case." Other issues that the advisory committee had been dealing with, he noted, have been set forth in footnotes to the proposed rules. He emphasized that the proposed restyling changes had been very thoroughly vetted at the advisory committee level.

A member noted that the proposed revision of FED. R. EVID. 201(d) (judicial notice) refers to the "nature" of a noticed fact, rather than the "tenor" of the fact, as in the current rule. Professor Capra responded that the advisory committee had examined the case law and could find no discussion of what "tenor" means. As a result, it decided to use "nature," rather than "tenor," because it is easier to understand and does not represent a substantive change.

The committee without objection by voice vote approved the proposed amendments for delayed publication.

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that FED. R. EVID. 804(b)(3) is the hearsay exception for a statement against interest by an unavailable witness. The proposed amendment, he said, would extend the corroborating circumstances requirement to all declarations against penal interest offered in criminal cases. He emphasized that the Department of Justice does not oppose the change.

He noted that the current rule requires corroborating circumstances if the defendant offers a statement, but not if the government does. The anomaly results from the fact that Congress, in drafting the rule, believed that the government could never use

the provision because case law under the Confrontation Clause would preclude the government from submitting evidence under the rule.

The government, however, in fact can use the rule. Therefore, the provision does not impose parallel requirements on the government and the defendant. Nevertheless, some courts have held that the government must show corroborating circumstances, even though the current rule does not contain that requirement.

Judge Hinkle said that there was never any real rationale for the different treatment in the rule. It was just an historical accident because the drafters had assumed that the government could never use the provision.

He stated that the advisory committee had decided not to make any change in the rule regarding civil cases. The amendment, thus, would address only criminal cases. In addition, there are some other current misunderstandings about the rule that the committee decided not to address as part of the current proposal.

Professor Capra stated that the proposed amendments to Rule 804(b)(3) had not yet gone through style review. He pointed out that all the hearsay rules would be restyled together, which will require a great deal of work. Nevertheless, the advisory committee wanted to publish the substantive amendments to Rule 804(b)(3) now, with the understanding that the rule will be restyled in due course as part of the restyling process.

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Item

Judge Hinkle reported that the most important matter currently affecting the evidence rules is the pending effort to get Congress to enact new FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work-product protection). The rule, he noted, had been approved unanimously by the Senate, but was still pending before the House Judiciary Committee.

Judge Hinkle noted that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). In that case, the Court held that admitting "testimonial" hearsay violates an accused's right to confrontation unless the accused has had an opportunity to cross-examine the declarant. He said that it is at least possible, in light of *Crawford* and the developing case law, that some hearsay exceptions may be subject to an

unconstitutional application in some circumstances. Case law developments to date suggest that rule amendments not be necessary.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the sealing subcommittee, reported that the subcommittee had decided to confine its inquiry to cases that have been totally sealed by a judge. The Federal Judicial Center, he noted, had been searching the courts' electronic databases to identify all cases filed in 2006 that have been sealed. It divided the civil cases into five categories: (1) False Claims Act cases; (2) cases related to grand jury proceedings; (3) cases involving juveniles; (4) cases involving seizures of property; and (5) all other cases. Criminal cases are being treated separately. In addition, the Center had contacted the clerks of the courts to obtain additional information about the cases. Its initial research to date had identified 74 sealed civil cases, 238 sealed criminal cases, and 3,631 cases sealed by magistrate judges. The Center reported that some of the sealed cases were later resolved by public opinions, including some published opinions.

Judge Hartz reported that the subcommittee planned to hold an additional meeting before the next meeting of the standing committee.

REPORT ON STANDING ORDERS

Judge Rosenthal reported that the committee, with the invaluable assistance of Professor Capra, was continuing its work on reviewing the use of standing orders in the courts. She said that a survey had just been distributed to chief district judges and chief bankruptcy judges, and a good deal of helpful information had been received. Professor Capra, she added, was working on proposed guidelines to assist courts in determining which subjects should be set forth in local rules of court and which may appropriately be relegated to standing orders. In addition, the courts will be urged to post all standing orders on their court web-sites.

NEXT MEETING

The committee agreed to hold the next meeting in early to mid-January 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, January 12-13, in San Antonio, Texas.

Judge Kravitz reported that the civil rules committee was planning to hold three hearings on the proposed amendments to FED. R. CIV. P. 26 and 56 – one on the east coast, one on the west coast, and one in the middle of the country. Judge Rosenthal recommended scheduling the hearings to coincide with upcoming committee meetings. Thus, one hearing will be held on November 17, 2008, in conjunction with the fall meeting of the civil rules committee in Washington, and another will be held in San Antonio on January 14, 2009, the day after the next meeting of the standing committee. The third will be held on February 2, 2009, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 1

Advisory Committee on Evidence Rules

Minutes of the Meeting of May 1-2, 2008

Boston, MA

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 1st and 2nd 2008 in Boston.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
Ronald J. Tenpas, Esq., Department of Justice

Also present were:

Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Elizabeth Shapiro, Esq., Department of Justice
Professor Daniel Coquillette, Reporter to the Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Style Subcommittee of the Committee on Rules of Practice and Procedure
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

Opening Business

Judge Hinkle welcomed the Committee's new member, Judge Anita Brody, to her first Committee meeting. Judge Hinkle asked for and received approval of the minutes of the Fall 2007 Committee meeting.

Judge Hinkle then asked Professor Coquillette for a report on the status of proposed Evidence Rule 502, which would provide protections against waiver of privilege and work product. Professor Coquillette noted that Rule 502 was passed unanimously in the Senate in February, but that its prospects of passage in the House are dependent on convincing some staffers and members of Congress that the Rule is well-drafted and that it does not conflict with other pending legislation on protective orders. Recent statements from staffers and House members appear to be positive, and there is a fair possibility that the House will pass the legislation before the end of the year.

I. Restyling Project

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee reviewed a draft of the first third of the Evidence Rules (Rules 101-415). The draft had been reviewed by the Reporter, who provided suggestions, and it was approved by the Style Subcommittee of the Standing Committee.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change is not implemented.

The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be reconsidered by the Style Subcommittee of the Standing Committee. After considering possible changes of both substance and style, the Committee unanimously voted to refer the restyled rules to the Standing Committee, with the recommendation that they be released for public comment. If the Standing Committee accepts the Evidence Rules Committee's recommendations, then all of the proposed restyled rules would be released for public comment as one complete package, in approximately two years.

What follows is a description of the Committee's determinations, rule by rule. **The final version of each rule to be submitted to the Standing Committee is attached (along with the existing rule in a side-by-side presentation) to these Minutes.**

Rule 101

Rule 101 provides an introductory statement about the applicability of the Evidence Rules — the details of Evidence Rule-applicability are found in Rule 1101. The Style Subcommittee draft of Rule 101 referred in some detail to the specific courts to which the Evidence Rules are applicable, including courts of appeals, district courts, and the District Courts of Guam, the Virgin Islands, and the Northern Marianas Islands.

Committee members raised a number of issues, including: 1) does it make sense to state that the Evidence Rules are applicable to the courts of appeals?; 2) should the proposal be amended to apply the Evidence Rules to the Supreme Court?; and 3) why should district courts in general be distinguished from the District Courts of Guam, the Virgin Islands, and the Northern Mariana Islands?

On these questions, the Committee determined that 1) Evidence Rules can and do apply to the courts of appeals, for example the rules on judicial notice and preservation of the right to appeal; 2) the Evidence Rules do not apply to the Supreme Court, as the Enabling Act does not authorize the rulemaking process to establish rules that would bind the Supreme Court; and 3) research is needed to determine whether a textual distinction was required to differentiate the District Courts of Guam, the Virgin Islands, and the Northern Mariana Islands from other district courts.

The Committee voted unanimously to defer the difficult drafting questions of rule-applicability until it reached Rule 1101. For now, the Committee adopted a simple and general statement of rule-applicability in Rule 101:

> **These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.**

Rule 102

Rule 102 provides as follows:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

The restyled version presented to the Committee changed the heading of Rule 102 from "Purpose and Construction" to "Purpose". Committee members noted that the change was problematic because the rule deals mostly with how a court is to construe the Evidence Rules. The Committee asked the Style Subcommittee to consider whether to retain the existing heading, or in the alternative to change it to "Construction" rather than "Purpose."

The Style Subcommittee changed "shall" to "should". After discussion, the Committee agreed with this change. One of the goals of the style project is to take out all the "shalls" from the Rules; the reasoning is that "shall" is a vague term that might mean "must", "may" or "should" among other possibilities. The style change to "should" in Rule 102 was approved because the Rule is hortatory — it does not require a court to apply specific guidelines for construing the rules.

The style draft changed the existing language "proceedings justly determined" to "achieve a just result." The Committee voted unanimously against this change on substantive grounds. Committee members concluded that a focus on a justly determined proceeding could be construed to mandate an accurate result in every circumstance — a mandate that would be in conflict with the goal of evidence rules and burdens of proof in criminal cases. For the same substantive reason, the Committee unanimously rejected the proposed change from "to the end that the truth be ascertained" to "determine the truth."

The Committee also unanimously determined that the Style Subcommitee's deletion of the term "to the end that" would be substantive because it changes the goal of the rule. The existing rule divides the rules of construction and the ultimate goals of construction. The restyled rule simply lumps all the factors together without differentiating rules of construction from goals of construction. So the Committee voted to restore the language "to the end that".

The Committee corrected the substantive changes and unanimously approved the following restyled version of Rule 102:

> These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end that the truth may be ascertained and proceedings justly determined.

Rule 103

Rule 103 sets forth various rules on objections, offers of proof, preserving claims of error, and related questions. The Evidence Rules Committee unanimously approved the draft prepared by the Style Subcommittee. The Evidence Rules Committee made one suggestion — to take out the word "also" from subdivision (c). Committee members also raised questions about whether the restyled subdivision (d) was correct in mandating that the court conduct proceedings so that inadmissible evidence is not suggested to the jury, to the extent practicable. But the Committee ultimately concluded that the restyled language tracked the existing case law.

Rule 104

Rule 104 covers preliminary questions, including admissibility determinations and conditional relevance. Rule 104(a) provides that in making an admissibility determination, a trial court "is not bound by the rules of evidence except those with respect to privileges." The Style Subcommittee considered whether there might be rules outside the Evidence Rules that could affect the trial court's determination of admissibility, and if those rules should also be inapplicable to admissibility determinations. The Subcommittee proposed the term "any evidence rules"; but the

Evidence Rules Committee determined that a reference to "any" evidence rules could raise a host of unforeseen issues about the applicability of rules outside the Evidence Rules to preliminary determinations. The Committee decided, as a substantive matter, that the proper reference should be to "evidence rules."

The Committee next considered the draft's use of the term "criminal defendant." All members of the Committee agreed that the term "criminal defendant" was presumptive and pejorative. Six members of the Committee believed that the term "criminal defendant" effectuated a substantive change — much like the difference between "victim" and "alleged victim." The Committee then discussed what term should be used. It rejected the term "accused" because that term had been used in other rules and courts sometimes misconstrued it to apply to civil defendants accused of misconduct. The Committee tentatively agreed on the term "defendant in a criminal case." Professor Kimble, the style consultant, agreed to try to implement that term throughout the restyled rules. The Committee agreed that whatever term is used, it must be used consistently throughout the rules.

The Committee next turned to Rule 104(b), which currently provides that when relevance is conditioned on the existence of a fact, "the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding." The restyled version changes "shall" to "may". The DOJ representative suggested that this might be a substantive change because it would give courts more discretion to exclude conditionally relevant evidence than is currently provided. He suggested that the correct word is "should." But the rest of the Committee disagreed. It determined that the word "may" properly gives the trial court discretion — which exists under the current rule — to rule on conditional relevance immediately or to admit the evidence subject to a connection and rule at a later point.

The Committee voted unanimously to approve the restyled version of Rule 104, with the deletion of "any" before evidence rules and the change of "criminal defendant" to "defendant in a criminal case."

Rule 105

Rule 105 provides as follows:

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

The Style Subcommittee Draft changed the heading to "Limiting Evidence That Is Not Admissible Against All Parties or for All Purposes." Committee members suggested that the heading was inaccurate because there is no way to determine all the purposes for which evidence might be admissible, at least outside the context of a case. The Committee recognized that the heading did not

effectuate a substantive change, but nonetheless suggested that the heading be reconsidered. After discussion, the Committee and Professor Kimble agreed on the following heading:

"Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes."

But the Committee also voted that the best solution was to retain the existing heading: "Limited Admissibility." The Committee determined that the existing heading accurately and succinctly captures the subject matter of the rule. Finally, the Committee voted 6 to 2 to recommend publication of restyled Rule 105.

Rule 106

Rule 106 provides as follows:

> 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.

The Style Subcommittee draft deleted "may require the introduction" and substituted "may introduce." The Committee determined, unanimously, that this change was substantive, because it failed to cover all the situations in which Rule 106 currently applies. If the conditions of the existing Rule 106 are met, a party can force an adverse party to introduce completing evidence during its case. Changing the rule to "may introduce" does not cover the situation in which a party can require another party to introduce the completing evidence.

The Committee therefore determined that the term "require the introduction" must be retained. As so retained, the Committee unanimously approved the restyled version of Rule 106.

Rule 201

Rule 201 is the rule on judicial notice. The Committee unanimously approved the Style Committee draft of Rule 201. The Committee, however, discussed a substantive anomaly in the existing rule that is carried over to the restyled rule: the text of the Rule permits an appellate court to judicially notice a fact, but in criminal cases the Constitution prohibits an appellate court from noticing a fact against the defendant if that fact was not noticed below. (This is because of the accused's constitutional right to jury trial). The Committee asked Professor Broun, consultant to the Committee, to prepare a memorandum on a possible substantive amendment to Rule 201 that would track the constitutional prohibition on judicial notice on appeal of a criminal case.

Rule 301

Rule 301 governs presumptions. The Subcommittee's restyling draft made a number of changes but kept the basic framework of the rule, i.e., that a presumption imposes the burden of going forward with evidence to rebut, but does not shift the burden of proof, "in the sense of the risk of nonpersuasion." The Committee unanimously approved the Style Subcommittee's draft.

Rule 302

Rule 302 provides as follows:

> In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

The Style Subcommittee draft, among other things, changes "civil actions and proceedings" to "a civil case." The Committee discussed whether this is a substantive change. Some Committee members suggested that the term "proceeding" was broader than "case" but that if there was such a distinction, it would not make a difference for Rule 302. The Committee determined that the proper iteration of "civil case", "civil action" and "civil proceeding" was a global question that might be best treated by a specification in Rule 1101 that the terms would be used interchangeably throughout the Evidence Rules. For now, the Committee resolved to keep track of usages of terms such as "civil action", "civil case" and "civil proceeding" and to work on a global solution as the restyling project goes forward. The Committee unanimously agreed to recommend that the restyled version of Rule 302 be released for public comment.

Rule 401

Rule 401 provides as follows:

> ''Relevant evidence'' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The Style Subcommittee draft retained the reference to "the action." Committee members noted that this reference was different from Rule 302, which currently refers to "actions and proceedings," and the restyled version of Rule 302, which refers to a "case". Again, this is a global issue that might possibly be resolved by language added to Rule 1101 that would allow those different references to be used interchangeably. The Committee approved for now the reference to "the action."

Committee members objected, however, to a change from "fact that is of consequence" to "fact that is consequential." Committee members unanimously agreed that this change could be read to provide a stricter standard for relevance than under the current, permissive rule. In essence, the change could be read to require that the evidence be more important to the action than is required

under existing law. Raising even an argument of a substantive change was considered especially problematic given the importance of Rule 401 in the structure of the Evidence Rules. Committee members voted unanimously to restore the current reference to a "fact that is of consequence in determining the action." With that change, the Committee voted unanimously to approve the Style Committee draft of Rule 401.

Rule 402

Rule 402 provides as follows:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

The draft of the Style Subcommittee breaks out the sources of exclusion into bullet points and provides other style improvements. One Committee member suggested that the restyled Rule 401 created a disconnect with Rule 402 because Rule 401 no longer uses the term "relevant evidence" but instead refers to evidence that is relevant. But Committee members, after discussion, determined that no change of substance had been made and that restyled Rules 401 and 402 have the same connection as the existing versions. The Committee voted unanimously to approve the Style Subcommittee draft of Rule 402.

Rule 403

Rule 403 provides as follows:

> **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Among other things, the Style Subcommittee draft changed the heading of Rule 403 to "Exclusion of Relevant Evidence for Specific Reasons." The Committee unanimously objected to this heading, on the ground that the reference to "specific reasons" was vague and could be read to limit judicial discretion. Professor Kimble suggested that the existing heading was inaccurate because it referred to three reasons for excluding evidence when the rule mentions six. After discussion, the Committee unanimously suggested that the Style Committee consider and adopt the following heading to the restyled Rule 403:

"Exclusion of Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons"

After referring this style suggestion to the Style Subcommittee, the Committee unanimously approved the restyled Rule 403.

Rule 404

Rule 404 generally prohibits the circumstantial use of character evidence; sets forth a number of situations in which character evidence is admissible; and provides that specific acts are excluded if offered to prove character but are not barred by the rule if offered for some not-for-character purpose. The Committee determined that the restyled Rule 404 contained a number of substantive changes from the existing rule. Those substantive changes are as follows:

1. *Character/trait of character:* The existing rule sometimes refers to "character" and other times to "trait of character." The Style Subcommittee draft generally tried to refer to "character trait" or "trait" and deleted most of the broader references to "character". The Evidence Rules Committee found these changes to be substantive, because there is a reasoned difference between character and a character trait. In some cases, a party will be arguing that the adversary is making an undifferentiated attack — a character smear. Rule 404 provides protections against these attacks. In other situations, a party may be attempting to introduce a particular aspect of a person's character, such as honesty or peaceableness. Rule 404 provides other rules to govern this situation. The Committee carefully reviewed the existing Rule and determined that the various uses of "character" and "trait of character" were well considered, and that any change of those usages would be substantive. So the existing references were restored to the restyled draft.

2. *Reference to Rule 607:* Rule 404(a) provides that the bar on character evidence does not apply to evidence of the character of a witness, "as provided in Rules 607, 608, and 609." The Style Subcommittee asked the Evidence Rules to consider whether the reference to Rule 607 should be deleted as inaccurate, because Rule 607 is not a rule that directly provides for admission of character evidence. The Committee considered this request and decided that deletion of the reference to Rule 607 would be a substantive change. While Rule 607 does not directly govern character evidence, it does allow character evidence (or for that matter impeachment evidence generally) to be introduced in situations that were not permitted before the federal rules were enacted. If the reference to Rule 607 were deleted, it could create the unintended consequence of an argument, or even a holding, that a witness's character could not be attacked on direct examination.

3. *"Another purpose":* Rule 404(b) currently provides that bad act evidence, while inadmissible to prove character, "may, however, be admissible" for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." The restyled version states that such evidence "may be admitted for another purpose, such as proving motive, opportunity, intent, plan, preparation, knowledge, identity, absence of mistake, or lack of accident." This change raised a number of questions with Committee members, especially given the heavy use of Rule 404(b) in the courts. One problem raised by the Reporter is that the

change from "other purposes" to "another purpose" could lead to an unintended substantive change. Under current law, the government often offers bad act evidence for multiple purposes, and then the evidence is assessed under Rule 403 for its probative value as to all such not-for-character purposes. Changing the language to "another purpose" could be read to permit the articulation of only *one* not-for-character purpose. Professor Kimble responded that the style convention is to use singular rather than plural, and that the use of the singular is not intended to be limiting. He also explained that applying the plural only in this rule could lead to unnecessary arguments about the use of the singular in other rules. After discussion, the Committee voted unanimously that the use of the singular rather than the plural did not create a substantive change. The Committee then voted on whether to recommend to the Style Subcommittee that the plural, "other purposes" be retained. That vote failed by a vote of 5 to 4.

In an email exchange of Committee members after the meeting, the Committee agreed to suggest to the Style Subcommittee that "another purpose" should be changed to "any other purpose." This change would then track a similar change made to Rules 413-415 (see below); it would not be in conflict with the style rule on singular and plural; and it would clearly allow the proponent to articulate multiple not-for-character purposes for evidence of uncharged misconduct.

4. "May be admitted" — The DOJ representative objected to the change from "may, however, be admissible" to "may be admitted" in Rule 404(b). He noted that hundreds of cases had established that Rule 404(b) is a rule of inclusion, not exclusion. He also noted that Congress explicitly changed the Advisory Committee draft of Rule 404(b) — which used more exclusionary language — to "may, however, be admissible." Under the Style protocol, language in a rule that is a "sacred phrase" is considered substantive and is not to be changed. The DOJ representative argued that the change to "may be admitted" was substantive because it was stricter in tone than "may, however, be admissible"; and that at any rate the Rule 404(b) language was a sacred phrase. A vote was taken on whether the change to "may be admitted" was substantive and a majority (five Committee members) agreed that it was substantive. Under the Style protocol, that means that the change cannot be made by the Style Subcommittee. So "may be admissible" was retained.

5. Plan/preparation: The Style Subcommittee switched "plan" and "preparation" in the list of permissible purposes set forth in Rule 404(b). The Reporter objected to this change as an unjustified tinkering with a Rule that has been applied in thousands of cases. The reasoning for the change is that a bad act is planned before it is prepared, and so the style change follows a more logical progression than the current rule. The Reporter's response was that the list of permissible purposes in Rule 404(b) does not, and is not intended to, follow a logical progression. The Committee voted on whether the list of purposes in Rule 404(b) constituted a "sacred phrase," changing which is considered substantive under the restyling protocol. The Committee voted 7 to 2 that the list of purposes was not a "sacred phrase" and therefore the flipping of "plan"and "preparation" was not substantive.

The Committee then voted unanimously to recommend to the Style Subcommittee that it retain the list of purposes as it is in the existing rule, i.e., to keep "preparation" before "plan" in the list.

Finally, a vote was taken to approve the restyled Rule 404, subject to undoing the substantive changes discussed above. The Committee unanimously approved the rule as so modified.

Rule 405

Rule 405 provides the rule on proof of character when such proof is permitted by Rule 404. The Committee reviewed the restyled version of Rule 405. After discussion, the Committee voted unanimously that the Rule must refer both to "character" and "character trait" in both subdivisions of the Rule. This was necessary to properly track the use of "character" and "character trait" in Rule 404. The Committee recognized that the Rule must cover proof of both specific character traits and more general references to character, e.g., "the defendant is a good person." Thus, the reference in the restyled version to character traits only operated as a substantive change.

After restoring references to character as well as character traits, the Committee unanimously approved the restyled version of Rule 405.

Rule 406

Rule 406 currently provides as follows:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 406 is not strictly necessary, because even without the rule, habit evidence is clearly relevant to show conduct consistent with the habit under Rule 401. But the drafters of Rule 406 reasoned that a specific application of the relevance definition was necessary to abrogate some common law limitations on the use of habit evidence — specifically, the common law held that habit evidence was not relevant unless it was supported by corroborating evidence or eyewitness testimony. Rule 406 rejects those common law limitations.

The Style Subcommittee substituted "admissible" for "relevant": i.e., "habit is admissible" rather than "habit is relevant." After discussion, Committee members voted unanimously that the change from "relevant" to "admissible" was substantive. It essentially changed the rule from a particularized definition of relevance to a positive grant of admissibility. As such it went beyond the intent of the drafters of the original rule. The Committee then voted on the restyled version of Rule 406, with "relevant" replacing "admissible". The Committee unanimously approved the Rule as modified.

Rule 407

Rule 407 currently provides as follows:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Among other changes, the restyled version of Rule 407 provides that evidence "may be admitted" if offered for one of the designated proper purposes in the rule. A number of Committee members argued that this was a change in the tone of the Rule. Current Rule 407 is a rule of exclusion; it becomes inapplicable if the proponent can articulate a purpose for the evidence that is not prohibited by the Rule. Rule 407 is not a rule that admits evidence. Committee members argued that by using the term "may be admitted" the tone of the rule was changed to one that provided a positive grant of admissibility. The Reporter noted that the language "does not require the exclusion of evidence" was carefully chosen by the original Advisory Committee, and carefully vetted by Congress, which changed similar language in Rule 404(b) to provide a broader rule of admissibility, but made no such change to Rule 407. Professor Kimble argued in response that the phraseology "may be admitted" was to be preferred because it means the same thing and is "tighter" than "need not be excluded."

The Committee voted on whether the change in approach from "does not require exclusion" to "may be admitted" was a substantive change under the style protocol. Eight members of the Committee were of the view that the change was not substantive; one Committee member dissented from that view.

The Committee then voted on whether to suggest to the Style Subcommittee to return to the original iteration of the rule or some variation, e.g., "the rule does not require exclusion" or "the evidence need not be excluded" — or simply "the rule does not apply." The Committee voted 6 to 2 in favor of this style recommendation. The Committee's second choice for a style change was to provide that "a court may admit" rather than "may be admitted." Committee members reasoned that "a court may admit" seemed less compulsory (and more direct) than "the evidence may be admitted."

The Committee then voted on whether to approve the restyled Rule 407. It was approved by a vote of 8 to 1.

Rule 408

Like Rule 407, Rule 408 provides that certain evidence — in this instance evidence of compromise — is excluded if offered for certain specified purposes, but the rule "does not require exclusion" i.e., is not applicable, if the evidence is offered for a purpose not specifically barred by the rule. As with Rule 407, the Style Subcommittee changed Rule 408 to provide that evidence "may be admitted" if offered for some purpose not prohibited by the Rule. With respect to this change, Committee members came to the same resolution as was reached under Rule 407: all but one member agreed that the change was stylistic rather than substantive; but a strong majority voted to suggest to the Style Subcommittee that it return to the language of the original rule (which in this case was reaffirmed by an amendment in 2006): the evidence "does not require exclusion" if offered for a purpose not barred by the rule — or some variation of that language, such as "the rule does not apply." As a less preferred alternative, yet an improvement on the Style draft, the Committee suggested "the court may admit."

Committee members also suggested that the heading to subdivision (b) should be changed from "Exceptions" to "Permitted Uses." Professor Kimble agreed to take this suggestion under advisement.

Committee members unanimously approved the restyled version of Rule 408.

Rule 409

The Committee unanimously approved the restyled version of Rule 409.

Rule 410

Rule 410 provides that certain evidence related to plea negotiations is not admissible against the defendant involved in the negotiations. The Committee reviewed the restyled draft and noted that one change was substantive. One subdivision of Rule 412 currently protects "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." The restyled draft changed "attorney for the prosecuting authority" to "the prosecutor." Committee members unanimously saw this as a substantive change because Congress specifically chose this language to cover all attorneys acting under prosecutorial authority whether or not they were "prosecutors" in the strict sense. For example, in some jurisdictions private attorneys exercise prosecutorial authority for certain matters, and a change to "prosecutor" may raise doubts about whether discussions with those attorneys are covered by Rule 410.

Committee members voted unanimously that the change from "attorney for the prosecuting authority" to "the prosecutor" was substantive and therefore the original language was to be retained. Committee members then voted unanimously to approve the restyled draft of Rule 410, subject to restoring the language "attorney for the prosecuting authority."

Rule 411

Rule 411 currently provides as follows:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

As with Rules 407 and 408, the Style Committee draft changes Rule 411 from a rule that "does not require the exclusion of evidence" to a rule providing that evidence "may be admitted" if offered for a purpose not prohibited by the rule. The Committee voted on the restyled draft to Rule 411 in the same way as it did with respect to Rules 407 and 408: the change to "may be admitted" was not substantive, but the Committee suggested that the Style Subcommittee restore the language "does not require exclusion" or some variation such as "the rule does not apply." As a second alternative, the Committee suggested that the Style Subcommittee use "the court may admit."

Rule 412

Rule 412 provides that in cases involving sex offenses, evidence of the alleged victim's other sexual behavior or predisposition is to be admitted only under narrow circumstances. The existing rule provides that such evidence "is admissible, if otherwise admissible under these rules" under the narrow circumstances provided (in separate subdivisions for civil and criminal cases). Both Professor Kimble and the Reporter determined that the language "if otherwise admissible under these rules" should be deleted from the restyled draft because the general principle of all evidence rules is that admissibility under one rule does not guarantee admissibility under others. (For example, a statement that satisfies the hearsay rule may nonetheless be excluded under Rule 403). Moreover, the use of the term "if otherwise admissible under these rules" created an anomaly in criminal cases, where Rule 412 provides that evidence of the victim's sexual behavior must be admitted if its exclusion would violate the constitutional rights of the defendant. Retaining the language "if otherwise admissible under these rules" would condition a defendant's constitutional right on those other evidence rules, which is obviously incorrect.

Committee members agreed with the deletion of the two references to "if otherwise admissible under these rules." Members noted, however, that without this qualifying language, the term "is admissible" sounded too positive, especially given the substantial limitations on the admissibility of evidence covered by Rule 412. As such the restyled version had made a substantive change. Committee members voted to change "is admissible" to "may be admitted" or "the court may admit"— with the determination of the exact language to be made by the Style Subcommittee.

Committee members and Professor Kimble also agreed to a style change to the notice provision to Rule 412: changing "14 days before the scheduled trial date" to "14 days before trial."

With these changes, the Committee voted unanimously to approve the restyled draft of Rule 412.

Rule 413

Rule 413 provides in part as follows:

> (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
>
> (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

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The restyled version changed "another offense or offenses" to "another offense." This was in accord with style rules using the singular rather than the plural. But Committee members noted that this change would allow a defendant to argue that the prosecution could only admit one other sexual assault, even if the defendant had committed more than one. Members noted that such an argument was especially likely to be raised given the sensitive nature of the issues and the stakes involved in cases covered by Rule 413. After discussion, the Committee voted 5 to 4 to make a substantive change to the restyled draft: "another act" was changed to "any other act."

The Reporter noted that the term "relevant matter" — as used in the restyled draft — was not a term that is recognized under the Evidence Rules. Professor Kimble agreed to return to the language of the existing rule — "on any matter to which it is relevant."

The DOJ representative raised a possible substantive change in the restyled notice provision, which deleted the term "testimony that is expected to be offered" and replaced it with "summary of the testimony." The DOJ representative noted that the government could not know with certainty in advance how a witness will testify on the stand. The term "summary of the testimony" could imply some standard of accuracy that the government would not be able to meet, especially compared with the language in the existing rule which refers to "testimony that is *expected* to be offered." After discussion, the Committee voted unanimously that the deletion of the term "expected" was a substantive change. Accordingly the Committee voted to add the word "expected" before "testimony" in the restyled draft.

Finally, the Committee and Professor Kimble agreed to a change to the notice provision to provide consistent language with the modification made to the notice provision in Rule 412: "before the scheduled trial date" in the restyled draft was changed, by agreement, to "before trial."

With all the above changes, the Committee voted unanimously to approve the restyled draft of Rule 413.

Rules 414 and 415

Rules 414 and 415 provide the same treatment of evidence of sexual misconduct as Rule 413, but in different types of actions. These Rules present the same restyling issues presented by Rule 413, and the Committee resolved them in the same way: 1. Using "any other" rather than "another" to describe the acts subject to admission; 2. Using "on any matter to which it is relevant" rather than "any relevant matter"; 3. Adding "expected" before "testimony" in the notice provision; and 4. Changing "before the expected trial date" to "before trial" in the notice provision. Subject to these changes, the Committee unanimously approved the restyled draft of Rules 414 and 415.

II. Proposed Amendment to Rule 804(b)(3)

At its last meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee expressed interest in at least considering an amendment that would extend the corroborating circumstances requirement to all proffered declarations against penal interest in criminal cases. The possible need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the Fall 2007 meeting, Committee members expressed interest in proceeding with an amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts — because some courts currently apply a corroborating circumstances requirement to statements offered by the government and some do not. The Department of Justice representative asked the Committee to wait before proposing an amendment, until the Department had time to review the proposal and prepare a position. At the Spring 2008 meeting, the DOJ representative stated that the Department supported publication of an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to declarations against penal interest offered by the government in criminal cases.

The Committee then discussed whether three issues that had been raised in the case law should be addressed in the text or note to a proposed amendment to Rule 804(b)(3). Those questions are as follows:

1. *Should the corroborating circumstances requirement be extended to civil cases?* Committee members noted that only one reported decision had extended the corroborating circumstances requirement to civil cases, and that there were no other significant reported

cases on the subject. Given the dearth of authority, and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases, the Committee decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases.

2. *Should the amendment consider the applicability of the Supreme Court's decision in* Crawford v. Washington? Under *Crawford v. Washington,* a declaration against penal interest cannot be admitted against an accused if it is testimonial. Committee members considered whether to provide a textual limitation in Rule 804(b)(3), i.e., that "testimonial" declarations against penal interest are not admissible against the accused. The Committee determined that this language was unnecessary, because federal courts after *Crawford* have uniformly held that if a statement is testimonial, it by definition cannot satisfy the admissibility requirements of Rule 804(b)(3). A statement is "testimonial" when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution — but such a statement cannot be a declaration against penal interest because the Supreme Court held in *Williamson v. United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law. Because of the fit between the hearsay exception and the right to confrontation, Committee members saw no need to refer to the *Crawford* standard in the text of the rule — especially since to do so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford.*

3. *Should the amendment resolve some disputes in the courts about the meaning of "corroborating circumstances"?* Committee members noted that there are a few decisions that define "corroborating circumstances" as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. Members noted, however, that the disagreement in the courts about the meaning of "corroborating circumstances" did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the issue is directly addressed. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

After discussion, the Committee voted unanimously to refer the proposed amendment to Rule 804(b)(3), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. Committee members noted that the Rule would have to be restyled as part of the restyling project, but resolved unanimously that the proposed substantive change should proceed on a separate track and timeline. Thus, Rule 804(b)(3), together with its substantive change if approved, will be restyled together with all the other hearsay exceptions in the third part of the restyling project.

What follows is the proposed amendment and Committee Note as unanimously approved by the Committee:

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

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

* * *

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

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)");*United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal

circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford. See, e.g., United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007) (accomplice's statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (admissions of crime made informally to a friend were not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

The meeting was adjourned on May 2, 2008. The Fall 2008 Committee meeting is scheduled for October 23 and 24 in Santa Fe.

Respectfully submitted,

Daniel J. Capra
Reporter

Attachment: Side by side version of restyled Evidence Rules 101-415

TAB 2A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Restyled Evidence Rules 501-706, to be submitted for public comment
Date: September 23, 2008

The Style Subcommittee of the Standing Committee has reviewed and approved a draft of restyled Evidence Rules 501-706. The Advisory Committee reviewed and provided suggestions on an earlier draft. At this meeting, the Advisory Committee will review the draft from the Style Subcommittee to determine whether any of the proposed changes are substantive, and also to provide any necessary style suggestions for the Style Subcommittee's consideration. The Advisory Committee will also vote on whether to refer the restyled Rules 501-706 to the Standing Committee with the recommendation that those rules be released for public comment once all of the Evidence Rules have been restyled.

This memorandum sets forth the restyled Rules 501-706, and supporting information to assist the Advisory Committee in its review. The memorandum is in four parts. Part One provides a recap of the restyling protocol and the timeline for the restyling project. Part Two sets forth the draft of Rules 501-706 as approved by the Style Subcommittee. This part is blacklined to show changes from the existing rules. Comments and suggestions from the Reporter and others are at the bottom of each rule. Part Three sets forth the proposed language for the Committee Note to each of the restyled rules. Part Four provides a short discussion of the advisability of adding a rule for definitions.

Also in this agenda book, immediately behind this memo, is a side-by-side version of Rules 501-706, with a few footnotes indicating comments from the Style Subcommittee. Last time around I tried to put each side-by-side rule together with the blacklined rule in a single memo. This created a number of serious formatting problems. For those who want to have the side-by-side next to the blackline for ease of reference — you have my authorization to tear the agenda book apart to implement that juxtaposition.

I. Styling Protocol and Timeline

A. Approved Steps for Restyling

What follows is the agreed-upon procedure for restyling the Evidence Rules:

1. Professor Kimble prepares a draft of a restyled rule.

2. The Reporter reviews the draft and provides suggestions, specifically with an eye to whether any proposed change is substantive rather than procedural. But the suggestions can go further than just the substantive/procedural distinction.

3. Professor Kimble considers the Reporter's comments and revises the draft if he finds it necessary.

4. The Advisory Committee reviews the draft and provides suggestions of both style and substance.

5. Professor Kimble considers the comments of the Advisory Committee and revises the draft if he finds it necessary.

6. The draft as revised to this point is sent to the Standing Committee's Subcommittee on Style. The Subcommittee reviews the draft with a focus on the areas of disagreement between Professor Kimble and the Advisory Committee and Reporter. The Subcommittee may also make style changes that have not been previously proposed or considered.

5. The Style Subcommittee draft is referred to the Advisory Committee. The draft may contain footnotes providing comments on the issues unresolved up to this point in the process. At the Advisory Committee meeting, Committee members, liaisons and consultants review the draft to determine whether a proposed change is "substantive." If a "significant minority" of the Evidence Rules Committee believes that a change is substantive, then the wording is not approved.

6. The draft approved by the Advisory Committee is reviewed once again by the Style Subcommittee of the Standing Committee in order to consider the comments and votes by the Advisory Committee.

7. The proposed restyled rules are submitted to the Standing Committee and, if approved, released for public comment..

The Evidence Rules Committee has agreed that the Evidence Rules will be split into three parts, and the process described above will therefore be conducted in three separate stages. The Committee determined that the entire package of restyled rules will be submitted for public comment

at one time. Thus, when this second part of the Rules is approved by the Standing Committee for release for public comment, it will be held until the final part (Rules 801-1103) is approved as well.

B. Ground Rules for Restyling:

The Evidence Rules Committee has approved the following ground rules for restyling:

(1) The Committee will follow Garner's Guidelines. [A copy of Garner's style guidelines has been distributed to each committee member.]

(2) On matters not covered by the Guidelines, the Committee will follow Garner's reference books. [The reporter will keep those books on file.]

(3) The basic rule for the restyling project is that the final word on questions of "style" are for Professor Kimble and the Style Subcommittee of the Standing Committee, while the Evidence Rules Committee can veto a proposed change if it would be "substantive."

(4) A change is "substantive" if:

a. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question); or

c. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement." Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

C. Timeline for the Restyling Project

The Committee has agreed to the following timeline for the restyling project:

December 2007 – Professors Capra and Kimble draft and comment on Group A Rules

January 2008 — Advisory Committee does an initial review of Group A Rules

February 2008 – Standing Style Subcommittee reviews **Group A — Rules 101-415.**

May 1-2, 2008 – Advisory Committee reviews Group A

June 2008 – Standing Committee reviews Group A for publication for comment (but the package is held until the whole is completed).

June 2008 – Professor Kimble completes restyling **Group B — Rules 501-706.**

July 2008 – Professor Capra edits Group B

July 2008 — Advisory Committee does an initial review of Group B Rules

August 2008 – Standing Style Subcommittee reviews Group B

October 2008 – Advisory Committee reviews Group B

December 2008 – Professor Kimble completes editing **Group C — Rules 801-1103**

January 2009 – Standing Committee reviews Group B for publication (but the package is held until the whole is completed).

January 2009 – Professor Capra edits Group C

January 2009 — Advisory Committee does an initial review of Group C rules

February 2009 – Standing Style Subcommittee reviews Group C

April 2009 – Advisory Committee reviews Group C

June 2009 – Standing Committee reviews Group C for publication.

August 2009 – Publication of entire set of restyled rules

January 2010 – Hearings

April 2010 – Advisory Committee approves restyled rules

June 2010 – Standing Committee approves rules

September 2010 – Judicial Conference approves rules

April 2011 – Supreme Court approves rules

December 1, 2011 – Rules take effect

II. Restyled Rules 501-706

What follows is the draft of restyled Rules 501-706, after review and changes by the Style Subcommittee of the Standing Committee. Comments by the Reporter and certain Committee members are included at the bottom of the blacklined version, as are Joe Kimble's responses to those comments. As stated above, a side-by-side version of the restyled Rules 501-706 is in this agenda book, right after this memorandum.

Note that it might be possible that there are one or two discrepancies between the blacklined version and the side-by-side. *If any such discrepancy is found, the side-by-side controls.*

Rule 501 — ~~General Rule~~ Privilege in General

~~Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the~~ The common law — as ~~they may be~~ interpreted by ~~the courts of the~~ United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provide otherwise:

- the United States Constitution;
- a federal statute; or
- other rules prescribed by the Supreme Court under statutory authority [restore "under statutory authority" to 402].

~~However, in civil actions and proceedings,~~ But in a civil case, state law governs if the privilege relates to ~~with respect to an element of~~ a claim or defense ~~as to~~ for which State law supplies the rule of decision; . ~~the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.~~

Comment

Line 4, deletion of "witness, person, government, State," etc. — Professor Saltzburg suggested that the rule could be restyled to cut out all reference to who can invoke the privilege. There would appear to be no need to specify who is making the claim of privilege (person, witness, whatever). The point is that *any* claim of privilege is governed by federal common law. The description of who can invoke is intended to be comprehensive, and any limitation on who can invoke is provided by the common law, not by the rule. The existing version of the rule carries an odd implication that if there is something not specified on the list, the invocation of privilege will not be governed by the common law — that is certainly an anomalous implication that should be fixed.

The Style Subcommittee agreed with and implemented Professor Saltzburg's suggestion.

Line 10 "under statutory authority" — Joe asked whether we could use the language from restyled Rule 402, "other rules prescribed by the Supreme Court." My opinion is that the reference to statutory authority is necessary here because of the special statutory provision governing rules of privilege. Unlike other Supreme Court-prescribed rules that could bear on

the admissibility of relevant evidence, privilege rules must be directly enacted by Congress. So I think there should be some explicit reference to statutory authority in Rule 502.

The Style Subcommittee agreed to retain the reference to statutory authority. Professor Kimble suggested that Rule 402 should include the same language, and the Style Subcommittee agreed with that suggestion. (That language had been dropped from Rule 402 in the restyling). In a separate memo on Rules 101-415, I suggest that the "statutory authority" language be restored in Rule 402. That memo is included in this agenda book.

Line 12, "civil case" — The change from "civil actions and proceedings" to "civil case" is one of those universal questions to which the Committee will have to return once all the rules are restyled. It would seem particularly important to provide the broadest terminology in Rule 501, because privilege rules are applicable to any issue that a federal court could decide. So "cases and proceedings" is probably necessary here.

Judge Ericksen agrees that "cases and proceedings" should be used.

Professor Kimble's Response:

As you'll see from another part of the agenda book, I'm thinking about a few common-sense definitions at the end of the rules. For instance, we could define *civil case* as "a civil action or proceeding."

Rule 601 — ~~General Rule of~~ Competency to Testify in General

Every person is competent to be a witness unless ~~except as otherwise provided in~~ these rules provide otherwise. ~~However, in civil actions and proceedings, with respect to an element of~~ But in a civil case, state law on witness competency governs when the witness's competency relates to a claim or defense ~~as to~~ for which State law supplies the rule of decision.~~, the competency of a witness shall be determined in accordance with State law.~~

Comment

Line 4, reference to "the witness's competency" — The restyling covers a witness's competency that is "related to" a claim or defense governed by state law. But it is not the competency that has to "relate" to the claim or defense. Rather, it is the *testimony* of the witness that has to relate to the claim or defense for the state law on competency to apply. Joe argues that the existing rule doesn't refer to testimony and that the restyling "seems to be an accurate translation of the current rule." But that is not the case because the existing rule does not say that the witness's competency relates to a claim or defense. It says that if state law provides the rule of decision, then the competency of any witness testifying "with respect to an element" of that claim or defense is governed by state law. So the rule ties together state law and testimony, not state law and competency.

I suggest that "the witness's competency" should be changed to "the witness's testimony." So the second sentence of the Rule would look like this:

> But in a civil case, state law on witness competency governs when the witness's testimony ~~competency~~ relates to a claim or defense for which state law provides the rule of decision.

> *Judge Ericksen: I agree that the reporter's alternative is an improvement for the second sentence. I specifically dislike the expression "witness's competency relates to". A lot of witnesses have competency problems unrelated to any claim or defense.*

> *Professor Broun alternative suggestion: But in a civil case in which state law supplies the rule of decision on a claim or defense, state law governs the competency of a witness* ***whose testimony relates to that claim or defense****.*

Rule 602 — ~~Lack of~~ Need for Personal Knowledge

A witness may ~~not~~ testify ~~to~~ on a matter ~~unless~~ only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may~~, but need not,~~ consist of the witness's own testimony. This rule ~~is subject~~ does not apply to ~~the provisions of rule 703 relating to opinion~~ testimony by an expert witnesses under Rule 703.

Comment:

None.

Rule 603 — Oath or Affirmation to Testify Truthfully

Before testifying, ~~every~~ a witness ~~shall be required to~~ must ~~declare that the witness will testify truthfully, by~~ give an oath or affirmation to testify truthfully. The oath or affirmation must be ~~administered~~ in a form ~~calculated to awaken the witness' conscience and~~ designed to impress ~~the witness' mind with the~~ that duty ~~to do so~~ on the witness's conscience.

Comment:

None.

Rule 604 — Interpreters

An interpreter is subject to the ~~provisions of these rules relating to qualification~~ Rule 603 on giving an oath or affirmation to make a true translation and to Rule 702 on qualifying as an expert and ~~the administration of an oath or affirmation to make a true translation~~.

Comment

Line 3, citation to Rule 702 – In the context of interpreters, any citation to Rule 702 should refer only to the standards on qualifications, because nobody wants to, or should have to, do a *Daubert* hearing on an interpreter. The Style Subcommittee has so limited the rule by referring to Rule 702 only insofar as applicable to qualifications.

But it is arguably a problem to refer to Rule 702 at all. One reason is that some interpreters have been qualified who would not satisfy the standards of Rule 702, at least in the ordinary sense. These are the interpreters who can interpret signals and the like from impaired witnesses, because they have taken care of those witnesses and learned to communicate with them. These witnesses are probably lay witnesses and yet courts have permitted them to testify. Joe says that this result "goes beyond the current rule" and maybe so, but it's not the point of restyling to bring doubt to the existing case law. So it may be best to leave the rule as it is — without an explicit reference to Rule 702.

Professor Kimble's response:

> It's poor drafting to refer to *these rules* and not identify which ones, except when you are referring generally to the entire set. I don't believe we do it anywhere else. When I first read 604, I asked myself, "Which rules?" Beyond bad drafting, it seems odd to suggest that we don't want to cite Rule 702 because 604 doesn't always mean what it says, so it's better that readers don't know what *these rules* refers to. Shouldn't we say what we mean?

Reporter's response: **The existing rule does not refer to "these rules" generally, but only to the rules "relating to qualification as an expert, etc." The point is that any change making it more specific threatens to upset the existing case law.**

Line 3, "true" translation. A previous draft referred to the possibility of using the term "accurate" rather than "true". Committee members commented that "accurate" could be a substantive change. The Style Subcommittee dropped the term "accurate."

Rule 605 — ~~Competency of~~ Judge as a Witness

The ~~judge~~ presiding ~~at the trial~~ judge may not [we need to think about *may not* versus *must not*; cf. for instance, three uses of *may not* in 606(a) & (b)(1)] testify ~~in that trial~~ as a witness at the trial. ~~No objection need be made in order to preserve the point.~~ A party need not object to preserve a claim that the judge did so.

Comment:

Bracket line 2-3, "may not/must not": they appear to mean the same thing. While "may" and "must" mean different things, once the "not" is added, don't they both mean "is not permitted to"? Certainly the use of "may not" as a prohibition – the language used in the existing rule – is correct in this context. If this is correct, then the remaining style question is to be consistent in the use of "may not" rather than "must not". Note that there are 10 uses of "may not" in the existing rules, and *no* uses of "must not" in the existing rules — so it would appear that using "may not" provides consistent style and that any addition of "must not" when "may not" will do would be inappropriate stylistically.

For the record, "must not" was added to the caption of Rule 104(c): "Matters that the Jury Must Not Hear" — It would seem to make sense to go back and change it to "May Not" for consistency— again assuming that "must not" and "may not" are interchangeable.

Judge Ericksen and Professor Broun agree that "may not" should be used.

Professor Kimble's Comment:

On *may not* vs. *must not*: Dan is right that, in the negative, *may* and *must* typically come out to the same thing — a prohibition. Once in a while, though, *may not* can be ambiguous: "the defendant may not testify at trial." That probably isn't a prohibition. (Of course, you wouldn't want to write it that way.) So the commentators have generally recommended *must not*. I confess that I have sometimes varied between them, depending on clarity and the context. (I'm happy to leave *may not* here.)

Rule 606 — ~~Competency of~~ Juror as a Witness

(a) At the Trial. A ~~member of the jury~~ juror may not testify as a witness before ~~that jury in the trial of the case in which the juror is sitting~~ the other jurors at the trial. If ~~the~~ a juror is called ~~so~~ to testify, the court must give an ~~opposing~~ adverse party ~~shall be afforded~~ an opportunity to object ~~out of the presence of the jury~~ outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) ***Prohibited Testimony or Other Evidence.*** ~~Upon~~ During an inquiry into the validity of a verdict or indictment, a juror may not testify ~~as to any matter or statement occurring~~ about any statement made or incident that occurred during ~~the course of~~ the jury's deliberations; ~~or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment~~ anything that may have affected the juror or another juror and thus influenced that person's vote; or any ~~concerning the~~ juror's mental processes ~~in connection therewith~~ concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) ***Exceptions.*** ~~But a~~ A juror may testify about ~~(1)~~ whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;; ~~(2) whether~~

(B) any outside influence was improperly brought to bear ~~upon any~~ on a juror; ; or ~~(3) whether~~

(C) ~~there was~~ a mistake was made in entering the verdict ~~into~~ on the verdict form.

~~A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.~~

Comment:

Joe addressed all of the Reporter's and Committee's comments by changing the captions to (b) and (b)(1), and by refining the language "any statement made or incident that occurred" instead of "anything" in (b)(1). The only remaining issue is whether "incident" is coextensive with "matter" — the word used in the original. A possible alternative, to hew closer to the original, is to use "any statement made or matter that occurred." Joe Spaniol thinks that it is awkward to refer to matters as "occurring." .

Rule 607 — Who May Impeach a Witness

~~The credibility of a witness may be attacked by any~~ Any party, including the party ~~calling~~ that called the witness, may attack the witness's credibility.

Comment:

The Style Subcommittee opted for Professor Saltzburg's proposal to use active voice.

Rule 608 — ~~Evidence of Character and Conduct of Witness~~ A Witness's Character for Truthfulness or Untruthfulness

(a) Opinion ~~and~~ or Reputation Evidence ~~of Character~~. ~~The~~ A witness's credibility ~~of a witness~~ may be attacked or supported by evidence in the form of an opinion about — or a reputation for — ; having a character for truthfulness or untruthfulness. ~~but subject to these limitations: (1) the~~ But evidence ~~may refer only to character for truthfulness or un-truthfulness, and (2) evidence~~ of truthful character is admissible only after the witness's character ~~of the witness~~ for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove ~~Specific~~ specific instances of ~~the~~ a witness's conduct, ~~of a witness, for the purpose of attacking or supporting~~ in order to attack or support the witness's character for truthfulness, ~~other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They~~ But the court may, ~~however, in the discretion of the court,~~ on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness~~, be inquired into on cross-examination of the witness~~ of

(1) ~~concerning~~ the witness~~' character for truthfulness or untruthfulness;~~ ;or

(2) ~~concerning the character for truthfulness or untruthfulness of~~ another witness ~~as to which~~ whose character the witness being cross-examined has testified about.

(c) Privilege Against Self-Incrimination. ~~The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against selfincrimination when examined with respect to matters which relate only to character for truthfulness.~~ By testifying about a matter that relates only to a character for truthfulness, a witness does not waive the privilege against self-incrimination.

Comment:

Lines 14 and 18, "on cross-examination" – Use of the term "cross-examination" here continues an inaccuracy in the current rule. In fact witnesses can be attacked on direct. This is because Rule 607 allows parties to call adverse witnesses, in which case direct looks like cross and cross looks like direct. Commentators often observe that the use of "cross-examination" in Rule 608 is not fully accurate as a description of when the rules apply. See 2 Federal Rules of Evidence Manual at 608-21: "A direct examiner who wishes to impeach a witness may ask the witness about specific acts. This result is consistent with Rule 607." Accord 3 Mueller & Kirkpatrick at 153. See also *United States v. Medical Therapy Sciences, Inc.*, 583 F.2d 36 (2d Cir. 1978) (Rule 608, read in light of Rule 607, permits inquiry into bad acts on direct examination). The courts have not read "cross-examination" as a literal

limitation, i.e., they have construed 608 in light of 607, so it could be anticipated that continuing to use the term "cross-examination" in restyled 608 will not be a problem. There is an argument, however, that restyling provides a good and appropriate opportunity to delete the term "on cross-examination". As discussed, the change would not be substantive as courts have already read it out of the rule in light of Rule 607; and it would make Rule 608 more textually accurate.

If the Committee reference to cross-examination is to be deleted in the body of 608(b), then a conforming change is necessary to line 18 (608(b)(2)), which refers to the witness being cross-examined. That could be changed to "another witness whose character the witness being *questioned* has testified about."

So the deletion of the reference to cross-examination would read as follows:

> **But the court may ~~, on cross-examination,~~ allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness * * ***
>
> **(2) another witness whose character the witness being ~~cross-examined~~ <u>questioned</u> has testified about.**

Broun: I am comfortable leaving the term "cross-examination" in this restyling. If the courts have gotten it right before, that is unlikely to change. However, if it is to be changed, I would substitute "on examination of the witness" in lines 13-14 and "examined" for cross examined in line 19.

Meyers: If "cross-examination" is deleted it should be flagged for comment.

Judge Hinkle would delete the references to cross-examination "as inaccurate and contrary to the way the current rule has been interpreted."

Judge Ericksen would delete the references to cross-examination and flag the change in the comment.

Line 19-20, 608(c) – Accused/witness: The restyled version takes out the specific reference to the accused that is in the existing rule. The reasoning is that the accused gets no protection from the rule unless he is a witness. Thus, "accused" is a subset of "witness" in this context and so appears to be repetitive. I could not find anything in the case law that treated the accused differently from other witnesses for purposes of waiver of the 5th Amendment privilege. Apparently "accused" was added for emphasis, i.e., that even the defendant in a

criminal case does not waive the privilege when testifying to matters that relate only to character for truthfulness. In response to comments from some Committee members, Joe included the reference to the accused as a bracketed alternative in the draft sent to the Style Subcommittee. But the Style Subcommittee did not adopt that bracketed alternative. There is a strong argument that the special emphasis on the accused is unnecessary and will only lead to confusion in analogous situations in which the emphasis is not provided.

Meyers: I would retain "accused" for emphasis. By taking the stand the accused does waive some of his Fifth Amendment protection. Obviously, he can be cross-examined on matters raised by his direct testimony. Deleting the word "accused" might lead to an argument that the accused is special and not just a subset of the category of witnesses.

Judge Ericksen and Professor Broun agree with Meyers.

Professor Kimble's comment:

In (c), I disagree with the suggestion to include any reference to *an accused*. So does Dan. An accused who testifies is a witness. The argument that something should be retained "for emphasis" has no end, and we should be wary about starting down that road. If you include the emphasis here, you create negative implications for every other time that you use *a witness* by itself. What's more, we are not using the term *accused*. So we are back to the choice between *criminal defendant*, *defendant in the criminal case*, and *criminal-case defendant*. Any of those is clumsy here.

Rule 609. Impeachment by Evidence of a Criminal Conviction ~~of Crime~~

(a) In General ~~rule~~. ~~For the purpose of~~ The following rules apply to attacking ~~the~~ a witness's character for truthfulness ~~of a witness,~~ by evidence of a criminal conviction:

(1) ~~evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the~~ for a crime that was punishable by death or by imprisonment ~~in excess of~~ for more than one year ~~under the law under which the witness was convicted~~, the evidence:

(A) must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and

(B) ~~and evidence that an accused has been convicted of such a crime shall~~ must be admitted if the witness is a defendant in a criminal case and the court determines that the probative value of ~~admitting this~~ the evidence outweighs its prejudicial effect ~~to the accused~~; and

(2) ~~evidence that any witness has been convicted of a crime shall~~ for any crime regardless of the punishment, the evidence must be admitted ~~regardless of the punishment, if it readily can be determined~~ if the court can readily determine that establishing the elements of the crime required ~~proof or admission of an act of dishonesty or false statement by the witness~~ proving — or the witness's admitting — a dishonest act or false statement.

.

(b) ~~Time limit~~ Limit on Using the Evidence After 10 Years. ~~Evidence of a conviction under this rule is not admissible~~ This subdivision (b) applies if ~~a period of~~ more than ~~ten~~ 10 years ~~has elapsed~~ have passed since the ~~date of the~~ conviction or ~~of~~ the witness's release ~~of the witness~~ from ~~the~~ confinement ~~imposed for that~~ for the conviction, whichever is ~~the later date,~~ later. Evidence of the conviction is admissible [need to check *is/is not admissible* elsewhere; do we ever use the court may/may not admit?] ~~unless~~ only if the court determines ~~, in the interests of justice,~~ that ~~the~~ its probative value, ~~of the conviction~~ supported by specific facts and circumstances substantially outweighs its prejudicial effect. ~~However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless~~ But before offering the evidence, the proponent ~~gives to the~~ must give an adverse party ~~sufficient advance written~~ reasonable written notice, in any form, of the intent to use ~~such evidence to provide the adverse~~ it so that the party ~~with~~ has a fair opportunity to contest ~~the~~ its use ~~of such evidence~~.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible ~~under this rule~~ if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding ~~of the rehabilitation~~

~~of the person convicted~~ that the person has been rehabilitated, and ~~that~~ the person has not been convicted of a ~~subsequent~~ later crime ~~that was~~ punishable by death or by imprisonment ~~in excess of~~ for more than one year~~;~~ ; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudications is ~~generally not~~ admissible ~~under this rule. The court may, however, in~~ only if:

(1) the case is a criminal case;

(2) the ~~allow evidence of a juvenile~~ adjudication was of a witness other than the ~~accused~~ defendant;

(3) ~~if~~ a conviction ~~of the~~ for that offense would be admissible to attack ~~the~~ an adult's credibility ~~of an adult~~ ; and

(4) ~~the court is satisfied that~~admission in admitting the evidence is necessary ~~for a fair determination of the issue of~~ to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction [or adjudication?] that satisfies this rule is admissible even if an appeal is pending. ~~The pendency of an appeal therefrom does not render evidence of a conviction inadmissible.~~ Evidence of the pendency ~~of an appeal~~ is also admissible.

Comment:

Lines 6-7 page 1, deletion of reference to the law under which the witness was convicted — this is a choice of law provision and while it would seem to make an obvious point, it can be argued that it signals a substantive change. For example, a minor drug offense might be a felony under federal law and a misdemeanor under state law. This provision tells the court to look to state law if the witness was convicted in state court. Of course a court will probably do that anyway in the absence of the language, but it doesn't seem to be within the jurisdiction of restyling to cut out language on a substantive point simply because a court will probably act in the same way if the language weren't there. So it can be argued that the choice of law language should be retained. Moreover, it is not unreasonable to think that a federal court, without the constraining language, would treat as a felony a state conviction that would be a felony under federal law. The court may well reason that the conviction was for a serious act and so should be useable for impeachment.

Professor Kimble's Comment:

> In talking about the punishment for the crime in (a)(1), I don't think we need to include *under the law under which the witness was convicted*. In previous restylings, we tried to avoid stating the obvious, and we tried not to be concerned about what one judge called "wildly improbable interpretations." Of course we're talking about where the conviction occurred. At the time of the conviction, the crime was "punishable" only according to the law of that jurisdiction. If the rule had meant anything else, it presumably would have said something like *punishable in that state or in federal court*. Finally, note that adding *under the law under which the witness was convicted* would seriously gum up the drafting of (a)(1).

Response by Reporter:

> **It doesn't seem "wildly improbable" for a federal court to say, "if it's a felony under federal law, why shouldn't I treat it as such for purposes of impeachment in federal court?" The fact that using the reference to the law under which the witness was convicted would "gum up the drafting" is unfortunate. But you can't get rid of something just because the language is difficult.**

Line 24, change from "for that conviction" to "for the conviction" — The change from "that" to "the" might seem trivial, but a recent Ninth Circuit opinion suggests that the change might be substantive. The case is *Simpson v. Thomas*, 528 F.3d 685 (9th cir. 2008). One question in the case was whether an inmate's convictions were covered by 609(b) or 609(a). The convictions were more than 10 years old, but the question was whether they were covered by Rule 609(b) "if those prior convictions are used to enhance a sentence for a separate conviction that falls within the ten-year time limit" --- does enhancing a new sentence take these convictions out of the "old conviction" rule?

The court held that 609(b) applied to the old convictions even if they were used to enhance a new conviction. In doing so, it relied on the language of existing Rule 609(b):

> **Furthermore, the plain language of 609(b) excludes evidence of a conviction if it has been more than ten years 'since the date of the conviction or the release of the witness from the confinement imposed *for that conviction*. We see no reason to construe this language to mean anything other than exactly what it says. (Emphasis in original).**

The restyling changes the language emphasized by the *Simpson* court. The pertinent passage now reads "more than 10 years have passed since the conviction or the witness's release of confinement for the conviction."

Of course the responsive argument (which Joe made when consulted on this question) is that "the" means "that" in context. But query why it is necessary to have to make that argument. Given a recent circuit court opinion on the subject, wouldn't it be less disruptive to retain the word "that"?

Line 25, subdivision (b) bracketed question, do we ever use the court may/may not admit? I'm not sure why the question is asked. But there is one other use of "may not be admitted unless" in the Rules — Rule 807, which states that residual hearsay may not be admitted unless the proponent provides notice. The rules use "is/is not admissible" in a number of rules, including 492, 404, and 610, all as restyled. It makes sense to use "is admissible only if" in Rule 609(b) to emphasize that old convictions are only to be admitted under very narrow circumstances.

Rule 609(d), line 6, deletion of "under this rule": It could be argued that taking out the language "under this rule" means that the presumptive exclusion could also apply to using juvenile adjudications to impeach for purposes such as bias. Rule 609(d) applies only to impeaching a witness's character for untruthfulness. The response to any concern that the restyling extends the reach of Rule 609(d) is that the preamble to Rule 609 explicitly limits its coverage to impeaching a witness's character for truthfulness. But the rejoinder is that this is a long rule, and it might make sense to clarify, in Rule 609(d), the limited scope of the rule.

I note that Mueller and Kirkpatrick make much of the "under this rule" limitation in Rule 609(d):

> FRE 609(d) bars only the use of juvenile adjudications to impeach "under this rule," which means that it only applies to juvenile adjudications offered to show the witness is by disposition untruthful. It does not speak to the use of adjudications to impeach a witness who testifies that he has never been in trouble, where an adjudication impeaches by contradiction and may be admitted for this purpose. Nor does FRE 609(d) bar the use of juvenile adjudications to prove prior conduct for substantive purposes, such as showing intent or knowledge under Rule 404(b).

Professor Kimble's comment:

> On deleting *under this rule* in (d): the whole rule is, as Dan points out, about impeaching a witness's character for truthfulness by a conviction. In (b), we use *the conviction*, obviously referring back to

the conviction we were talking about in (a). And we drop *under this rule*. Same thing in (c). In (d), we shift from *conviction* to *adjudication*, but there is no more reason for including *under this rule* in (d) than in (b) and (c). Surely, (d) — like (b) and (c) — need to be understood within the confines of 609(a).

Subdivision (e), Line 15, page 2, bracketed material "or adjudication" —

The Style Subcommittee's footnote on this bracketed reference is as follows:

Was the omission of any mention of a juvenile "adjudication" in rule 609(e), even though juvenile adjudications are addressed at length in rule 609(d), a deliberate drafting choice or merely an inadvertent omission? If it was the latter, the style subcommittee may consider whether to add a reference to an "adjudication" in rule 609(e).

This is the Reporter's response:

The Advisory Committee Note to Rules 609(d) and (e) do not indicate that any particular thought was given to the topic of juvenile adjudications that are on appeal. Nor does any of the supporting documentation give any indication of why juvenile adjudications are not specified in subdivision (e).

I have not been able to find a case in which the issue was raised — which is not surprising, because it is an exceedingly narrow question, for the following reasons: 1. Most juvenile adjudications are not admissible in the first place, under the terms of Rule 609(d) — the impeachment must occur in a criminal case, with someone other than the defendant being impeached, and the court has to find that the juvenile adjudication is necessary to determine guilt or innocence; 2. I don't have statistics, but I would think that relatively few juvenile adjudications are appealed; and 3. Such a rare appeal would have to be pending at the time of the trial in which the witness is testifying.

It could be argued that the issue of impeachment with juvenile adjudications on appeal is so narrow that it is better off left alone. But if it is to be treated, it must be done subject to two conditions:

1) juvenile adjudications would have to be added not only to subdivision (e), but also to subdivision (c) — because juvenile adjudications, like convictions, can be the subject of pardon, annulment, etc

2) the bracketed term in the restyling — "adjudication" — is insufficient. It must be "juvenile adjudication" because the general term "adjudication" would be overbroad and confusing.

Rule 610. Religious Beliefs or Opinions

Evidence of ~~the~~ a witness's religious beliefs or opinions ~~of a witness on matters of religion~~ is not admissible ~~for the purpose of showing that by reason of their nature~~ to attack or support the witness's credibility ~~is impaired or enhanced~~.

Comment:

Joe implemented the Advisory Committee members' style suggestion to frame the rule in terms of "attack or support."

Rule 611 — Mode and Order of ~~Interrogation and Presentation~~ Questioning Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court ~~shall~~ should exercise reasonable control over the mode and order of ~~interrogating~~ questioning witnesses and presenting evidence so as to:

(1) make ~~the interrogation and presentation~~ those procedures effective for ~~the ascertainment of~~ determining the truth; ;

(2) avoid ~~needless consumption of~~ wasting time; ; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. ~~Cross-examination should be limited~~ The court should limit cross-examination to the subject matter of the direct examination and matters affecting ~~the~~ a witness's credibility ~~of the witness~~. The court may ~~, in the exercise of discretion,~~ permit inquiry into additional matters as if on direct examination.

(c) Leading questions. ~~Leading questions should not be used on the direct examination of a witness except as may be~~ The court should permit leading questions on direct examination only if necessary to develop the witness's testimony. Ordinarily, the court should permit leading questions ~~should be permitted~~ on cross-examination. ~~When~~ And the court must permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party; ~~interrogation may be by leading questions~~.

Comment:

Line 3, "shall/should exercise" — The rule is often cited as providing a font of authority for courts to deal with anything that might come up at a trial concerning the presentation of evidence, including allowing rebuttal, altering the order of proof, regulating summary charts, and on and on. Rule 611(a) is a reservoir of judicial discretion, meaning that "must" does not fit. "Should" seems a little more mandatory (or encouraging) than "may" and given the way this rule is used, it could be argued that "may" is more appropriate.

Broun agrees with "may."

Meyers: I suggest "should." Hurwitz opts for "should."

Professor Kimble's response:

On the choice between *should* and *may* in (a): I have always said that the choice between *must*, *should*, and *may* is ultimately a substantive call. But note that the current rule uses *shall*, and *should* is closer to that than *may* is.

Line 9/10, "The court should limit" : The rule is intended to direct the parties to avoid asking questions outside the scope of the direct. Of course, the court is involved in enforcing the rule, but it is in the first instance a direction to the parties. So the original iteration — "should not be used" appears to be more substantively accurate than "the court should limit."

Lines 14 - 15, "the court should permit": The restyling changes the focus totally to what the court will do rather than what the parties are supposed to do. Getting rid of passive voice is not justified if it comes at the cost of changing the focus of the rule.

Professor Kimble's response:

The Style Subcommittee decided to shift from the passive voice to the active in the first sentence of (b) and (c). Dan says that this changes the focus. But even if that's true, would it change anything as a practical matter? Also, the first sentence of current (b) uses the phrase *should be limited*. Who should limit? Couldn't that sentence be directed to the court as well as the parties? Finally, to the extent that the focus does shift back and forth, I think it's jarring to the reader.

Line 16, "the court must permit" — the existing rule states that when a party calls a hostile witness, interrogation "may be by leading questions." The restyling changes a "may" to a "must." This would appear to be a substantive change. Mueller & Kirkpatrick, at page 841, have this to say about the use of "may" in the existing rule:

> The third sentence of FRE 611(c) also suggests that leading hostile witnesses is a matter over which the court has discretion (the verb form "may be" suggests as much). With respect to adverse parties and people identified with them it would be a rare case in which leading would be objectionable. But a measure of discretion is essential in determining whether a witness is "hostile" and sometimes in determining whether a person is identified with an adverse party.

Admittedly, the restyled rule does not absolutely prevent discretion in determining whether

a witness is hostile. But it does sound a lot more mandatory than the existing rule.

Moreover, there is some case law providing that a court has discretion to prohibit leading questions even when the witness is found hostile or adverse. For example, in *Rodriguez v. Banco Cent.* 990 F.2d 7 (1st Cir. 1993), the court found no error when the trial court precluded the plaintiffs from using leading questions to examine certain defendants. The court observed that Rule 611(c) "generally permits leading questions to be asked of an adverse party"; but such questions would properly be disallowed, for example, it they would tend to distort the witness's testimony.

In sum, using the word "must" appears to be a substantive change.

Professor Kimble's response:

> In (c), the current last sentence says *may be by leading questions*. Another passive-voice troublemaker. If that sentence is directed to the parties, then those parties *may* use leading questions. In other words, they must be permitted. That seems to be a faithful translation of the current rule. What's more, if we use *may* in the third sentence, then how do we make a contrast with the second sentence? In the current rule, isn't the third sentence meant to allow for freer use of leading questions? If we go from the court *should* to the court *may*, we seem to be moving in the opposite direction.

Reporter's Response: **"Must" is mandatory. The case law gives trial courts discretion to prohibit leading questions of hostile witnesses. So "must" permit is inconsistent with the case law. To Joe's point about distinguishing between the second and third sentences, perhaps the solution is to combine them. Or you could make the third sentence a "should" rather than a "may".**

Rule 612 — Writing Used To Refresh a Witness's Memory

(a) General Application. This rule gives an adverse party certain options when a witness uses any form of a writing 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~~ decides that justice requires a party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence ~~those~~ any portions ~~which~~ that relates to the witness's testimony ~~of the witness~~. If ~~it is claimed~~ the producing party claims that the writing ~~contains matters not related to the subject~~ includes unrelated matter, ~~of the testimony~~ the court ~~shall~~ must examine the writing in camera, ~~excise~~ delete any unrelated portions ~~not so related~~, and order ~~delivery of the remainder to the party entitled thereto~~ that the rest be delivered to the adverse party. Any portion ~~withheld~~ deleted over objections ~~shall~~ must be preserved ~~and made available to the appellate court in the event of an appeal~~ for the record.

(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered ~~pursuant to order under this rule~~ as ordered, the court ~~shall make any order justice requires, except that~~ may issue any appropriate order. But if the prosecution does not comply in a criminal case~~s~~, ~~when the prosecution elects not to comply, the order shall be one striking~~ the court must strike the witness's testimony or~~, if the court in its discretion determines that the interests of~~ — if justice so requires~~;~~ — ~~declaring~~ declare a mistrial.

Comment:

Lines 15-16, "unrelated matter" — that is a nice and compact phrase. Query though whether it means the same thing as "matters not related to the subject matter of the testimony". "Unrelated matter" is not specifically tied into the testimony of the witness, so it is possible that this changes the rule to make it less protective. That is, a portion of the writing may be related to some part of the case, but not to the testimony of the witness, and so it would not be unrelated matter that could be redacted under the restyled rule, whereas it would be

matter that would be redacted under the original rule. So I suggest retaining the language "matter unrelated to the testimony." Joe provided that language as a bracketed alternative, but the Style Subcommittee rejected it.

Professor Kimble's response:

> Here again, in (b), the Style Subcommittee thought it highly improbable that *unrelated matter* would be interpreted to mean unrelated to anything other than the witness's testimony. Note the end of the previous sentence — *relates to the witness's testimony*. Then, in the span of half a sentence, we go from *relates to* to *unrelated*. Positive and negative. Related to and unrelated to. Unrelated to what? The witness's testimony.

Subdivisions b and c, passim, "the writing": The preamble refers to "any form of a writing", which is of course appropriate, because a major reason for restyling is to provide for electronic evidence. But in subdivisions b and c, the references are to a "writing" without the proviso "in any form." Joe states that the use of "any form" at the beginning carries on throughout the rule, and I defer to him on that.

Subdivision b, style observation — Subdivision b deals with two separate topics, use by the adverse party and deleting unrelated material. Should it be divided further into two separate subdivisions?

Meyers, line 21: An important word like "justice" should not be deleted. It is retained in the second sentence, but also needs to be in the first.

Professor Kimble's response to Meyers' suggestion re deletion of "justice":

> On deleting *justice* in the first sentence of (c): yes, *justice* is an important word — in the abstract. In the civil rules, we tended to delete all the variations on issuing an order — *may issue an order appropriate in the circumstances, may issue an order if justice would be served thereby, may issue any appropriate order that justice requires*. To be appropriate, the order certainly must be just. Are there other places in the evidence rules that refer to issuing an order? Are we going to use some kind of *justice*-formulation in those instances? I think the

reference to *justice* in (a)(2) and the last sentence of (c) is more appropriate because they deal with exceptions.

Judge Hinkle notes a universal issue — the rule, in subdivision (c), refers to "the prosecution." **Note that the term "prosecution" is also used in Rules 404 and 412 (both in original and as restyled), as well as Rules 803(22) and 804(b)(2).**

Rule 613 — Witness's Prior Statements ~~of Witnesses~~

(a) ~~Examining witness concerning prior statement~~ Showing or Disclosing the Statement During Questioning. ~~In examining~~ When questioning a witness ~~concerning a~~ about the witness's prior statement ~~made by the witness, whether written or not,~~ the ~~statement~~ party need not ~~be shown nor~~ show it or disclose its contents ~~disclosed~~ to the witness. ~~at that time, but~~ But the party must, on request, ~~the same shall be shown or disclosed to opposing counsel~~ show it or disclose its contents to an adverse party.

(b) Extrinsic Evidence of a Prior Inconsistent Statement ~~of witness~~. Extrinsic evidence of a witness's prior inconsistent statement ~~by a witness~~ is ~~not~~ admissible ~~unless~~ only if justice so requires or if the witness is ~~afforded~~ given an opportunity to explain or deny the ~~same~~ statement and ~~the opposite~~ an adverse party [Judge Hinkle thinks it should be "adverse in (a) but not in (b); might require research?] is ~~afforded~~ given an opportunity to ~~interrogate~~ question the witness ~~thereon~~ about it, ~~or the interests of justice otherwise require~~. This ~~provision~~ subdivision (b) does not apply to a party opponent's admission ~~admissions of a party-opponent as defined in~~ under Rule 801(d)(2).

Comment:

Joe changed "opposing party" to "adverse party", and "attorney" to "party" in various places in the rule, in response to suggestions from the Committee.

Line 10, admissible "only if" — The restyling changes the rule from "not admissible unless" to "admissible only if". Do they mean the same thing? "Admissible only if" implies that the *only* condition of admissibility is that the witness is allowed an opportunity to confront the statement [or justice so requires, which the courts have applied mainly in cases where the inconsistent statement is discovered only after the witness testifies and can't be produced]. But presentation to the witness is not the only condition of admissibility of a prior inconsistent statement. Most importantly, the statement must satisfy the balancing test of Rule 403. The existing rule does not appear to so clearly raise the implication that presentation is the only condition to admission: "not admissible unless" sounds like it sets forth one condition, and there may be others. So this arguably is a substantive change.

Professor Kimble responds:

On the use of *only if* in (b): there's no semantic difference between *is not admissible unless* and *is admissible only if.* Take an example (now

outdated): "The Tigers will not win the pennant unless they catch the Twins" and "The Tigers will win the pennant only if they catch the Twins." Does one suggest more than the other that that's all the Tigers have to do? The Tigers also have to catch the White Sox. Does one convey that more strongly than the other? I don't think so. I think we are just too used to multiple negatives in legal drafting. It would be different if we used the phrase *if and only if.* What's more, in the context of the restyling and the consistent conversion of multiple negatives, I'm pretty sure that people will not consider this a substantive change.

Rule 614 — Court's Calling ~~and Interrogation~~ or Questioning a Witness ~~of Witnesses by Court~~

(a) Calling ~~by court~~. The court may~~,~~ call a witness on its own ~~motion~~ or at ~~the~~ a party's suggestion. ~~of a party, call witnesses, and all parties are~~ Each party is entitled to cross-examine the witness~~es thus called~~.

(b) ~~Interrogation by court~~ Questioning. The court may ~~interrogate witnesses, whether called by itself or by a party~~ question a witness regardless of who calls the witness.

(c) Objections. ~~Objections~~ A party may object to the court's calling or questioning a witness ~~of witnesses by the court or to interrogation by it may be made~~ either at ~~the~~ that time or at the next ~~available~~ opportunity when the jury is not present

Comment

Joe implemented the suggestion of Committee members to return to the "opportunity" language in the existing subdivision (c).

Rule 615 — ~~Exclusion of~~ Excluding Witnesses

At ~~the~~ a party's request, ~~of a party~~ the court ~~shall~~ must order witnesses excluded so that they cannot hear ~~the testimony of~~ other witnesses' testimony. ~~, and it may make the order of its own motion.~~ Or the court may do so on its own. ~~This~~ But this rule does not authorize ~~exclusion of~~ excluding:

~~(1)~~ **(a)** a party who is a natural person;~~, or~~

~~(2)~~ **(b)** an officer or employee of a party ~~which~~ that is not a natural person, after being designated as ~~its~~ the party's representative by its attorney; ~~, or~~

~~(3)~~ **(c)** a person whose presence ~~is shown by~~ a party shows to be essential to presenting the ~~presentation of the~~ party's ~~cause~~, claim or defense; or

~~(4)~~ **(d)** a person authorized by statute to be present.

Reporter Comment:

None.

Rule 701. Opinion Testimony by Lay Witnesses

If ~~the~~ a witness is not testifying as an expert, ~~the witness'~~ testimony in the form of an opinions ~~or inferences~~ is limited to ~~those opinions or inferences which are~~ one that is:

(a) rationally based on the ~~perception of the~~ witness's perception;~~,~~ ~~and~~

(b) helpful to ~~a clear~~ clearly understanding ~~of~~ the witness's testimony or ~~the determination of~~ to determining a fact in issue~~,~~; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment:

Title and throughout Article VII — opinions and inferences: The basic question is whether an "inference" is different from an "opinion" so that both have to be mentioned throughout. Rules 701-704 do not take a consistent approach, sometimes using "opinion or inference" and sometimes just "opinion." The restyling effort provides the opportunity to be consistent.

Ken Broun did some research and concludes that "inference" adds nothing to "opinion" and so should be dropped. Here is his statement:

> Both my research assistant and I took a look at the "inference" and "opinion" language of 701 and 703. Every case and writer I could find used the terms synonymously. Example: *Teen-Ed, Inc. v. Kimball Intern. Inc.*, 620 F.2d 399 (3d Cir. 1980) ("The personal knowledge of appellant's balance sheets . . . was clearly sufficient . . . to qualify him as a witness eligible under Rule 701 to testify to his opinion of how lost profits could be calculated and to inferences that he could draw from his perception of Teen-Ed's books.") Blacks Legal Dictionary defines an inference as "A conclusion reached by considering other facts and deducing a logical consequence from them." Black's defines opinion as "A person's thought, belief, or inference, especially a witness's view about facts in dispute, as to opposed to personal knowledge of the the facts themselves." I ordinarily don't cite Blacks, but I couldn't find anything else. I think we did a pretty thorough search of the logical places where a court would have distinguished between the two things and really found nothing. The courts almost always say "opinions or inferences" in referring to the language of Rules 701 or 703. I think we can safely eliminate the terms from both Rules (as well as 704). * * * Another case is *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1206, n. 22 (3d

Cir. 1995) "Lasere's bases for his opinion were . . . the reasonable inference that this design had a tendency to cause punctures of the tanks in roll-over accidents." The court in both these cases [*Teen-Ed* and *Asplundh*] uses inferences as the basis for opinion. But how could there be testimony about an inference without an opinon? When could it make a difference in terms of the application of Rules 701, 703 or 704? I admit that we are all used to seeing the two-word phrase and probably agree that opinions are based on inferences. But so what?

I also asked for an opinion from Professor Laird Kirkpatrick. Here was his response:

In examining the issue, I note that FRE 701, 703, 704 and 705 speak of "opinions or inferences," whereas FRE 702 doesn't mention "inferences" and instead says that the expert may testify "in the form of an opinion or otherwise." Also noteworthy is the last sentence to FRE 703 (the new amendment that was adopted when I was on the committee). Arguably it contains an inconsistency. The first part of the sentence speaks of "the opinion or inference" whereas the last part says the underlying data is not admissible "unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion [no mention of inference] substantially outweighs their prejudicial effect." So this sentence seems to assume that an opinion includes an inference, unless there was an intent to exclude inferences from the last sentence which I don't think is the case.

Another interesting issue to consider--is there an inconsistency between the FRE and the FRCivP? FRCivP 26(a)(2) requires advance disclosure of all "opinions" that are to be expressed by an expert witness but does not require disclosure of "inferences." This suggests that the Civil Rules also assume (like the last sentence of FRE 703), that opinions include inferences.

In the case of experts, I think that is the general assumption made in the case law (that opinions include inferences), and I can't recall seeing any cases that draw a distinction between the two terms. In the case of lay opinion, though, I can see more of a basis for a distinction. Let me give a couple of examples. First, assume a witness who heard cars crash but didn't actually see the collision. If he is asked when the collision occurred, and he says 10 p.m., he is drawing the inference that the collision occurred at the time he heard the noise of clanging metal. Technically this is his opinion (that the noise resulted from the collision) but in common parlance we would tend to think of this as a justifiable inference. Another example--if a witness describes a person accused of robbing a bank as seeming "nervous" while standing in the customer line before the robbery "fidgeting, and looking around." again we would probably characterize what the witness said about the defendant seeming "nervous" as a legitimate inference under the collective facts doctrine, even though it is also opinion. So my guess is that the drafters included the reference to inferences in the FRE to cover those more informal inferential conclusions of witnesses, particularly lay witnesses, that we wouldn't normally describe as "opinions." Although probably it wouldn't result in a substantive change, I'd be a little more uncomfortable taking the reference to inferences out of FRE 701 than out of the rules dealing with expert testimony (although maybe it could all

be clarified by an ACN explaining the change).

So, both Ken and Laird conclude that any reference to inferences in any rule covering *expert* opinions is unnecessary. Laird expresses a bit of a doubt about deleting "inference" as applied to lay witnesses. But the examples he gives of a distinction are about "common parlance" and not about how a court construes the Federal Rules of Evidence. The bottom line is that in his examples, as he admits, the witness is expressing an opinion, even if it could *also* be called an inference. An inference is an opinion. [Inferences are drawn by the *jury* but those inferences are obviously not covered by Article VII.] And Laird's point about the inconsistency between the Evidence Rules and the Civil Rules is an important one. (He could also have included an inconsistency with the Criminal Rules, because Rule 16 speaks only of opinions and not of inferences).

So there is a strong argument that the Committee can delete *all* of the reference to inferences in Article VII— it will not be a substantive change and will be a definite stylistic improvement. [Note that there is a downside in deleting inferences only when experts are involved and retaining inferences as to lay witnesses — it will be taken as some grand determination that there is a major difference when in fact there is not.]

If inferences are deleted, the Committee may wish to highlight the change in seeking public comment, and it could also be explained in the Committee Note.

The Style Subcommittee has deleted all of the references to an "inference" in Article VII.

Meyers on opinion/inference: I would retain "inference" only with respect to lay witnesses. Experts give opinions that include inferences. Lay people sometimes give opinions (e.g. character) but also offer inferences, often on the basis of circumstantial evidence. Professor Kirkpatrick gave a good example of this. Fed. R. Crim. P. 16 only mentions "opinions," but it also only covers experts.

Judge Huff on the opinion/inference question:

> *I agree with Professors Capra and Broun that the inclusion of "inference" is unnecessary because it adds nothing to "opinion." Professor Kirkpatrick concludes that while an expert's opinion includes inferences, a lay witness may make inferences based on circumstantial evidence. However, I think there is no substantive change in deleting "inference" throughout, and doing so would improve consistency. Including "inference" only for a lay witness could lead to the incorrect conclusion that there is a major difference between the two. I would delete it throughout.*

Rule 702 — Testimony by Experts Witnesses

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

(a) the expert's scientific, technical, or other specialized knowledge will help [cf. 701(b)] the trier of fact to understand the evidence or to determine a fact in issue;

~~(1)~~ (b) the testimony is based ~~upon~~ on sufficient facts or data~~,~~ ;

~~(2)~~ (c) the testimony is the product of reliable principles and methods~~,~~ ; and

~~(3)~~ (d) the witness has reliably applied the principles and methods ~~reliably~~ to the facts of the case.

Comment

In response to comments from the Advisory Committee, the introductory sentence has been fixed to make clear that qualification is an admissibility requirement.

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

~~The facts or data in the particular case upon which an expert bases~~ An expert may base an opinion ~~or inference~~ on facts or data in the case that the expert has been made aware of or personally observed ~~may be those perceived by or made known to the expert at or before the hearing~~. If ~~of a type reasonably relied upon by~~ experts in ~~the particular field in forming opinions or inferences upon the subject~~, that same field would reasonably rely on ~~the~~ those kinds of facts or data in forming an opinion on the subject, they need not be admissible ~~in evidence in order~~ for the opinion ~~or inference~~ to be admitted. ~~Facts~~ But if the facts or data ~~that are~~ would otherwise be inadmissible, ~~shall not be disclosed to the jury by~~ the proponent of the opinion ~~or inference~~ may disclose them to the jury only if ~~unless~~ the court determines that their probative value in ~~assisting~~ helping the jury ~~to~~ evaluate the ~~expert's~~ opinion substantially outweighs their prejudicial effect.

Comment

Lines 6 "that same field" — the existing rule sets the reasonable reliance factor in "the particular field in forming opinions or inferences on the subject." The reason for the "particular field" language is that there will often be a question of which set of experts to consult for purposes of reasonable reliance. Judge Becker dealt with this question at length in the Japanese Products Case. There may well be argument among the parties, where one argues that experts in "his field" rely on this information but the adversary notes that the relevant field of expertise is not the one cited by the expert but rather some other field. So taking out the "particular field" language might be chancy. Joe's solution is to use the "same" field. I fear, though, that this change might raise a lot of arguments about whether one field is the "same" as another, especially when it comes to specialization. Given all the case law, and the risk of upsetting things, I would suggest a return to "particular".

Broun: I agree with Dan's comments – this is too delicate an area in which to use vague phrases.

Professor Kimble's response:

In the second sentence, doesn't *that same field* mean "that same field as the expert's"? And doesn't *the particular field* in the current rule mean "the expert's particular field"? I don't see the difference.

Reporter's response: **If it's all the same, why not use "particular" instead of "same"?**

Why use a different but essentially no better word when it will just raise arguments?

Line 9, "to the jury" — The Style Subcommittee's footnote on this language states as follows:

> *The Style Subcommittee asks whether the inclusion of the words "to the jury" could have any negative or unintended applications in a bench trial without a jury. If not, the style subcommittee chooses to include the words "to the jury."*

Reporter's response to the footnote:

This sentence of the rule being restyled was added in 2000 in order to end an abusive practice — a party could, before the rule change, call an expert to act as a conduit for otherwise inadmissible hearsay. The abuse was that a party could get the hearsay in by feeding it to an expert and then have the expert disclose the hearsay ostensibly as part of the basis of the expert's testimony. The Advisory Committee's concern was that *the jury* would misuse the hearsay for its truth. The Advisory Committee was not concerned about bench trials, because it figured that a judge would be able to use the hearsay properly — i.e., only for its bearing on the expert's testimony — and not for its truth. So the words "to the jury" were intentionally and carefully chosen. (I can personally attest to the careful consideration of "to the jury" because I am the one that proposed the amendment to the Committee, and I drafted the text and Committee Note.)

Another point of differentiation between bench and jury trials is that in most cases the trial judge will have already heard the hearsay at the *Daubert* hearing — as the basis for the expert's testimony. It would make little sense to provide that the hearsay could not then be disclosed to the judge at trial — that bell has already rung.

In sum, the reference "to the jury" does not have any negative or unintended consequences, and its retention is necessary to avoid a substantive change.

Rule 704 — Opinion on an Ultimate Issue

(a) Admissibility in General . ~~Except as provided in subdivision (b), testimony in the form of an~~ An opinion ~~or inference otherwise admissible~~ is not objectionable just because it embraces an ultimate issue ~~to be decided by the trier of fact~~.

(b) Exception. In a criminal case, ~~No~~ an expert witness ~~testifying with respect to the mental state or condition of a defendant in a criminal case may~~ must not state an opinion ~~or inference as~~ to about whether the defendant did or did not have ~~the~~ a mental state or condition ~~constituting~~ that constitutes an element of the crime charged or of a defense ~~thereto~~. ~~Such ultimate issues are matters for the trier of fact alone.~~

Comment:

Subdivision (a) Title: "Admissibility in General" is an inaccurate description of the text. The text is intended to abrogate the common law rule that opinion testimony on an ultimate issue is per se barred. The rule does not say that such testimony is admissible. Rule 704 is not a rule that admits evidence: admissibility is determined by the helpfulness standards of Rules 702 and 701. It simply says that the testimony is not automatically inadmissible. So it would appear that a different title is needed. A more accurate title would be something like "No Automatic Exclusion". Then subdivision (b) is accurately titled, because it is an exception to that principle, i.e., exclusion is automatic under 704(b).

Meyers agrees that the title is inaccurate.

Professor Kimble's response:

On the heading to (a): I think Dan is cutting it too fine. The heading doesn't say that the opinion is admissible; it simply says that the rule deals with admissibility. Remember that we need a heading that works with the heading to (b). Dan's suggested *No Automatic Exclusion* does not work well with (b). Remember, too, that headings are not the substantive rule.

Line 4, deletion of "to be decided by the trier of fact": Judge Hinkle and others suggested deleting the reference to "trier of fact" because ultimate issues are by definition for

the trier of fact, so there is no reason to refer to the trier of fact in the rule. The Style Subcommittee agreed with this suggestion.

Meyers would not delete the reference to the trier of fact: "The emphasis that the ultimate issue on mental state is for the trier of fact alone is important. In fact, this was the common law generally." **Reporter comment: In this instance, the language is surplusage. Emphasis is one thing, duplication is another.**

Rule 705 – ~~Disclosure of~~ Disclosing the Facts or Data Underlying an Expert's Opinion

~~The~~ Unless the court orders otherwise, an expert may ~~testify in terms of~~ state an opinion ~~or inference~~ — and give the reasons ~~therefor~~ for it — without first testifying to the underlying facts or data. ~~unless the court requires otherwise. The expert may in any event be required~~ But the court may require the expert to disclose ~~the underlying~~ those facts or data on cross-examination.

Comment:

None.

Rule 706 — Court-Appointed Experts

(a) Appointment Process. ~~The court may on its own motion or on the motion of any party~~ On a party's motion or its own, the court may ~~enter an~~ order the parties to show cause why expert witnesses should not be appointed, and may ~~request~~ ask the parties to submit nominations. The court may appoint any expert witnesses ~~agreed upon by~~ that the parties agree on; and ~~may appoint expert witnesses~~ any of its own ~~selection~~ choosing. ~~An expert witness shall not be appointed by~~ But the court may only appoint someone who ~~unless the witness~~ consents to act.

(b) Expert's Role. The court must inform the expert ~~A witness so appointed shall be informed of the witness' duties by the court~~ in writing, in any form, of the expert's duties; and have a copy ~~of which shall be~~ filed with the clerk;. Or the court may so inform the expert ~~or~~ at a conference in which the parties ~~shall~~ have an opportunity to participate. The expert:

(1) must ~~A witness so appointed shall~~ advise the parties of ~~the witness'~~ any findings, ~~if any~~ the expert makes;

(2) may be deposed ~~the witness' deposition may be taken~~ by any party;

(3) ~~and the witness~~ may be called to testify by the court or any party; and

(4) may be cross-examined ~~The witness shall be subject to cross-examination~~ by ~~each~~ any party, including ~~a~~ the party ~~calling~~ that called the ~~witness~~ expert.

~~(b)~~ (c) **Compensation.** ~~Expert witnesses so appointed are~~ The expert is entitled to whatever reasonable compensation ~~in whatever sum~~ the court ~~may~~ allows. The compensation ~~thus fixed~~ is payable as follows:

(1) ~~from funds which may be provided by law~~ in a criminal cases and in a civil actions ~~and~~ or proceedings involving just compensation under the Fifth amendment, from any funds that are provided by law; and;

(2) ~~In~~ in any other civil actions ~~and~~ or proceedings, ~~the compensation shall be paid~~ by the parties in ~~such~~ the proportion and at ~~such~~ the time ~~as~~ that the court directs; — and ~~thereafter~~ the compensation is then charged ~~in~~ like ~~manner as~~ other costs.

~~(c)~~ (d) ~~**Disclosure of**~~ **Disclosing the Appointment**. ~~In the exercise of its discretion, the~~ The court may authorize disclosure to the jury ~~of the fact~~ that the court appointed the expert ~~witness~~.

~~(d)~~ (e) **Parties' Choice of Their Own Experts ~~of own selection~~.** ~~Nothing in this~~ This rule

does not limits ~~the parties in calling expert witnesses of their own selection~~ a party in calling its own experts.

Comment

Lines 22-27, references to "civil actions or proceedings" — restyled Rule 501 changes this same language to "civil case." This is one of those universal terms which must be reviewed at the end, but it might make sense to use consistent terminology right now.

III. Restyling Committee Note

The previous restyling projects have used the following template for Committee Notes to each of the restyled rules:

Committee Note

The language of Rule [ ] has been amended as part of the restyling of the [ ] Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Unless the Evidence Committee thinks otherwise, the Committee Notes to the restyled Evidence Rules will use the same template.

The Committee may wish to amplify the Committee Note to particular rules. For example, if "inference" is taken out of Article VII, the Committee may wish to flag that change. If the Committee decides that more than basic treatment is needed for a specific rule, the Reporter will draft a more detailed Committee Note.

The Civil Rules restyling project included a Committee Note to Rule 1 that was more fulsome than the template. That note provided a short description of the process and the goals of restyling. **What follows is the Committee Note to the restyled Civil Rule 1, as amended to apply to the Evidence Rules**:

Committee Note

The language of Rule 101 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Style Project

The Evidence Rules are the fourth set of the rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled rules of Criminal Procedure took

effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal and Civil Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the Unites States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure,* at x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 103 illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "accused" in many rules to "criminal defendant" in all rules..

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers". These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rule does not change their substantive meaning. [examples]

The restyled rules also remove words and concepts that are outdated or redundant. [examples]

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

When the restyled Evidence Rules are completed to be submitted for public comment, the Advisory Committee may wish to review the above Committee Note to Rule 101 for inclusion in the package.

IV. Possible New Rule for Definitions

Professor Kimble has mentioned several times over the last year that the Committee might consider a rule providing for definitions of some of the terminology that will be used throughout the restyled Evidence Rules. In an email exchange, Professor Kimble made the following, very preliminary, proposal:

> I think the definitions would fit as new 1102. Surely, current 1102 and 1103 could move up one. I'm not talking about content-heavy definitions or definitions that would come as any kind of surprise--just definitions that confirm the meaning people would probably give to the words anyway but that would allow us to avoiding having to repeat some wordy phrases. And I wouldn't expect to use more than five or six.
>
> Possible examples:
>
> "Civil case" means a civil action or proceeding.
>
> "Criminal case" means a criminal prosecution or proceeding.
>
> "Criminal defendant" means a defendant in a criminal case.
>
> "Writing" or "written" means a writing in any form, including electronic form.

Professor Kimble and I propose that the Committee discuss, as a preliminary matter, the possibility of a definitions section along the lines discussed above. What follows is a short list of talking points on the advisability of having a definitions section, and on the particular list set forth by Professor Kimble.

1. Prior Committee Discussion:

The Advisory Committee discussed the possibility of having a rule on definitions at the beginning of the restyling project. Here is the excerpt from the minutes of that meeting:

> ***New Rule for Definitions*** — The Committee discussed whether to add a new rule covering definitions as part of restyling. The Criminal Rules Committee added a rule on definitions, but the Civil Rules Committee did not. Committee members were skeptical about a new rule on definitions. They pointed out that some of the Evidence Rules already provide a definition for some terms — most importantly Rule 801, which defines hearsay, and Rule 1001, which defines writings and recordings, original, duplicate, etc. Adding a definition section might require transferring those definitions to that new section, and this would be unduly

disruptive. Nor would it be user-friendly, which is the basic reason for restyling. Other members noted the difficulty of determining which terms must be defined, and expressed concern that an attempt to define some of the important terms used in the Evidence Rules might result in substantive changes, as courts might not be in uniform agreement about the meaning of the term. At Professor Kimble's suggestion, however, the Committee decided to leave open the question of a new rule on definitions, in order to see how the style process plays out.

Certainly there is an issue of how to integrate a definitions section with the other Rules that have definitions for particular purposes, such as 801 and 1001.

2. Location: A few years ago, the Committee considered a rule that would provide an "electronic" definition for all the paper-based terminology in the Evidence Rules. The Committee considered two possible locations for the rule: a new Rule 1104 and a new Rule 107. The Committee voted for Rule 107, on the rationale that it would be a more prominent placement, more likely to be read, and more integrated with the rest of the rules. Another way to put this is that the Committee determined that the rule should not be buried in Article XI. A similar argument might well be made for a definitions rule in restyling — it should be placed in Article I, not Article XI.

3. Particular Definition: "Criminal defendant": At its last meeting, the Advisory Committee voted that the use of the term "criminal defendant" was substantive because it was presumptive and carried a negative connotation. Professor Kimble preliminarily proposes to address this problem by using the term "criminal defendant" throughout the rules but then providing a definition that doesn't carry the same negative connotation, i.e., "a defendant in a criminal case." The motivation for this proposal is, of course, that the term "criminal defendant" is easier to use stylistically than "defendant in a criminal case" or "criminal-case defendant." But the Committee may nonetheless wish to consider whether this solves the problem of using the presumptive term "criminal defendant." The fact is that the presumptive term is being used throughout the rules, and you would have to go to a separate definitions rule (possibly buried in Article XI) to erase the presumption. Arguably this is not an effective solution to the problematic use of "criminal defendant."

4. Particular Definition: "Writing/written": Professor Kimble's definition provides electronic language for "writing" and "written." But there are a number of other terms used throughout the Evidence Rules that are paper-based. When Rule 107 was proposed as a means of updating the paper-based language in the Rules, it looked like this:

Rule 107. Electronic Form

As used in these rules, the following terms, whether singular or plural, include information in electronic form: "book," "certificate," "data compilation," "directory," "document," "entry," "list," "memorandum," "newspaper," "pamphlet," "paper," "periodical," "printed", "publication," "published", "record," "recorded", "recording," "report," "tabulation," "writing" and "written." Any "attestation," "certification," "execution" or "signature" required by these rules may be made electronically. A certificate, declaration, document, record or the like may be "filed," "recorded," "sealed" or "signed" electronically.

Unless the restyling takes out all of the above paper-based terminology, then terms like "book" and "record" should probably be included along with "writing" and "written" in any definitions rule. The failure to include *all* of the paper-based language could raise the negative inference that if it is not included, then an electronic equivalent is inadmissible.

TAB 2B

ARTICLE V. PRIVILEGES **Rule 501. General Rule**	**ARTICLE V. PRIVILEGES**[1] **Rule 501 — Privilege in General**
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provide otherwise: • the United States Constitution; • a federal statute; or • other rules prescribed by the Supreme Court under statutory authority [restore *under statutory authority* to 402]. But in a civil case, state law governs if the privilege relates to a claim or defense for which state law supplies the rule of decision.

[1] The date of this version is September 16, 2008.

ARTICLE VI. WITNESSES **Rule 601. General Rule of Competency**	ARTICLE VI. WITNESSES **Rule 601 — Competency to Testify in General**
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.	Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law on witness competency governs when the witness's testimony relates to a claim or defense for which state law supplies the rule of decision.

Rule 602. Lack of Personal Knowledge	Rule 602 — Need for Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	A witness may testify on a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 703.

Rule 603. Oath or Affirmation	Rule 603 — Oath or Affirmation to Testify Truthfully
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness's conscience.

Rule 604. Interpreters	Rule 604 — Interpreter
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.	An interpreter is subject to Rule 603 on giving an oath or affirmation to make a true translation and to Rule 702 on qualifying as an expert.

Rule 605. Competency of Judge as Witness	Rule 605 — Judge as a Witness
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not [we need to think about *may not* versus *must not*; cf., for instance, three uses of *may not* in 606(a) & (b)(1)] testify as a witness at the trial. A party need not object to preserve a claim that the judge did so.

Rule 606. Competency of Juror as Witness	Rule 606 — Juror as a Witness
(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.	**(a) At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.
(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	**(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; anything that may have affected the juror or another juror and thus influenced that person's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. **(2)** ***Exceptions.*** A juror may testify about whether: **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** any outside influence was improperly brought to bear on a juror; or **(C)** a mistake was made in entering the verdict on the verdict form.

Rule 607. Who May Impeach	Rule 607 — Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608 — A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	(a) **Opinion or Reputation Evidence.** A witness's credibility may be attacked or supported by evidence in the form of an opinion about — or a reputation for — having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	(b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct, in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: **(1)** the witness; or **(2)** another witness whose character the witness being cross-examined has testified about. (c) **Privilege Against Self-Incrimination.** By testifying about a matter that relates only to a character for truthfulness, a witness does not waive the privilege against self-incrimination.

Rule 609. Impeachment by Evidence of Conviction of Crime	Rule 609 — Impeachment by Evidence of a Criminal Conviction
(a) General rule. For the purpose of attacking the character for truthfulness of a witness, **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and **(2)** evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and **(B)** must be admitted if the witness is a defendant in a criminal case and the court determines that the probative value of the evidence outweighs its prejudicial effect; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.
(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 10 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.	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the conviction or the witness's release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible [need to check *is/is not admissible* elsewhere; do we ever use *the court may/may not admit*?] only if the court determines that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. But before offering the evidence, the proponent must give an adverse party reasonable written notice, in any form, of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.	**(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if: **(1)** the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or **(2)** the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.	**(d) Juvenile Adjudications**. Evidence of a juvenile adjudication is admissible only if: **(1)** the case is a criminal case; **(2)** the adjudication was of a witness other than the defendant; **(3)** a conviction for that offense would be admissible to attack an adult's credibility; and **(4)** admitting the evidence is necessary to fairly determine guilt or innocence.
(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.	**(e) Pendency of an Appeal.** A conviction [or adjudication?][2] that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

[2] Was the omission of any mention of a juvenile "adjudication" in rule 609(e), even though juvenile adjudications are addressed at length in rule 609(d), a deliberate drafting choice or merely an inadvertent omission? If the latter, the style subcommittee may consider whether to add a reference to an "adjudication" in rule 609(e).

Rule 610. Religious Beliefs or Opinions	Rule 610 — Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611 — Mode and Order of Questioning Witnesses and Presenting Evidence
(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	(a) **Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.
(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	(b) **Scope of Cross-Examination**. The court should limit cross-examination to the subject matter of the direct examination and matters affecting a witness's credibility. The court may permit inquiry into additional matters as if on direct examination.
(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.	(c) **Leading Questions.** The court should permit leading questions on direct examination only if necessary to develop the witness's testimony. Ordinarily, the court should permit leading questions on cross-examination. And the court must permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 612. Writing Used to Refresh Memory	Rule 612 — Writing Used to Refresh a Witness's 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.	**(a)** **General Application.** This rule gives an adverse party certain options when a witness uses any form of a writing to refresh memory: **(1)** while testifying; or **(2)** before testifying, if the court decides that justice requires a party to have those options. **(b)** **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. **(c)** **Failure to Produce or Deliver.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Rule 613. Prior Statements of Witnesses	Rule 613 — Witness's Prior Statement
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	(a) **Showing or Disclosing the Statement During Questioning.** When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	(b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if justice so requires or if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it. This subdivision (b) does not apply to a party opponent's admission under Rule 801(d)(2).

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614 — Court's Calling or Questioning a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	(a) **Calling.** The court may call a witness on its own or at a party's suggestion. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	(b) **Questioning.** The court may question a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	(c) **Objections.** A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses	Rule 615 — Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person. after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701 — Opinion Testimony by Lay Witnesses**
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts	Rule 702 — Testimony by Expert Witnesses
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help [cf. 701(b)] the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts	Rule 703 — Bases of an Expert's Opinion Testimony
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in that same field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury[3] only if the court determines that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

[3] The style subcommittee asks whether the inclusion of the words "to the jury" could have any negative or unintended implications in a bench trial without a jury. If not, the style subcommittee chooses to include the words "to the jury."

Rule 704. Opinion on Ultimate Issue	Rule 704 — Opinion on an Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	(a) **Admissibility in General.** An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	(b) **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	Rule 705 — Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.	Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the court may require the expert to disclose those facts or data on cross-examination.

Rule 706. Court Appointed Experts	Rule 706 — Court-Appointed Experts
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.	(a) **Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. (b) **Expert's Role.** The court must inform the expert in writing, in any form, of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate. The expert: **(1)** must advise the parties of any findings the expert makes; **(2)** may be deposed by any party; **(3)** may be called to testify by the court or any party; and **(4)** may be cross-examined by any party, including the party that called the expert.
(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.	(c) **Compensation.** The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows: **(1)** in a criminal case and in a civil action or proceeding involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil action or proceeding, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.	(d) **Disclosing the Appointment.** The court may authorize disclosure to the jury that the court appointed the expert.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.	(e) **Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

TAB 3A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Restyled Rules 101-415 — some remaining issues
Date: September 23, 2008

Restyled Rules 101-415 have been approved by the Standing Committee for release for public comment. These rules are set forth in side-by-side form immediately after this memo.

Questions have been raised about a few determinations that were made at the last Advisory Committee meeting. These questions will probably need to be addressed eventually — if there is time at this meeting it might be useful to discuss them and possibly resolve them. (And of course if upon review of these rules anyone sees something that they want to address, they should raise it.)

The questions are as follows:

1. Heading to Rule 104(c) — Matters the Jury "Must Not" Hear.

The question of "may not"/ "must not" is addressed in the Reporter's comment to Rule 605, in this agenda book. I point out there that "may not" appears to be the same as "must not" and if that is so, the Committee should choose one and use it uniformly. The Evidence Rules currently use "may not" 10 times, but never use "must not." The restyling effort so far has used "may not" in all places but one — the heading to Rule 104(c).

This is obviously a style question, but the Committee may consider suggesting to the Style Subcommittee that the heading be made uniform by substituting "may not" for "must not."

In an email exchange, Professor Kimble had this preliminary thought:

"Must not" seems right for the jury. And is there a slight chance of ambiguity or a miscue here? A slight chance that "may" will be read as "might"? I'm inclined to leave it but don't

have strong feelings.

2. Returning "under statutory authority" back to Rule 402.

The restyling deleted the term "under statutory authority" in Rule 402 as an unnecessary reference. In reviewing Rule 501, Professor Kimble made the same suggestion — to delete the reference to Supreme Court rules promulgated "under statutory authority." But as explained in the Reporter's comment to Rule 501, the reference to statutory authority is probably not surplusage in Rule 501, because of the special limitations on enacting rules of privilege. The Style Subcommittee agreed to retain the reference to statutory authority in Rule 501, but suggests that, to maintain uniformity, Rule 402 should be revised to put back the reference to statutory authority. That change would look like this:

Relevant evidence is admissible unless any of the following provide otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court under statutory authority.

Irrelevant evidence is not admissible.

Reporter's Comment: Keeping the terminology uniform seems sensible, and if all things are equal, things should be left the same as in the original rule. So there is a good argument that the "under statutory authority"language should be restored.

Another style question that might be rethought in this Rule — the use of bullet points. Bullet points can't be cited; and based on the experience with the Civil Rules, the Committee is sure to get some pushback from the practicing bar about the use of bullet points. Is there any other way to organize this rule effectively without the use of bullet points?

3. Heading to Rule 404(b)(2) — "Permitted Uses"

The heading to Rule 404(b)(1) is "Prohibited Uses" and the heading to Rule 404(b)(2) is "Permitted Uses; Notice". The Style Subcommittee proposed that the heading to Rule 404(b)(2) refer to "Exceptions" — that would be consistent with the approach to Rules 408 and other rules, which refer to prohibited uses and exceptions.

The Style Subcommittee footnote on the use of the term "permitted uses" reads as follows:

> The Advisory Committee changed this from *Exceptions*. The heading is now not parallel with 404(a)(2) & (3), 408(b), 410(b), and 412(b). Notice the consistent pattern that we have tried to use: the heading to one subpart says *Prohibited Uses*, and the heading to the following subpart says *Exceptions*. We believe that the heading should probably be changed back.

Reporter's Comment: Rule 404(b) is sensitive. The reasoning for using "Permitted Uses" rather than "Exceptions" is that Rule 404(b) has been construed as essentially a rule of inclusion. Using a title like "Exceptions" makes it sound like admitting evidence of uncharged misconduct is some exceptional situation. Given the thousands of cases on the subject, it would seem that caution is required before sending a possible signal that could be inconsistent with the case law and basic approach to Rule 404(b). It's true that there is a cost in uniformity. But the Advisory Committee determined that the cost was worth it in order to preserve the status quo on Rule 404(b). On the other hand, it could be argued that it's only a heading, not the text of the Rule. It's up to the Committee to determine whether it wishes to reconsider the issue.

4. Rule 404(b)(2)— **"may be admissible"**

Rule 404(b)(2) provides that evidence of uncharged misconduct "may be admissible" for a not for character purpose. After extensive discussion and argument, the Committee acceded to the Style Committee's structure for Rules 407, 408, et seq. That structure provided for prohibited uses, with the statement that "the court may admit" the evidence if offered for a proper purpose. (The Reporter argued that this was inaccurate terminology and that the rules should state that the rule "does not require exclusion" if the evidence is offered for a proper purpose. But a majority of the Committee voted that the change by the Style Subcommittee was not substantive.)

When it came to Rule 404(b), however, a majority of the Committee objected to using "the court may admit." Here is the entry from the minutes of the meeting:

> *"May be admitted"* — The DOJ representative objected to the change from "may, however, be admissible" to "may be admitted" [subsequently changed in the other rules to "the court may admit"] in Rule 404(b). He noted that hundreds of cases had established that Rule 404(b) is a rule of inclusion, not exclusion. He also noted that Congress explicitly changed the Advisory Committee draft of Rule 404(b) — which used more exclusionary language — to "may, however, be admissible." Under the Style protocol, language in a rule that is a "sacred phrase" is considered substantive and is not to be changed. The DOJ representative argued that the change to "may be admitted" was substantive because it was

stricter in tone than "may, however, be admissible"; and that at any rate the Rule 404(b) language was a sacred phrase. A vote was taken on whether the change to "may be admitted" was substantive and a majority (five Committee members) agreed that it was substantive. Under the Style protocol, that means that the change cannot be made by the Style Subcommittee. So "may be admissible" was retained.

The Style Subcommittee has asked the Advisory Committee to reconsider its determination that the change from "may be admissible" is substantive. The Style Subcommittee footnote reads as follows:

> The Style Subcommittee believes that it's critically important to be consistent in phrasing the court's discretionary authority to admit evidence. In nine other places, the rules now use the court *may admit*: 407, 408(b), 411, 412(b)(1), 412(b)(2)(twice), 413(a), 414(a), and 415(a). The Advisory Committee concluded that may be admissible is substantive in 404(b)(2), but we think that decision should be reconsidered.

Reporter's Comment:

404(b) is different. Congress treated it differently. It is understandably close to the heart of the DOJ. The change to "the court may admit" — or for that matter any change — could signal a less generous approach to bad act evidence. Given the Justice Department's opposition to any change from "may be admissible" it would seem that a little disuniformity is a minor cost for avoiding a fight with the DOJ. Finally, the language of Rule 404(b), as vetted and cited in so many cases, appears to be a "sacred phrase" and therefore substantive under the restyling protocol.

TAB 3B

ARTICLE I. GENERAL PROVISIONS Rule 101. Scope	ARTICLE I. GENERAL PROVISIONS[1] Rule 101 — Scope
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

[1] The date of this version is September 25, 2008.

Rule 102. Purpose and Construction	Rule 102 -- Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Rule 103. Rulings on Evidence	Rule 103 — Rulings on Evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: **(1)** if the ruling admits evidence, the party, on the record: **(A)** timely objects or moves to strike; and **(B)** states the specific ground, unless it was apparent from the context; or **(2)** if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	**(c) Court's Statements About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	**(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct the proceedings in a jury trial so that inadmissible evidence is not suggested to the jury by any means.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	**(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Rule 104. Preliminary Questions	Rule 104 — Preliminary Questions
(a) 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.	(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) 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.	(b) **Relevancy That Depends on a Fact.** When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.	(c) **Matters That the Jury Must Not Hear.** A hearing on a preliminary question must be conducted outside the jury's hearing if: (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and requests that the jury not be present; or (3) justice so requires.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	(d) **Testimony by a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	(e) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 105. Limited Admissibility	Rule 105 — Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106 — Rest 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.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that should in fairness be considered at the same time. This rule applies to a writing or recorded statement in any form.

ARTICLE II. JUDICIAL NOTICE **Rule 201. Judicial Notice of Adjudicative Facts**	ARTICLE II. JUDICIAL NOTICE **Rule 201 — Judicial Notice of Adjudicative Facts**
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it: **(1)** is generally known within the court's territorial jurisdiction; or **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** At any stage of the proceeding, the court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the noticed fact. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(e) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS	ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS
Rule 301. Presumptions in General in Civil Actions and Proceedings	**Rule 301 — Presumptions in a Civil Case Generally**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion; the burden of proof remains on the party who has it originally.

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302 — Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption related to a claim or defense for which state law supplies the rule of decision.

ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401. Definition of "Relevant Evidence"**	ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401 — Definition of Relevant Evidence**
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	Rule 402 — General Admissibility of Relevant Evidence
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.	Relevant evidence is admissible unless any of the following provide otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403 — Exclusion of Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is substantially outweighed by one or more of the following: a danger of unfair prejudice, confusing the issues, or misleading the jury, or considerations of undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404 — Character Evidence; Crimes or Other Acts
(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: **(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; **(2) Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(1)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. **(2)** ***Exceptions in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. **(3)** ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	**(b) Crimes or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses[2]; Notice.*** This evidence may be admissible[3] for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

[2] Style Subcommittee comment: The Advisory Committee changed this from *Exceptions*. The heading is now not parallel with 404(a)(2) & (3), 408(b), 410(b), and 412(b). Notice the consistent pattern that we have tried to use: the heading to one subpart says *Prohibited Uses*, and the heading to the following subpart says *Exceptions*. We believe that the heading should probably be changed back. For now, this could be added to the list of global issues.

[3] Style Subcommittee comment: The Style Subcommittee believes that it's critically important to be consistent in phrasing the court's discretionary authority to admit evidence. See the footnote to Rule 407. In nine other places, the rules now use *the court may admit*: 407, 408(b), 411, 412(b)(1), 412(b)(2)(twice), 413(a), 414(a), and 415(a). The Advisory Committee concluded that *may be admissible* is substantive in 404(b)(2), but we think that decision should be reconsidered.

Professor Capra comment: A majority of the Advisory Committee determined that "may be admissible" is substantive and had to be retained for the following reasons: 1) hundreds of cases have established that Rule 404(b) is a rule of "admissibility" and not exclusion, so any change to the language that could even be conceived as changing or narrowing the existing language threatens this uniform case law; 2) Congress carefully considered this language, revising the original Advisory Committee draft, which had provided that the rule "does not exclude" bad act evidence if offered for a proper purpose. Congress made the change to place "greater emphasis on admissibility." The Committee was reluctant to change the language carefully chosen by Congress; 3) the change was opposed by the Justice Department, as signaling a less generous approach to bad act evidence; and 4) the language of Rule 404(b), as vetted and cited in so many cases, is a "sacred phrase" and therefore substantive under the restyling protocol.

Rule 405. Methods of Proving Character	Rule 405 — Methods of Proving Character
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.	(a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by opinion testimony. On cross-examination, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.	(b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 406. Habit; Routine Practice	Rule 406 — Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	Evidence of a person's habit or an organization's routine practice is relevant to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. This evidence is relevant regardless of whether it is corroborated or whether there was an eyewitness.

Rule 407. Subsequent Remedial Measures	Rule 407 — Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Rule 408. Compromise and Offers to Compromise	Rule 408 — Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office or agency in the exercise of its regulatory, investigative, or enforcement authority.
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of Medical and Similar Expenses	Rule 409 — Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	Rule 410 — Pleas, Plea Discussions, and Related Statements
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(1)** a plea of guilty which was later withdrawn; **(2)** a plea of nolo contendere; **(3)** any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or **(4)** any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.	**(a)** **Prohibited Uses.** In any civil or criminal proceeding, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: **(1)** a guilty plea that was later withdrawn; **(2)** a plea of nolo contendere; **(3)** a statement about either of those pleas made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or **(4)** a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. **(b)** **Exceptions.** A statement described in Rule 410(a)(3) or (4) is admissible: **(1)** in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if both statements should in fairness be considered at the same time; or **(2)** in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and in the presence of counsel.

Rule 411. Liability Insurance	Rule 411 — Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving agency, ownership, control, or a witness's bias or prejudice.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Rule 412 — Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c): **(1)** Evidence offered to prove that any alleged victim engaged in other sexual behavior. **(2)** Evidence offered to prove any alleged victim's sexual predisposition.	**(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: **(1)** evidence offered to prove that a victim engaged in other sexual behavior; or **(2)** evidence offered to prove a victim's sexual predisposition.
(b) Exceptions. **(1)** In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: **(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; **(B)** evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and **(C)** evidence the exclusion of which would violate the constitutional rights of the defendant. **(2)** In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.	**(b) Exceptions.** **(1)** ***Criminal Cases.*** The court may admit the following evidence in a criminal case: **(A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; **(B)** evidence of specific instances of a victim's sexual behavior toward the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and **(C)** evidence whose exclusion would violate the defendant's constitutional rights. **(2)** ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(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 a 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.	**(c) Procedure to Determine Admissibility.** **(1)** ***Motion.*** If a party intends to offer evidence under Rule 412(b), the party must: **(A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered; **(B)** do so at least 14 days before trial unless the court, for good cause, sets a different time; **(C)** serve the motion on all parties; and **(D)** notify the victim or, when appropriate, the victim's guardian or representative. **(2)** ***Hearing.*** Before admitting evidence under this rule, the court must conduct an in-camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and record of the hearing must be and remain sealed.
	(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	Rule 413 — Similar Crimes in Sexual-Assault Cases
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code; **(2)** contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; **(3)** contact, without consent, between the genitals or anus of the defendant and any part of another person's body; **(4)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).	**(d) Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(1)** any conduct prohibited by 18 U.S.C. chapter 109A; **(2)** contact, without consent, between any part of the defendant's body – or an object – and another person's genitals or anus; **(3)** contact, without consent, between the defendant's genitals or anus and any part of another person's body; **(4)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases	Rule 414 — Similar Crimes in Child-Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, ''child'' means a person below the age of fourteen, and ''offense of child molestation'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child; **(2)** any conduct proscribed by chapter 110 of title 18, United States Code; **(3)** contact between any part of the defendant's body or an object and the genitals or anus of a child; **(4)** contact between the genitals or anus of the defendant and any part of the body of a child; **(5)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or **(6)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).	**(d) Definition of "Child" and "Child Molestation."** In this rule and Rule 415: **(1)** "child" means a person below the age of 14; and **(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(A)** any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child; **(B)** any conduct prohibited by 18 U.S.C. chapter 110; **(C)** contact between any part of the defendant's body – or an object – and a child's genitals or anus; **(D)** contact between the defendant's genitals or anus and any part of a child's body; **(E)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or **(F)** an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation	Rule 415 — Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation.
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.	**(a) Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation. The evidence may be considered as provided in Rules 413 and 414.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

TAB 4

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Proposed Amendment to Evidence Rule 804(b)(3), to extend the corroborating circumstances requirement to statements offered by the prosecution.
Date: September 23, 2008

At its last meeting the Evidence Rules Committee approved, for release for public comment, an amendment to Evidence Rule 804(b)(3). The amendment would require the government, as well as the accused, to provide corroborating circumstances indicating trustworthiness before a declaration against penal interest could be admitted. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

The Committee decided that the proposed amendment would be narrow — it would cover only the extension of the corroborating circumstances requirement to declarations against penal interest offered by the government. The Committee voted against addressing other issues, specifically:

1. *Should the corroborating circumstances requirement be extended to civil cases?* Only one reported decision has extended the corroborating circumstances requirement to civil cases. Given the scarce case law and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases, the Committee decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases.

2. *Should the amendment consider the applicability of the Supreme Court's decision*

in Crawford v. Washington? Case law has demonstrated a fit between Rule 804(b)(3) and the right to confrontation after *Crawford*: to be admissible under Rule 804(b)(3), a statement by definition cannot be testimonial under *Crawford.* Put another way, if it's admissible under Rule 804(b)(3) it thereby satisfies the Confrontation Clause. Committee members therefore saw no need to refer to the *Crawford* standard in the text of the rule — especially as doing so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford.*

3. Should the amendment resolve some disputes in the courts about the meaning of "corroborating circumstances"? A few cases define "corroborating circumstances" as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. But the disagreement in the courts about the meaning of "corroborating circumstances" has only arisen in a few cases, and the courts that are relying on outmoded constitutional law may well change their approach when the issue is directly addressed. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

What follows is the amendment as it has been issued for public comment. To date the Committee has received no public comments on the proposed amendment. But most public comments are submitted in February and March.

No action on the amendment is required at this meeting. But at the next meeting, the Committee will review the public comments and determine whether to propose the amendment to the Standing Committee for final approval and referral to the Judicial Conference.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804(b)(3)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

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

* * *

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

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)");*United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford. See, e.g., United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007) (accomplice's statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (admissions of crime made informally to a friend were

not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

TAB 5

FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Professor Daniel Capra, Reporter
Re: Enactment of Rule 502
Date: September 24, 2008

Rule 502 was signed into law by the President on September 19, 2008. That was the culmination of a four-year effort to adopt a rule that would limit the costs of preproduction privilege review. It was not easy, especially in the House. But largely through the amazing efforts and advocacy of Judge Rosenthal, the text of the Rule is exactly the same as was approved by the Evidence Rules Committee.

What follows is the rule as enacted; the Explanatory Note of the Judicial Conference (which is the Committee Note prepared by the Advisory Committee); and some of the legislative history.

Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) ***Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver.*** — When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) ***Inadvertent disclosure.*** — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

(c) ***Disclosure made in a state proceeding.*** — When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) ***Controlling effect of a court order.*** — A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) ***Controlling effect of a party agreement.*** — An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) ***Controlling effect of this rule.***— Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) ***Definitions***. — In this rule:

1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Explanatory Note on Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b).The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or

information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &* Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which are dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation. .

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). *See also Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order — predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently

offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

Addendum to Explanatory Note

Reporter's Note: A member of the House Judiciary Committee staff raised some questions about the application of Rule 502. Mostly these concerns resulted from an extravagant and unreasonable reading of the rule. For example, the staffer thought the rule could be read to allow a court to seal an entire case record — a patently unreasonable reading because Rule 502 does not authorize sealing any information at all; it is limited to privileged information, and it simply provides that a court order can protect against waiver of the privilege. Nonetheless, because there was a risk that the Rule would never be passed, the Judicial Conference agreed to add an addendum to the Explanatory Statement of the Advisory Committee. That addendum addresses all of the staffer's concerns — in exchange for the addendum, Rule 502 was passed on unanimous consent and without any change to the text.

Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence

During consideration of this rule in Congress, a number of questions were raised about the

scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference. In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)--Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)--Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases--for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

Subdivisions (a) and (b)--Disclosures to Federal Office or Agency

This rule, as a Federal Rule of Evidence, applies to admissibility of evidence. While subdivisions (a) and (b) are written broadly to apply as appropriate to disclosures of information to

a federal office or agency, they do not apply to uses of information--such as routine use in government publications--that fall outside the evidentiary context. Nor do these subdivisions relieve the party seeking to protect the information as privileged from the burden of proving that the privilege applies in the first place.

Subdivision (d)--Court Orders

This subdivision authorizes a court to enter orders only in the context of litigation pending before the court. And it does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information. Therefore, this subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information. This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery. While the benefits of a court order under this subdivision would be equally available in government enforcement actions as in private actions, acquiescence by the disclosing party in use by the federal agency of information disclosed pursuant to such an order would still be treated as under current law for purposes of determining whether the acquiescence in use of the information, as opposed to its mere disclosure, effects a waiver of the privilege. The same applies to acquiescence in use by another private party.

Moreover, whether the order is entered on motion of one or more parties, or on the court's own motion, the court retains its authority to include the conditions it deems appropriate in the circumstances.

Subdivision (e)--Party Agreements

This subdivision simply makes clear that while parties to a case may agree among themselves regarding the effect of disclosures between each other in a federal proceeding, it is not binding on others unless it is incorporated into a court order. This subdivision does not confer any authority on a court to enter any order regarding the effect of disclosures. That authority must be found in subdivision (d), or elsewhere.

Excerpts From Judicial Conference Letter to Congress Referring Proposed Rule 502 (Letter Prepared and Approved by the Advisory Committee on Evidence Rules)

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Under 28 U.S.C. § 2074(b), rules governing evidentiary privilege must be approved by an Act of Congress rather than adopted through the process prescribed by the Rules Enabling Act, 28 U.S.C. § 2072.

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee Chair suggested the proposal of a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would

- protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation.

The task of drafting a proposed rule was referred to the Advisory Committee on Evidence Rules (the "Advisory Committee"). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers, and academics to testify before the Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure ("the Standing Committee"). The public comment period began in August 2006 and ended February 15,

2007. The Advisory Committee received more that 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee's Subcommittee on Style. In April 2007, the Evidence Rules Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style, and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference and is attached to this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.,* House Conference Report 103-711 (stating that the "Conferees intend that the Advisory Committee Note on [Evidence] Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected 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 and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

The Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with

disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

- *Limitations on Scope of Waiver:* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.

- *Protections Against Inadvertent Disclosure:* Subdivision (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

- *Effect on State Proceedings and Disclosures Made in State Courts:* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

- *Orders Protecting Privileged Communications Binding on Non-Parties:* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

- *Agreements Protecting Privileged Communications Binding on Parties:* Subdivision (e) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings — and even when the disclosed material is then offered in a state proceeding (the so-called "state to state" problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the "state-to-state" problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called "federal to state" problem). The Conference of Chief Justices withdrew its objection to Rule 502 after the rule was scaled back to regulate only the "federal to state" problem.

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:

- Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.

- In the Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the

disclosure is initially made at the federal level.

In light of the public comment, however, Congress may wish to consider separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court. The Conference takes no position on the merits of such separate legislation.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal protection orders. The other protections against waiver in Rule 502 — against mistaken disclosure and subject matter waiver — would also bind state courts as to disclosures initially made at the federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even when a federal court would not.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of Proposed Rule 502 did not determine the question of what rule would apply when a disclosure is made in state court and the waiver determination is to be made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work product doctrine.

4) Selective waiver. At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively — to the government — and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed. The draft language for a selective waiver provision is set forth in a separate report.

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee on Federal Rules, as well as their reporters and consultants, are ready to assist Congress in any way its sees fit.

Statements on the House Floor Introducing Rule 502

Ms. JACKSON-LEE of Texas: Mr. Speaker, this legislation enacts a new Federal Rule of Evidence, proposed by the Judicial Conference, to address a growing problem that is adding inordinate and unnecessary burden, expense, uncertainty, and inefficiency to litigation.

The new rule 502 reaffirms and reinforces the attorney-client privilege and work product protection by clarifying how they are affected by, and withstand, inadvertent disclosure in discovery.

As the author of the companion bill, H.R. 6610, in the House, I urge my colleagues to join me in supporting the Senate-passed bill so that we can send it to the President and enact it into law without further delay.

Doing the research on this legislation and spending time with a number of lawyers, and the American Bar Association, Mr. Speaker, I can assure you that this has no negative impact on those lawyers representing defendants or those lawyers representing plaintiffs. In fact, unlike the courthouse and the courtroom, plaintiff lawyers and defendant lawyers, the plaintiff bar and the defendant bar, have come together in a unanimous voice, indicating that this will in fact enhance their ability to represent their clients and to ensure that they may have the broadest based discovery possible.

We have asked and answered a series of questions that impact this particular legislation, including engaging the Federal bench. And so I move that my colleagues view this enthusiastically and that it be supported.

The attorney-client privilege and work product protection are crucial to our legal system. They encourage businesses and individuals to obtain legal counsel when appropriate by protecting the confidentiality of communications between clients and their attorneys, and documents prepared by attorneys to assist their clients in litigation. In fact, this is the backbone, the infrastructure of civil and criminal litigation.

These legal protections are not absolute, however. Traditionally, persons seeking to rely on them must maintain the confidentiality of the information involved. If the information is shared outside the circle of confidentiality provided by the law, the legal protection is forfeited, or waived,

as the purpose for it no longer applies. This traditional principle can work unfair results in modern-day litigation when privileged information is disclosed by accident. Fast-moving litigation or expensive and vast litigation has both plaintiff and defendant shooting back and forth various documents, particularly in extensive discovery. In the course of the kind of voluminous discovery that often takes place, this can happen, where a privileged document is seen by the other party.

When vast amounts of documents are transmitted and stored electronically and can be searched and collected in the same manner, it is all too easy for a document containing privileged information to be overlooked, despite careful efforts to prevent it. * * * Unfortunately, the case law has not kept up with these developments of expedited discovery and the electronic use of passing documents. Outdated legal precedents from an earlier era continue to create uncertainty. There are precedents, for example, holding that an inadvertent disclosure of a single document or communication not only can waive the privilege as to that one item, but can result in a blanket waiver as to all information concerning the same subject. That can collapse a case.

Concern about the potential adverse consequences has in recent years forced clients and their lawyers to undertake exhaustive, time-consuming, and expensive examination of documents item by item, often page by page, before they can be comfortable turning them over in discovery. That impacts, of course, negatively plaintiffs and defendants. The document reviews can be grossly disproportionate in cost to the stakes of the underlying litigation and significantly impede the efficient processing of cases through the courts.

Courts have developed a balance rule in the case law that appropriately protects confidentiality, while guarding against abuses. But one court's order and one district's order and one circuit's order has uncertain authority, at best, in another court. Only a uniform rule can bring the certainty needed, and a uniform rule in the area of evidentiary privileges can only be achieved by an act of Congress.

The rule we are submitting today, submitted to Congress last year by the Judicial Conference, is a product of careful deliberations in its Advisory Committee on Evidence Rules, informed by years of examination of the issue in its Committee on Rules of Practice and Procedure. The Advisory Committee enlisted the help of eminent jurists, practitioners, and legal scholars, and sought and obtained extensive public comment both in written submissions and at two hearings. The rule that resulted has wide support in the legal community. * * * In order to more fully explain how the new rule is to be interpreted and applied, the Advisory Committee also prepared an explanatory note, as is customary, for publication alongside the text of the rule. The text of the explanatory note appears in the Record in the Senate debate. The proposed rule has now also undergone careful review in the House, as well as the Senate. During its consideration in the House Judiciary Committee, a number of questions arose regarding the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work product protection. That is a very important and cherished right, to ensure that privilege does not interfere or hamper the rights of a plaintiff, sometimes the underdog, and the defendant.

The Judicial Conference was able to answer all these questions satisfactorily, without need to revise the text of the rule as submitted to Congress. In order to further reduce any potential uncertainty regarding how the rule is to be interpreted and applied, the committee has asked and the Judicial Conference has agreed to augment the explanatory note. I would like to insert the agreed addendum to the explanatory note in the Record at this point.

[See above for the addendum to the Explanatory Note.]

The new rule protects the confidentiality of privileged information against waiver in several ways. It protects information inadvertently disclosed in discovery, as long as the party has taken reasonable efforts to avoid disclosing privileged information and, upon learning of the disclosure, promptly takes reasonable steps to rectify it. It protects against a waiver extending to other, undisclosed documents except where privileged information is being intentionally used to mislead the fact finder to the disadvantage of the other party, so that fairness requires that other information regarding the same subject matter also be available. And it authorizes courts to enter orders enforceable in all jurisdictions permitting parties to make initial discovery exchanges efficiently without waiving the right to appropriately assert privilege later for documents culled for actual use as evidence. This is sort of a back-up protection. This is your guarantee. This is an assistance to the idea of protecting privilege. This is extremely important, in that vast majority of documents exchanged in discovery, in some cases running to millions of pages, ultimately prove to be of no interest.

Importantly, the rule does not alter the law regarding when the attorney-client privilege or work product protection applies in the first instance. It is narrowly targeted to address the question of when the specified kinds of litigation-related disclosures do or do not operate as a waiver of the privilege that would otherwise apply.

* * *

Mr. KING of Iowa. Mr. Speaker, last year the U.S. Judicial Conference submitted a proposed addition to the Rules of Evidence governing waivers of the attorney-client privilege or work product immunity. Rules governing evidentiary privilege must be approved by an act of Congress. The Judicial Conference concluded that the current law on waivers of privilege and work product is largely responsible for the rising costs of discovery, especially discovery of electronic information. The reason is that if a protected 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 and document, but to other cases and documents as well. The fear of waiver also leads to extravagant claims of privilege.

Mr. Speaker, the Judicial Conference devoted great process to drafting their proposal. For more than a year, the conference's Advisory Committee on Evidentiary Rules conducted hearings that featured testimony that was submitted by eminent judges, lawyers and academics. The advisory committee later coordinated with the Conference of Chief Justices to assure that the evolving draft

addressed federalism concerns raised by the individual State court systems. In April of 2006, the advisory committee held a conference at Fordham Law School at which a selected group of academics and practitioners reviewed the draft. More revisions were developed that resulted in a revised rule that was published for public comment in August of 2006.

The advisory committee received more than 70 public comments and heard testimony from 20 witnesses at two hearings. In April of 2007, further changes were made based on this process, and the new rule 502 was released. This draft was approved by the Committee on Rules of Practice and Procedure and the full Judicial Conference. The text of S. 2450 incorporates the submission developed and approved by the Judicial Conference. The Senate passed the measure on February 27, 2008, by unanimous consent.

The content of the new rule includes the following provisions: If a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information. An inadvertent disclosure does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information. If there is a privileged or protected disclosure at the Federal level, then State courts must honor the new rule in subsequent State proceedings. If there is a disclosure in a State proceeding, then admissibility in a subsequent Federal proceeding is determined by the law that is most protective against a waiver. A Federal Court order that a disclosure does not constitute a waiver is enforceable in any Federal or State proceeding. Finally, Mr. Speaker, parties in a Federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding.

Mr. Speaker, the cost of discovery has spiked in recent years based on the proliferation of e-mail and other forms of electronic recordkeeping. Litigants must constantly sift through a mountain of documents to ensure that privileged material is not inadvertently released. While most documents produced during discovery have little value, attorneys must still conduct exhaustive reviews to prevent disclosures. The cost to litigants is staggering and the time consumed by courts to supervise these activities is excessive. The system is broken and must be fixed. S. 2450 does just that by providing a predictable standard to govern waivers of privileged information. The legislation improves the efficiency and the discovery process, while it still promotes accountability. It alters neither Federal nor State law on whether the attorney-client privilege or the work product doctrine protects specific information. The bill only modifies the consequences of an inadvertent disclosure once a privilege exists.

The process devoted to the development of new Federal Rule of Evidence 502 by the Judicial Conference was extensive. The Senate has reviewed the measure and approved it by unanimous consent with an accompanying committee report. The House Judiciary Committee spent months informally reviewing S. 2450, a process that included intense discussions with representatives of the judiciary and a Daniel Capra, a Fordham Law School professor who assisted in the drafting of the rule.

Now, Mr. Speaker, it is time to act. I urge my colleagues to support S. 2450.

Selected Portions of the Report of the Senate Judiciary Committee

BACKGROUND AND PURPOSE OF THE BILL

A. Background

An efficient and cost-effective discovery process is important to preserving the integrity of our legal system. The costs of discovery have increased dramatically in recent years as the proliferation of email and other forms of electronic record-keeping have multiplied the number of documents litigants must review to protect privileged material. Outdated law affecting inadvertent disclosure coupled with the stark increase in discovery materials has led to dramatic litigation cost increases.

Currently, the inadvertent production of even a single privileged document puts the producing party at significant risk. If a privileged document is disclosed, a court may find that the waiver applies not only to that specific document and case but to all other documents and cases concerning the same subject matter. Furthermore, the privilege can be waived even if the party took reasonable steps to avoid disclosing it.

The increased use of email and other electronic media in today's business environment have exacerbated the problems with the current doctrine on waiver. Electronic information is even more voluminous and dispersed than traditional record-keeping methods, greatly increasing the time needed to review and separate privileged from non-privileged material. As the time spent reviewing documents has increased, so too has the amount of money litigants on all sides must spend to protect against the potential waiver of privilege.

In his floor statement introducing legislation to correct this problem, Senator Leahy observed:

> Billions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privileged materials. With the routine use of email and other electronic media in today's business environment, discovery can encompass millions of documents in a given case, vastly expanding the risks of inadvertent disclosure. The rule proposed by the Standing Committee is aimed at adapting to the new realities that accompany today's modes of communication, and reducing the burdens associated with the conduct of diligent electronic discovery.

In his statement supporting the proposed legislation, co-sponsor Senator Specter remarked:

> Current law on attorney-client privilege and work product is responsible in large part for the rising costs of discovery—especially electronic discovery. Right now, it is far too easy to inadvertently lose—or "waive" the privilege. A single inadvertently disclosed document can result in waiving the privilege not only as to what was

produced, but as to all documents on the same subject matter. In some courts, a waiver may be found even if the producing party took reasonable steps to avoid disclosure. Such waivers will not just affect the case in which the accidental disclosure is made, but will also impact other cases filed subsequently in State or Federal courts.

In sum, though most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of privileged material. In addition to the amount of resources litigants must dedicate to preserving privileged material, the fear of waiver also leads to extravagant claims of privilege, further undermining the purpose of the discovery process. Consequently, the costs of privilege review are often wholly disproportionate to the overall cost of the case.

B. Purpose of the Bill

The bill addresses these problems by providing a predictable and consistent standard to govern the waiver of privileged information. It improves the efficiency of the discovery process while preserving accountability. Furthermore, it does not alter federal or state law on whether information is protected by the attorney-client privilege or work product doctrine in the first instance, but merely modifies the consequences of inadvertent disclosure once a privilege is found to exist.

The bill provides a new Federal Rule of Evidence 502 to limit the consequences of inadvertent disclosure, thereby relieving litigants of the burden that a single mistake during the discovery process can cost them the protection of a privilege. It provides that if there is a waiver of privilege, it applies only to the specific information disclosed and not the broader subject matter unless the holder has intentionally used the privileged information in a misleading fashion. An inadvertent disclosure of privileged information does not constitute a waiver as long as the holder took reasonable steps to prevent disclosure and acted promptly to retrieve the mistakenly disclosed information.

The bill provides a new rule to ensure that parties will take advantage of its protections by remaining enforceable in subsequent proceedings. If a federal court enters an order finding that an inadvertent disclosure of privileged information does not constitute a waiver, that order will be enforceable against persons in federal or state proceedings. This protects the rule's ability to limit discovery costs by ensuring that parties in any given case will know they can rely on the new waiver rules in subsequent proceedings.

Importantly, the bill respects federal-state comity. The bill will ensure that if there is a disclosure of privileged information at the federal level then courts must honor Rule 502 in any subsequent state proceedings. If there is a disclosure in a state proceeding, then admissibility in any subsequent federal proceeding will be determined by the law that is most protective against waiver. However, it does not apply to any disclosure made in a state proceeding that is later introduced in a subsequent state proceeding.

Litigants recognize the need to adopt a new waiver doctrine to adapt to the effects of changing technology in the business environment. The bill has attracted widespread support from major legal organizations representing stakeholders on all sides of modern litigation. Among those groups voicing support for the measure are the American Bar Association, American College of Trial Lawyers, U.S. Chamber of Commerce, former Chairs of the Section of Litigation of the American Bar Association, Lawyers for Civil Justice, and several private law firms.

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: September 24, 2008

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases considering whether certain hearsay is "testimonial" are grouped by subject matter.

Summary

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

Hearsay 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. Accusations made to officers responding to a 911 call, after the emergency has subsided.

7. Statements by a child-victim to a forensic investigator, when the 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 (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

10. A police officer's count of the number of marijuana plants found during the search of the defendant's premises.

Hearsay Found Not Testimonial:

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

2. Autopsy reports.

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

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

7. Warrants of deportation.

8. Entries into a regulatory database.

9. Statements made for purpose of medical treatment.

10. 911 calls reporting crimes.

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

12. Accusatory statements in a private diary.

13. Odometer statements prepared before any crime of odometer-tampering occurred.

14. A present sense impression describing an event that took place months before a crime occurred.

15. Business records — including medical records prepared with a view to litigation, and certificates of authenticity prepared for trial.

16. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

17. Judicial findings and orders in one case, offered in a different case.

18. Informal statements made with no law enforcement officers present.

Conclusion as to Rulemaking:

It is clear that some types of hearsay will always be testimonial, such as grand jury statements, plea allocutions, etc. It is also clear that some types of statements will never be testimonial, such as personal diaries, statements made before a crime takes place, and informal statements to friends without any contemplation that the statements will be used in a criminal prosecution.

Between these two poles there is some uncertainty, though the Supreme Court's decision in *Davis* as well as dicta in *Giles* (both discussed below) has been applied by the circuit courts to narrow the definition of "testimonial" and thus to resolve most of that uncertainty. Questions remain about whether statements to a person who is not a law enforcement official can ever be testimonial; whether the *Crawford* test is intended to apply to forensic reports; whether and when statements made to law enforcement officials responding to an emergency become testimonial; and whether testimonial statements violate the Confrontation Clause when they are offered only as part of the basis of an expert opinion. {Note that on March 17, 2008, the Supreme Court granted certiorari in a case challenging the admission of forensic reports under *Crawford.*}

There is now no question about the viability of *Roberts*. It is dead. The Court unanimously

held in *Bockting, infra,* that the Confrontation Clause imposes no limitation on the admissibility of hearsay that is not testimonial. It could be argued, then, that rulemaking has become critical after *Bockting*, because rulemaking is the only way to regulate the reliability of hearsay if it is not testimonial. So for example, the proposed amendment to Rule 804(b)(3) appears to have renewed relevance after *Bockting,* as it requires an important showing of reliability that is no longer mandated by the Confrontation Clause.

The Committee has in the past proposed amendments when an Evidence Rule is subject to an application that would violate the Constitution. But there does not appear to be much risk of unconstitutional application of the hearsay exceptions given the case law after *Davis*. For example, the cases have essentially held that if a statement fits the excited utterance exception, it is for that reason non-testimonial after *Davis* — because to be admissible it will have to be in response to an emergency as opposed to an attempt to generate evidence for a criminal trial. Courts have reached similar conclusions with respect to business records, public records, co-conspirator statements, and declarations against interest: the factors that make hearsay statements admissible under these exceptions by definition mean that the statements cannot be testimonial.

Cases Defining "Testimonial" Hearsay After Crawford, Arranged By Subject Matter

Admissions

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. ***See also United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*).

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: ***United States v. Gibson,*** 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as an admission by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Bruton — Testimonial Statements of Co-Defendants

Bruton **line of cases not altered by** ***Crawford*****:** ***United States v. Lung Fong Chen***, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton,* not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury.

Admissions not covered by *Crawford,* but *Bruton* remains in place to protect against admission against a non-confessing co-defendant: *United States v. Ramos-Cardenas,* 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant; nor did it displace the case law under *Bruton.* The court elaborated as follows:

> [W]hile *Crawford* certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton, Richardson* and *Gray.*

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them.

Bruton* and its progeny survive *Crawford* — co-defendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper, 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The court concluded that because "the Supreme Court has so far taken a 'pragmatic' approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the

defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Co-Conspirator Statements

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.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial).

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.* 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. **Accord** ***United States v. Bobb,*** 471 F.3d 491 (3d Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator 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).

Statement by an anonymous coconspirator is not testimonial: ***United States v. Martinez,*** 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford.* The court stated that "a reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused in investigating and prosecuting the crime." ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police

officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis,* "co-conspirators' statements made in pendency and furtherance of a conspiracy [are] not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)).

Coconspirator statements made to an undercover informant are not testimonial: ***United States v. Hargrove,*** 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that *"Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* — which as here involved a coconspirator's statement made to a government informant — to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

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); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators).

Statements in furtherance of a conspiracy are not testimonial: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial).

Statements admissible under the co-conspirator exemption are not testimonial: ***United States v. Townley,*** 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*).

Statements made during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Underwood,*** 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court explained as follows:

> In this case, the challenged evidence consisted of recorded conversations between the confidential informant and Darryl in which arrangements were made for the confidential informant to purchase cocaine. This evidence is neither testimony at a preliminary hearing, nor testimony before a grand jury, nor testimony at a former trial, nor a statement made during a police interrogation. Moreover, the challenged evidence does not fall within any of the formulations which *Crawford* suggested as potential candidates for "testimonial" status. Darryl, the declarant in the challenged evidence, made statements to Hopps in furtherance of the criminal conspiracy. His statements clearly were not made under circumstances which would have led him reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.
>
> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

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) when they implicate the defendant, 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. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was non-testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends admissible under Rule 804(b)(3) and not testimonial).

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: ***United States v. Jordan,*** 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, be extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: ***United States v. Udeozor,*** 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial

under *Crawford*. He argued specifically that under *Davis*, a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution–and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the husband's primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is 'testimonial' only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well.

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."

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 distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved statements made by accomplices to police officers, so that "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."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Accomplice confession to law enforcement is testimonial, even if redacted: *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."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* , 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes."

Accomplice confession to law enforcement is testimonial, even if it implicates the accused only indirectly: *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.

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 informally to a trusted person. 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."

Accomplice statements to cellmate are not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made a number of statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose

> of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court emphasized the limited nature of its holding. It noted that it was not providing an "exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." Among other things, the Court stated that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial." Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, we do not hold the opposite – that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that "under the *Davis* guideposts" the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The statements were not "testimonial" within the meaning of *Crawford v. Washington*. The court declared that the relevant question is whether the

statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." Once the initial danger has dissipated, however, "a person who speaks while still under the stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

> **Note: While the *Brito* decision preceded the Supreme Court's decision in *Davis/Hammon,* the result appears to be completely consistent with the Supreme Court's application of *Crawford* to 911 calls. When the statement is in response to an emergency, it is not testimonial.**

911 call — including statements about the defendant's felony status—are not testimonial: *United States v. Proctor,* 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the *Davis* "primary purpose" test and evaluated the call in the following passage:

> Viewing the facts of this case in light of *Davis*, Yogi's statements to the 911 operator were nontestimonial. Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing

emergency-not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi and Fairley. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: ***United States v. Arnold,*** 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was properly concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation. The court also made the following points:

1. The fact that Tamica left the scene to make the 911 call was irrelevant. While in *Davis,* the Court mentioned the fact that the *defendant* had left the scene as indicating that the emergency had passed, that reasoning does not apply when the *victim* leaves the scene and has no idea whether or not the defendant is following her.

2. Asking the victim to describe the gun did not amount to interrogation sufficient to make Tamica's answer testimonial: "Asking the victim to describe the gun represented one way of exploring the authenticity of her claim, one way in other words of determining whether the emergency was real. And having learned who the suspect was and having learned that he was armed, [the officers] surely were permitted to determine what kind of weapon he was carrying and whether it was loaded -- information that has more to do with

preempting the commission of future crimes than with worrying about the prosecution of completed ones. What officers would not want this information -- either to measure the threat to the public or to measure the threat to themselves? And what officer under these circumstances would have yielded to the prosecutor's concern of building a case for trial rather than to law enforcement's first and most pressing impulse of protecting the individual from danger?"

3. Tamica's statements upon Arnold's return were clearly not testimonial because they were prompted by Arnold's reappearance and not by any questioning by police officers: "This was not a statement prepared for court."

4. Because the statements were not testimonial, the Confrontation Clause had no applicability. This is because after *Davis*, the Confrontation Clause is solely concerned with testimonial hearsay, "meaning that the only admissibility question in this setting is whether the statement satisfies the Federal (or State) Rules of Evidence."

911 call is non-testimonial under *Davis/Hammon: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements in light of *Davis/Hammon* as follows:

> When viewing the facts in light of *Davis*, we find that the anonymous caller's statement to the 911 operator was nontestimonial. In *Davis*, the caller contacted the police after being attacked, but while the defendant was fleeing the scene. There the Supreme Court stressed that, despite the immediate attack being over, the caller "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" Similarly, the caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

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 told the responding officers 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."

> **Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime.**

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.

Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime.

Expert Witnesses

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry,* 472 F.3d 910 (D.C. Cir. 2007): The court declared that *Crawford* "did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703." ***See also United States v. Law,*** 528 F.3d 888 (D.C. Cir. 2008)**:** Expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, *Crawford* did not involve expert witness testimony. "Thomas testified based on his experience as a narcotics investigator; he did not related statements by out-of-court declarants to the jury."

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly related to the jury*: United States v. Lombardozzi,* 491 F.3d 61 (2d Cir. 2007): In an extortion case, the government called a criminal investigator who testified as an expert to the structure of La Cosa Nostra and to the defendant's affiliation with organized crime. The expert based his opinion as to the defendant in part on testimony from cooperating witnesses and confidential informants. The defendant argued that the introduction of the expert's testimony violated *Crawford* because it was based in part on testimonial hearsay. The court observed that *Crawford* is inapplicable if testimonial statements are not used for their truth, and noted the circuit's previous determination "that it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to

the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless.

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Forfeiture

Constitutional standard for forfeiture — like Rule 804(b)(6) — requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 128 S.Ct. 2678 (2008): The Court in an opinion by Justice Scalia held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. Justice Scalia found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to

procure his unavailability as a witness. The court of appeals affirmed this finding, rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate a retaliatory intent. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Grand Jury, Plea Allocutions, Etc.

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 noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2d Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2d Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2d Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2d Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

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, because 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.

Informal Circumstances, Private Statements, etc.

Informal letter 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.

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright,* 536 F.3d 819 (8th Cir. 2008): The defendant was charged with, among other things, shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a conversation he had on the night of the shooting with the other victim. This was a private conversation before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

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 (a proposition later rejected by the Supreme Court), 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 use at a trial.

Private conversation between mother and son is not testimonial: *United States v. Brown,* 441 F.3d 1330 (11th Cir. 2006): The defendant was convicted of murder of a federal employee. At trial, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked whether the defendant had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown

was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Interrogations, Etc.

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, directly or indirectly, 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.

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez,* 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth — to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

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). . . We 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 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. McGee,*** 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

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*, because 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.

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?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court 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.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not

for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the introduction of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Police officer's count of marijuana plants found in a search is testimonial: *United States v. Taylor,* 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer as to the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution..

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.

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial).

> **Note: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Davis*. There, the Court declared that it would find an excited utterance to be testimonial only if the *primary* purpose was to prepare a statement for law enforcement rather than to respond to an emergency.**

Compare United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.").

Statements made by a child-victim to a detective are testimonial: *Bockting v. Bayer,* 399 F.3d 1010 (9th Cir. 2005), *rev'd on other grounds,* 127 S.Ct. 1173 (2007): 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 — that ruling that was reversed by the Supreme Court, see *infra*.

Machines

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine — that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was

prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alchohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." The court noted that the notes of a chemist, evaluating the data from the machine, were testimonial, but it found no plain error in the admission of these notes. The court also observed that it is "problematic" to entertain a *Crawford* claim for plain error because it some cases it may be more advantageous for the defendant to contest hearsay than live testimony. It explained that hearsay "is usually weaker than live testimony" and in this case the defendant could argue that the government failed to produce the person who actually did the test, and that flaws in procedures may have been omitted from the lab notes.

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a cd of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the cd was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

Medical Statements

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of some of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,* 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Even under a broader definition of "testimonial", Taylor could not have reasonably expected that his statements would be used in a later trial, as they were made under a promise of confidentiality. Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Not Offered for Truth

Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* – as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a party admission, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's admissions. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Statements by informant to police officers, offered to prove the "context" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the Constitution was not violated because the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

> The government's articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or

words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

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: 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.

Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford*, as they were admitted to provide context: *United States v. Paulino*, 445 F.3d 211 (2d Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other. The government offered these statements to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. . . . The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Accomplice statement to police officer was testimonial, but did not violate the Confrontation Clause because it was not admitted for its truth: *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. ***See also United States v. Lore,*** 430 F.3d 190 (3d Cir. 2005) (relying on *Trala,* the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

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. **See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness — by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime — did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

Informant's statements were not properly offered for "context," so their admission violated *Crawford: United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate *Crawford*, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation. . . " The court found the error in admitting the hearsay to be harmless.

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: ***United States v. Gibbs,*** 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. These firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched."

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": ***United States v. Nettles,*** 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government arranged to put him in contact with an undercover informant who purported to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine: "We note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit."

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 that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. 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." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's

statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.").

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements were testimonial. But the Court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth — indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,* 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause).

Present Sense Impression

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the

hearsay rule."

Records, Certificates, Etc.

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti,* 519 F.3d 319 (D.C. Cir. 2007): The Court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court relied on *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006), which held that a certification of business records was not testimonial, given the fact that the underlying records were not testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Warrant of deportation is not testimonial: *United States v. Garcia,* 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter." The court found no reason to disagree with the other circuits.

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,* 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> Although the Court has yet to articulate a precise definition of "testimonial," it is beyond debate that the Board minutes are nontestimonial in character and, consequently, outside the class of statements prohibited by the Confrontation Clause. The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541

U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Autopsy reports are not testimonial: ***United States v. Feliz,*** 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8)(B). The court concluded that to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford*. Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6) cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and *Davis*. The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial." With respect to Rule 803(8)(B), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found inadmissible:

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

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.

See also United States v. Morgan, 505 F.3d 332 (5th Cir. 2007) (relying on *Rueda-Rivera* and holding that business records are not testimonial); ***United States v. Lopez-Moreno,*** 420 F.3d 420 (5th Cir. 2005) (relying on *Rueda-Rivera* and finding that records of deportation are not testimonial).

Warrant of deportation not testimonial: ***United States v. Valdez-Matos***, 443 F.3d 910 (5th Cir. 2006): In an illegal reentry case, the court found that a warrant of deportation was not testimonial. The court relied on *Rueda-Rivera*, supra, and stated that "generally documents in a defendant's immigration file are analogous to non-testimonial business records." The court concluded that a warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter."

Business records are not testimonial: ***United States v. Jamieson,*** 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Post office box records are not testimonial: ***United States v. Vasilakos,*** 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: ***United States v. Ellis,*** 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for

methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical report, the court reasoned as follows:

> Given the focus of the courts of appeals and our own precedent on the declarant's reasonable expectations of whether a statement would be used prosecutorially, Ellis may appear to be on strong ground in arguing that the results of his medical tests were testimonial. It must have been obvious to Kristy (the laboratory technician at the local hospital) that her test results might end up as evidence against Ellis in some kind of trial. . . .
>
> Nevertheless, we do not think these circumstances transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause. There is no indication that the observations embodied in Ellis's medical records were made in anything but the ordinary course of business. Such observations, the Court in *Crawford* made clear, are nontestimonial. And we do not think it matters that these observations were made with the knowledge that they might be used for criminal prosecution. Prior to the Court's decision in *Davis*, two other courts of appeals decided that certificates of nonexistence of record ("CNR"), admitted under Rule 803(10) and used to prove an alien did not receive permission from the Attorney General to reenter the country, were nontestimonial despite the fact they were prepared by the government in anticipation of a criminal prosecution. *See, e.g., United States v. Cervantes-Flores,* 421 F.3d 825, 833 (9th Cir. 2005)*; United States v. Rueda-Rivera,* 396 F.3d 678, 680 (5th Cir. 2005). The focus of these decisions was that the preparation of these CNRs was routine, and the statements in them were simply too far removed from the examples of testimonial evidence provided by *Crawford.*

The *Ellis* court found that the Supreme Court's analysis in *Davis* supported its view that a statement is not testimonial simply because it is prepared with the knowledge that it is likely to be used in a prosecution:

> In *Davis*, the Court addressed a statement made by a woman to a 911 operator reporting she had been assaulted. That recorded statement was later used at trial to prosecute Davis (the woman's former boyfriend) for a felony violation of a domestic no-contact order. The Court considered the 911 operator's questioning of the woman to be an interrogation, and the operators themselves to be at least "agents of law enforcement." In the face of Davis's objection that introduction of the statement violated the Sixth Amendment, the Court held that when the objective circumstances indicate the "primary purpose" of police interrogation is to meet an ongoing emergency, the statements elicited in response are nontestimonial. We believe this holding necessarily implies that consciousness on the part of the person reporting

an emergency (or the police officer eliciting information about the emergency) that his or her statements might be used as evidence in a crime does not lead to the conclusion ipso facto that the statement is testimonial. A reasonable person reporting a domestic disturbance, which is what the declarant in Davis was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator. . . . So it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially.

As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. Therefore, when these professionals made those observations, they--like the declarant reporting an emergency in *Davis*--were "not acting as . . . witness[es];" and were "not testifying." See *Davis*, 126 S. Ct. at 2277. They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that they were not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.
>
> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson,* 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford.* But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Certificate of nonexistence of an immigration record is not testimonial: *United States v. Urqhart,* 469 F.3d 745 (8th Cir. 2006): The defendant was convicted of illegal reentry into the United States after deportation. As evidence that he had not been permitted to re-enter, the government offered a Certificate of Nonexistence of Record, indicating that a search found no indication of permission in the pertinent records. The defendant argued that admitting the CNR violated his confrontation rights after *Crawford,* but the court disagreed and affirmed the conviction. The court recognized that the CNR was prepared for purposes of a prosecution, but nonetheless found the evidence to be non-testimonial. It stated that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford.*"

Warrant of deportation is not testimonial: *United States v. Torres-Villalobos,* 487 F.3d 607 (8th Cir. 2007): In an illegal reentry prosecution, the government used signed warrants of deportation to prove that the defendant had been deported from the country on two occasions. [The court described a warrant of deportation at "a document that commands an immigration official to take custody of the deportee and remove him from the United States. A signed warrant indicates that the attesting witness observed the deportee leaving the country."] The defendant argued that admitting the signed warrants violated *Crawford,* but the court disagreed. The court relied on *Davis's* "primary purpose" test and declared that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future

criminal prosecutions." The court also noted that as to one of the warrants, there was no possible confrontation claim even if it was testimonial; this was because the official who signed the warrant testified at trial. The fact that he could not remember seeing the defendant leave the country was irrelevant, because he was still subject to cross-examination within the meaning of the Confrontation Clause.

Certificate prepared by government officials is NOT testimonial: *United States v. Cervantes-Flores,* 421 F.3d 825 (9th Cir. 2005): The defendant was convicted of being found in the United States after deportation, without permission to re-enter. As evidence that he had not been permitted to re-enter, the government offered a Certificate of Nonexistence of Record, indicating that a search found no indication of permission in the pertinent records. The defendant argued that admitting the CNR violated his confrontation rights after *Crawford,* but the court disagreed and affirmed the conviction. The court recognized that the CNR was prepared for purposes of a prosecution, but nonetheless found the evidence to be non-testimonial. It explained that while the *certificate* was prepared for litigation, the underlying records were not. (Though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence could still be so because the certificate is prepared for purposes of litigation). The court concluded as follows:

> Finally, we note the obvious—that the CNR does not resemble the examples of testimonial evidence given by the Court [in *Crawford*]. "Police interrogations" and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" all involve live out-of-court statements against a defendant elicited by a government officer with a clear eye to prosecution. Ruth Jones' certification that a particular record does not exist in the INS's files bears no resemblance to these types of evidence.

See also United States v. Bahena-Cardenas, 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation was non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Weiland,*** 420 F.3d 1062 (9th Cir. 2006) (certification of a record of conviction by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly.") (quoting *Bahena-Cardenas*).

> **Note: The result and rationale of *Cervantes-Flores* (and similar results in other circuits) indicate that hearsay statements offered under Rule 803(10), as well as affidavits authenticating business records under Rules 902(11) and (12), will be considered non-testimonial and therefore admissible even after *Crawford.***

Foreign business records are not testimonial: ***United States v. Hagege,*** 437 F.3d 943 (9th Cir. 2006): In a prosecution for bankruptcy fraud and related offenses, the trial court admitted foreign business records under 18 U.S.C. § 3505. Similar to Rule 803(6), section 3505 allows the foundation requirements for the business records exception to be established by certification. The defendant argued that admission of the foreign business records violated his right to confrontation after *Crawford.* The court rejected this argument and affirmed the convictions. It relied on the statement in *Crawford* that business records are an example of the kind of statements "which by their nature are not testimonial." The court noted that "[t]he foreign certifications attesting to the authenticity of the business records were not admitted into evidence. Thus, we do not consider whether admission of the foreign certifications would have violated the Confrontation Clause under *Crawford.*"

Records In Database of Entry Documents Is Not Testimonial; and Drug Ledger Is Not Testimonial: ***United States v. Mendez,*** 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford,* "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

Warrant of deportation prepared by government officials is NOT testimonial: ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005): In an illegal reentry case, the defendant argued that the warrant of deportation was testimonial under *Crawford* and therefore his right to confrontation was violated by its admission. The warrant was offered to prove that the defendant left the country. The Court held that the warrant was not testimonial. It reasoned as follows:

Although the Court in *Crawford* declined to give a comprehensive definition of "testimonial"

evidence, non-testimonial evidence fails to raise the same concerns as testimonial evidence. Because non-testimonial evidence is not prepared in the shadow of criminal proceedings, it lacks the accusatory character of testimony. Non-testimonial evidence is not inherently adversarial. We are persuaded that a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial. It records facts about where, when, and how a deportee left the country. Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in *Crawford*, we conclude that a warrant of deportation is non-testimonial and therefore is not subject to confrontation.

The court also relied on the fact that the Fifth and the Ninth Circuits have held that certificates of no grant of entry (CNR's) are non-testimonial.

State of Mind Statements

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. 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."

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he

refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction — those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined.

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

Supreme Court

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 127 S.Ct. 1173 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). **But whatever improvement in reliability *Crawford* produced in this respect must be considered together with *Crawford's* elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.**

One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.*