ADVISORY COMMITTEE
ON
EVIDENCE RULES

Dallas, TX
April 3, 2012

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Dallas, Texas

April 3, 2012

I. Opening Business

Opening business includes approval of the minutes of the Fall, 2011 meeting; and a report on the January, 2012 meeting of the Standing Committee.

II. Proposed Amendment to Rule 803(10)

At the meeting, the Committee will determine whether to recommend to the Standing Committee that the proposed amendment to Rule 803(10) be approved and referred to the Judicial Conference. The agenda book contains a memorandum on the proposed amendment and on the public comments that have been received.

III. Possible Amendment to Rule 801(d)(1)(B)

The agenda book contains a memorandum from the Reporter analyzing the possibility of amending Rule 801(d)(1)(B) to provide that a prior consistent statement is exempt from the hearsay rule whenever it is admissible to rehabilitate the credibility of the declarant-witness.

IV. Possible Amendment to Rules 803(6) and 803(8)

The Committee previously decided not to propose an amendment to clarify that the opponent has the burden of showing the untrustworthiness of business and public records. Since that time, the Reporter has been informed by members of the Texas Restyling Project that they believe that the restyled rules place the burden of showing trustworthiness is on the proponent — which was not the intent of the Advisory Committee when it restyled the rules.

The agenda book contains a memorandum discussing the proposed amendment and the comments of the Texas Restyling Project.

V. Memo on "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. The agenda book includes a memo from the Reporter providing some history of the studies that have already been undertaken and providing some suggestions of possible amendments for consideration by the Committee.

VI. Crawford Outline

The updated outline on federal cases on confrontation after *Crawford v. Washington* is included in the agenda book.

VII. Symposium on Rule 502

The Evidence Rule Committee is sponsoring a symposium on Federal Rule of Evidence 502, which will take place on October 5, 2012, before the Fall meeting of the Committee. The agenda book contains a short memo on the plans for the symposium.

VIII. Privilege Project

The agenda book contains a memo from Professor Broun on the Privilege Project and a survey rule and commentary on the spousal testimony privilege.

IX. Next Meeting

The next meeting of the Committee is scheduled for Friday October 5, 2012, in Charleston, to take place after the Symposium on Rule 502.

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Honorable Mark R. Kravitz** United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510
Reporter, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Professor Daniel R. Coquillette** Boston College Law School 885 Centre Street Newton Centre, MA 02459

Chair, Advisory Committee on Appellate Rules	**Honorable Jeffrey S. Sutton** United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215
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Reporter, Advisory Committee on Bankruptcy Rules	**Professor S. Elizabeth Gibson** 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380 **Professor Troy A. McKenzie** New York University School of Law 40 Washington Square South New York, NY 10012

Chair, Advisory Committee on Civil Rules	**Honorable David G. Campbell** United States District Court 623 Sandra Day O'Connor U.S. Courthouse 401 West Washington Street Phoenix, AZ 85003-2146
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Chair, Advisory Committee on Criminal Rules	**Honorable Reena Raggi** United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818
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Chair, Advisory Committee on Evidence Rules	**Honorable Sidney A. Fitzwater** Chief Judge United States District Court Earle Cabell Federal Bldg. U.S. Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 140 West 62nd Street New York, NY 10023

Secretary, Standing Committee	**Peter G. McCabe** Secretary Committee on Rules of Practice & Procedure Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-180 Washington, DC 20544 Phone 202-502-1800 Fax 202-502-1766 Peter_McCabe@ao.uscourts.gov
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ADVISORY COMMITTEE ON EVIDENCE RULES

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Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 140 West 62nd Street New York, NY 10023
Members, Advisory Committee on Evidence Rules	**Honorable Brent R. Appel** Iowa Supreme Court Iowa Judicial Branch Building 1111 East Court Avenue Des Moines, IA 50319 **Honorable Anita B. Brody** United States District Court 7613 James A. Byrne United States Courthouse 601 Market Street Philadelphia, PA 19106-1797 **Honorable Stuart M. Goldberg** Principal Associate Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. – Room 4208 Washington, DC 20530 **William T. Hangley, Esq.** Hangley, Aronchick, Segal & Pudin, P.C. One Logan Square, 27th Floor Philadelphia, PA 19103-6933 **Marjorie A. Meyers, Esq.** Federal Public Defender Southern District of Texas 440 Louisiana, Suite 1350 Houston, Texas 77002

Members, Advisory Committee on Evidence Rules *(cont'd.)*	**Honorable William K. Sessions III** United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401 **Elizabeth J. Shapiro, Esq.** AD, Federal Programs Branch United States Department of Justice – Civil Division 20 Massachusetts Ave., N.W., Room 7152 Washington, DC 20530 **Paul Shechtman, Esq.** Zuckerman Spaeder LLP 1540 Broadway, Suite 1604 New York, NY 10036 **Honorable John A. Woodcock, Jr.** Chief Judge United States District Court Margaret Chase Smith Federal Building 202 Harlow Street, 3rd Floor Bangor, ME 04401-4901
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Liaison Members, Advisory Committee on Evidence Rules	**Honorable Paul S. Diamond** *(Civil)* United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106 **Honorable John F. Keenan** *(Criminal)* United States District Court 1930 Daniel Patrick Moynihan U.S. Courthouse 500 Pearl Street New York, NY 10007-1312 **Honorable Richard C. Wesley** *(Standing)* United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043

Liaison Members, Advisory Committee on Evidence Rules *(cont'd.)*	**Honorable Judith H. Wizmur** *(Bankruptcy)* Chief Judge United States Bankruptcy Court Mitchell H. Cohen U.S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570
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Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1A

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 28, 2011

Williamsburg, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee") met on October 28, 2011 in Williamsburg, Virginia.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
Hon. William K. Sessions III
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Wallace Jefferson, member of the Standing Committee
Hon. Joan N. Ericksen., former member of the Evidence Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Hon. Andrew Hurwitz, former member of the Evidence Rules Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Professor Laird Kirkpatrick, George Washington University Law School
Professor Frederic Lederer, William and Mary Law School
Professor Roger Park, Hastings Law School
Professor Katherine Schaffzin, University of Memphis School of Law

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members, liaisons, other members of the Standing Committee, and members of the public. The minutes of the Spring 2011 Committee meeting were approved.

Judge Fitzwater noted that the Restyled Rules of Evidence will go into effect on December 1, 2011. The Restyled Rules have won two important awards for excellence in legal writing — the Burton Award and the Clearmark Award. In honor of the Restyled Rules going into effect, the Advisory Committee sponsored a Symposium on the Restyled Rules of Evidence, which took place on the morning of the Advisory Committee meeting. Judge Fitzwater stated that the Symposium was a great success. He observed that the ideas exchanged by the panel members will provide an important historical record on the meaning of the Restyled Rules, and will also assist the Advisory Committee going forward. Judge Fitzwater thanked the Reporter for putting together the Symposium; William and Mary Law School for hosting the event; Professor Frederic Lederer for all his help in hosting the Symposium; the William and Mary Law Review for publishing the proceedings; and all the panelists and moderators who made such outstanding presentations.

Judge Fitzwater then welcomed and introduced the two new members of the Advisory Committee, Judge Sessions and Judge Woodcock.

Judge Fitzwater and the Reporter then provided heartfelt thanks to two former members — Justice Hurwitz and Judge Ericksen — who both provided excellent service to the Committee. Each has been and will be sorely missed.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz*, such a certificate would be testimonial. The proposed amendment to Rule 803(10) adds a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the

government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz* the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

The Reporter reported to the Advisory Committee that no public comments had yet been received on the proposed amendment to Rule 803(10). Any comments that are received will, of course, be reviewed by the Committee at its Spring 2012 meeting.

III. Possible Amendment to Rule 801(d)(1)(B)

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of public defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment. Justice Appel contacted courts in three states and reported that there was recognition that the current

distinction between rehabilitation and substantive use was confusing and not meaningful — but that there was no sense of urgency to amend the rule in those three states.

At the Fall meeting, the Public Defender expressed concern that courts would end up admitting more prior consistent statements under the amendment, leading to impermissible bolstering of witnesses. The Reporter responded that the amendment by its terms would admit no statements that are not already admitted for rehabilitation — and any possible risk of abuse would be tempered by the court's judicious use of Rule 403, as emphasized in the proposed Advisory Committee Note. The Reporter also noted that in Minnesota, where the Rule is similar to the proposed amendment, there does not appear to be any indication in the case law that prior consistent statements had been more liberally admitted.

The Public Defender also expressed concern that if a witness had made both consistent and inconsistent statements, all of them admissible for impeachment or rehabilitation, then under the amendment all of the consistent statements would be admissible for their truth while the prior inconsistent statements — if not made under oath — would be admissible only for impeachment and not for their truth. The Public Defender argued that in this situation the judge would completely confuse the jury by giving different instructions for consistent and inconsistent statements. (But in fact the judge in such a situation would not give any instruction about the consistent statements because, under the amendment, the consistent statements would be admissible for both rehabilitation and substantive use — this means that under the amendment there will be fewer, not more, instructions).

A member of the Committee noted that the rule as it exists is logically inconsistent and intellectually dishonest; as such the Committee should approve the amendment to further its goal of providing consistent and logical rules. Another member observed that prior consistent statements often had value as corroboration. He also noted that the clearer the judge can be to the jury, the better for the system — and the instruction required as to certain prior consistent statements under current law is incomprehensible to jurors and accordingly brings disrespect to the system. The Reporter and the Chair noted that the proposed amendment had been greeted with enthusiasm by some of the district court judges on the Standing Committee when it was raised as an information item at the Spring 2011 meeting. Those judges remarked that in their experience, an instruction that a prior consistent statement was admissible for rehabilitation and not for its truth is one that jurors find impossible to follow.

One Committee member suggested that the instruction currently given for consistent statements admissible only for rehabilitation might in fact have some value for counsel in argument to the jury.

Other members of the Committee were undecided about the amendment and suggested the Committee seek more input from judges and interested groups to determine whether it would be worthwhile to proceed with an amendment.

The Committee ultimately voted to table the proposal and conduct further research so that

it could be considered on the merits at the Spring 2012 meeting. The Reporter stated that he would work with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The Reporter stated that he would also send the proposal to the ABA, the American College of Trial Lawyers, the NACDL, and other interested groups for their views on the proposal. The Chair also stated that he would raise the proposal as an information item at the next Standing Committee, in order to seek guidance on whether the amendment was worth pursuing.

The working language for the proposed amendment, to be considered at the next meeting, is as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > **(B)** is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness;

IV. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), the proposed amendment currently out for public comment — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

V. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be advisable to propose an actual codification of all the evidentiary privileges to Congress, or even to opine on what model rules of privilege would look like. But it concluded that it could perform a valuable service to the bench and bar by setting forth, in text and commentary, the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for Rule 502 and the restyling project.

At the Fall meeting, Professor Broun submitted materials on the attorney-client privilege and the marital privileges. Committee members stated for the record that the project was intended only as a description of the federal common law of privilege, and would result in a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

But some members expressed concern that the project might be read as the Committee's statement about what privileges *ought* to look like or which side of a dispute about the meaning or extent of a privilege should be adopted. There was also a concern that by even stating what the law was, the Committee might put its imprimatur on bad or disputed law. Other members suggested that calling the project a "survey" or a "restatement" might be misinterpreted as the Committee's attempt to establish the law of privileges.

Professor Broun and the Reporter emphasized that the project was not intended to provide the Committee's imprimatur on any question of privilege law. Committee members suggested that the title of the project should be changed to indicate the limited intent. After discussion, the working title of the project was changed from "privilege survey" to "compendium" on the federal common law of privilege.

The Committee also determined that the ultimate work product should not be published under the name of the Committee. The Reporter noted that he had, at the Committee's direction, written two articles about the Federal Rules. Those articles were reviewed and approved by the Committee, but they were published under the Reporter's name in pamphlets published by the Federal Judicial Center. Those pamphlets thus were not sent out under the Advisory Committee's auspices, and accordingly their publication was outside the rules process. They were not sent out for a period of public comment and they were not approved by a vote of the Standing Committee. Committee members generally agreed that the same or a similar process should be employed if and when the work on privileges is ready for publication.

Judge Fitzwater stated that he would raise the privilege project at the next Standing Committee meeting and seek advice on how and whether the project should be published. Professor Broun and the Reporter stated that they would prepare a memorandum for the Committee's next

meeting on the process questions involved in preparing and publishing a work on privileges.

VI. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, after a brief discussion, Judge Fitzwater noted that the Committee was just coming off a number of difficult and time-consuming projects and could use more time to consider the possible amendments set out by the Reporter. Accordingly, the Committee resolved to place the Reporter's memorandum on the Spring agenda. One member stated for the record that he was in favor of the proposal to amend Rule 607 to prevent parties from abusing the rule by calling a witness solely to introduce otherwise inadmissible evidence.

VII. Next Meeting

The Spring 2012 meeting of the Committee is scheduled for Tuesday April 3 in Dallas.

Respectfully submitted,

Daniel J. Capra
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
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 Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Rules Committee Officer
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center
Bernida Evans	Rules Office Management Analyst

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Membership Changes

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

Meeting with Supreme Court Justices

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

Judicial Conference Report

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

Rules Taking Effect on December 1, 2011

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

Pending Rule Amendments

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

Lawsuit Abuse Reduction Act

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

Sunshine in Litigation Act

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

Pleading Standards

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Consent Decrees

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

Costs and Burdens of Civil Discovery

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

Time to File a Notice of Appeal When a Federal Officer or Employee is a Party

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Bankruptcy Legislation

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 2-3, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 12, 2011 (Agenda Item 8).

Amendments for Publication

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb "provides" to "provide."

The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).

Information Items

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word "must" to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word "shall." He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) "BAP" to mean a bankruptcy appellate panel; (2) "appellate court" to mean either the district court or the BAP to which an appeal is taken; and (3) "transmit" to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term "transmit" to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of "transmit" was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like "transmit," which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as "e-transmit."

Some members questioned the proposed definition of "appellate court" because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb "transmit" in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as "transmit,""provide," or "furnish," but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term "send," but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall*, he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall*, some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

Information Items

POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the

information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss

for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a "Duke II" conference, but had not yet made a decision on the matter.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center's research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix "suffice" under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to

the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

Amendments for Final Approval

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

The committee without objection by voice vote approved the proposed technical and conforming amendment for final approval by the Judicial Conference without publication.

Information Items

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a "best practices" section of the *Benchbook for U.S. District Court Judges.* She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center's Benchbook Committee, and a draft section had been prepared.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

Information Items

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquillette to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

1. FRONT-LOADING OF CASES

In re Hydrogen Peroxide

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Wal-Mart*, the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of "commonality," as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

Discovery at certification

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart*, the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a "trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

Early practicable time for making the certification decision

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)'s requirement that certification occur at "an early practicable time." There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

Early dispositive motions

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

Preponderance and Commonality

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of "manageability." Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

Rule 23(b)(2) classes

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding "commonality" under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court's statements that back pay could not be brought as part of a (b)(2) action because it was not "incidental" were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

Arbitration Clause Cases

It was argued that *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion.*

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a "no class-arbitration" clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

3. SETTLEMENT CLASSES

The need for a Rule 23 amendment on settlement classes

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about "manageability" in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit's *De Beers* litigation, for example, the court's opinion noted that "(e)ver since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law."

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties' actions or the attorney's fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem*. First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

Approval of Settlements

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be "fair, reasonable, and adequate." The rule would alter *AmChem's* statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court's inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at cy-près cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a cy-près issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the cy-près portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, cy-près should be an important component of them.

Role of the state attorneys general in class settlements

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. COMPETING CLASSES AND COUNSEL

Duplication of efforts

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

Appointment of Counsel

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

Federal-State coordination

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

Front-loading of cases

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

Class definition

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an "all or nothing" approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

Settlement classes

Another panelist's choice was for a distinct settlement-class rule. It might be similar to the advisory committee's proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

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REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 13, 2011

The Judicial Conference of the United States convened in Washington, D.C., on September 13, 2011, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge Carol Bagley Amon,
Eastern District of New York

Third Circuit:

Chief Judge Theodore A. McKee
Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Chief Judge Sarah S. Vance,
Eastern District of Louisiana

Sixth Circuit:

Chief Judge Alice M. Batchelder
Judge Thomas A. Varlan,
Eastern District of Tennessee

Seventh Circuit:

Chief Judge Frank H. Easterbrook
Chief Judge Richard L. Young,
Southern District of Indiana

Eighth Circuit:

Chief Judge William Jay Riley
Judge Rodney W. Sippel,
Eastern District of Missouri

Ninth Circuit:

Chief Judge Alex Kozinski
Judge Robert S. Lasnik,
Western District of Washington

Tenth Circuit:

Chief Judge Mary Beck Briscoe
Judge Robin J. Cauthron,
Western District of Oklahoma

Eleventh Circuit:

Chief Judge Joel F. Dubina
Judge Myron H. Thompson,
Middle District of Alabama

District of Columbia Circuit:

Chief Judge David Bryan Sentelle
Chief Judge Royce C. Lamberth,
District of Columbia

Federal Circuit:

Chief Judge Randall R. Rader

Court of International Trade:

Chief Judge Donald C. Pogue

The following Judicial Conference committee chairs attended the Conference session: Circuit Judges Julia Smith Gibbons, Michael S. Kanne, Diarmuid F. O'Scannlain, Reena Raggi (incoming chair), Jeffrey S. Sutton, and John Walker, Jr.; District Judges Robert Holmes Bell, Rosemary M. Collyer, Joy Flowers Conti, Claire V. Eagan, Sidney A. Fitzwater, Janet C. Hall, D. Brock Hornby, George H. King, Mark R. Kravitz, J. Frederick Motz, Julie A. Robinson, Lee H. Rosenthal, and George Z. Singal; and Bankruptcy Judge Eugene R. Wedoff. Bankruptcy Judge Rosemary Gambardella and Magistrate Judge Thomas C. Mummert, III, were also in attendance, and Cathy Catterson of the Ninth Circuit represented the circuit executives.

James C. Duff, Director of the Administrative Office of the United States Courts, attended the session of the Conference, as did Jill C. Sayenga, Deputy Director; William R. Burchill, Jr., Associate Director and General Counsel; Laura C. Minor, Assistant Director, and Wendy Jennis, Deputy Assistant Director, Judicial Conference Executive Secretariat; Cordia A. Strom, Assistant Director, Legislative Affairs; and David A. Sellers, Assistant Director, Public Affairs. District Judge Barbara Jacobs Rothstein, Director, and John S. Cooke, Deputy Director, as well as District Judge Jeremy D. Fogel, incoming Director, Federal Judicial Center, and District Judge Patti B. Saris, Chairman, and Judith W. Sheon, Staff Director, United States Sentencing Commission, were in attendance at the session of the Conference, as was Jeffrey P. Minear, Counselor to the Chief Justice. Scott Harris, Supreme Court Counsel, and the 2011-2012 Supreme Court Fellows also observed the Conference proceedings.

Attorney General Eric H. Holder, Jr., addressed the Conference on matters of mutual interest to the judiciary and the Department of Justice. Senators Patrick J. Leahy, Amy Klobuchar, and Jeff Sessions, and Representatives Lamar S. Smith, John S. Conyers, Jr., Howard Coble, and Steve Cohen spoke on matters pending in Congress of interest to the Conference.

REPORTS

Mr. Duff reported to the Conference on the judicial business of the courts and on matters relating to the Administrative Office (AO). Judge Rothstein spoke to the Conference about Federal Judicial Center (FJC) programs, and Judge Saris reported on Sentencing Commission activities. Judge Gibbons, Chair of the Committee on the Budget, presented a special report on the budget outlook.

EXECUTIVE COMMITTEE

RESOLUTIONS

Outgoing chairs. The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution recognizing the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2011:

> The Judicial Conference of the United States recognizes with appreciation, respect, and admiration the following judicial officers:
>
> **HONORABLE M. MARGARET MCKEOWN**
> Committee on Codes of Conduct
>
> **HONORABLE JANET C. HALL**
> Committee on Federal-State Jurisdiction
>
> **HONORABLE BOBBY R. BALDOCK**
> Committee on Financial Disclosure
>
> **HONORABLE GEORGE Z. SINGAL**
> Committee on Judicial Resources
>
> **HONORABLE MICHAEL S. KANNE**
> Committee on Judicial Security
>
> **HONORABLE LEE H. ROSENTHAL**
> Committee on Rules of Practice and Procedure

HONORABLE MARK R. KRAVITZ
Advisory Committee on Civil Rules

HONORABLE RICHARD C. TALLMAN
Advisory Committee on Criminal Rules

Appointed as committee chairs by the Chief Justice of the United States, these outstanding jurists have played a vital role in the administration of the federal court system. These judges served with distinction as leaders of their Judicial Conference committees while, at the same time, continuing to perform their duties as judges in their own courts. They have set a standard of skilled leadership and earned our deep respect and sincere gratitude for their innumerable contributions. We acknowledge with appreciation their commitment and dedicated service to the Judicial Conference and to the entire federal judiciary.

Director of the Administrative Office. The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution to mark the departure of James C. Duff from the position of Director of the Administrative Office of the United States Courts:

The Judicial Conference of the United States recognizes with appreciation, admiration, and respect

JAMES C. DUFF
Director of the Administrative Office
2006-2011

James C. Duff's service as the Director of the Administrative Office (AO) over the last five years is the culmination of many years of distinguished service to the federal judiciary. He began his career in the judiciary as an assistant to Chief Justice Warren E. Burger, serving from 1975-1979, while also attending law school. He returned to the judiciary in 1996 to serve for four years as the Administrative Assistant to Chief Justice William H. Rehnquist, and then again in July 2006, when he was appointed Director of the Administrative Office by Chief Justice John G. Roberts, Jr. As Director of the Administrative Office, Jim Duff has proven to be a tenacious

advocate for the judiciary and for ensuring that the American judicial system maintains its reputation for excellence.

Jim Duff devoted his tenure at the Administrative Office to his goal of making the AO the most effective service organization in government. He worked to strengthen the ties between the AO and the courts it serves by creating exchanges between AO and court staff and by ensuring that the courts have a strong voice on the AO's advisory councils and groups. He focused on teamwork and collaboration both within the AO and between the AO and the agencies with which it partners to administer the nation's judicial system. Under his leadership, the judiciary forged strong working relationships with the General Services Administration and the United States Marshals Service to ensure that the judiciary had adequate facilities to carry out its mission and to secure the safety of the judicial community.

Jim Duff has also been a powerful voice for the judiciary before Congress. By partnering strong advocacy for the judiciary's budgetary and legislative needs with equally strong emphasis on good stewardship in managing the judiciary's resources, he has made sure that the judiciary's requests to Congress are heard. He has also been a champion for maintaining the independence of the Third Branch and preserving the unique aspects of service in the federal judiciary that guarantee its ability to administer fair and impartial justice. As a key part of this effort, he has worked tirelessly to obtain fair compensation for members of the judiciary so that the courts can continue to attract the highest caliber of judges and staff. As a further part of this effort, he has worked to strengthen the judiciary's internal oversight program to ensure the public's continued confidence in the integrity of the judiciary. Under his leadership, the Committee on the Administrative Office was renamed the Committee on Audits and Administrative Office Accountability and restructured to focus on the significant areas of audit, review, and investigative assistance.

Jim Duff has led the Administrative Office during a period of great challenges – workload and security risks in the border

courts, mammoth bankruptcy cases in the wake of the 2008-2009 financial crisis, and an increasingly austere fiscal environment. His great gift as a leader is that he has faced these challenges with grace and optimism, as a consensus builder, a mediator, and a motivator. His warm personal qualities, including his humility, approachability, and sense of humor make working with Jim a true pleasure. His sharp intellect, excellent judgment, and devotion to cause make working with him an honor.

The Judicial Conference expresses its great appreciation to Jim Duff for his strong leadership and dedicated service and wishes the best to him and his family in his new undertakings.

PROFESSIONAL LIABILITY INSURANCE

The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Public Law No. 105-277, as amended by Public Law No. 106-58, requires the judiciary to provide reimbursement for up to one half of the cost of professional liability insurance to certain groups within the judiciary, including supervisors and managers as authorized by the Judicial Conference. In September 1999, the Conference delegated authority to court unit executives and federal public defenders to designate eligible positions in their respective units, consistent with Conference guidelines (JCUS-SEP 99, pp. 61-62, 66-67). At this session, the Conference delegated to the Director of the Administrative Office of the United States Courts, the Director of the Federal Judicial Center, and the Chair of the United States Sentencing Commission the authority to designate supervisors and managers of their respective agencies with regard to eligibility for professional liability insurance reimbursement, and provided that the authority may be re-delegated to executives or human resources officials of the respective judicial branch agencies.

JUDICIAL CONDUCT AND DISABILITY ACT

The Department of Justice has proposed legislation that would loosen the confidentiality requirements of the Judicial Conduct and Disability Act so that information developed in complaint proceedings under the Act could be disclosed to law enforcement officials if it relates to a potential criminal

offense. In July 2011, the Committee on Judicial Conduct and Disability endorsed a recommendation that the Conference support the proposal if it were modified to include protections drawn from the concept of a "reporter's privilege." Because the legislation was moving quickly through Congress, the Executive Committee was asked to consider the matter. On recommendation of the Committee on Judicial Conduct and Disability, the Executive Committee adopted the following position on behalf of the Conference:

> The Judicial Conference supports amending the confidentiality provisions of the Judicial Conduct and Disability Act to recognize that the judiciary controls the disclosure of information developed in connection with proceedings under the Act ("Act information") and to permit the disclosure of Act information to a law enforcement agency (a) as pertaining only to possible criminal activity and (b) subject to requirements paralleling those described in the Department of Justice's "Policy with regard to issuance of subpoenas to members of the news media," 28 C.F.R. § 50.10. Those requirements include that (1) there must be a compelling need for the Act information for the investigation of a crime reasonably believed to have occurred; (2) the substance of the Act information must be unavailable from other sources; (3) the requester must give reasonable and timely notice of the request and negotiate with the judiciary over the disclosure's scope, timing, and manner; (4) the Attorney General of the United States or of the applicable state must give permission for the request; and (5) the requester must take effective precautions to prevent the disclosed Act information from being disseminated to unauthorized persons or for improper purposes.

FISCAL YEAR 2012 INTERIM FINANCIAL PLANS

Pending final congressional action on the judiciary's appropriations for the 2012 fiscal year, the Executive Committee approved fiscal year 2012 interim financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners accounts. The plans reflect many "quick hit" cost-containment items, suggested by Conference committees and others, that will significantly reduce fiscal year 2012 requirements. In approving the interim plan for the Salaries and Expenses

account, the Committee also endorsed a strategy for distributing court allotments among the court programs. In addition, the Committee affirmed that its approval of the interim plans included a determination not to allow step increases and routine promotions, and to allow other promotions only in extraordinary circumstances with approval of the Administrative Office Director, for all circuit unit, court, chambers, and defender organization staff.

MISCELLANEOUS ACTIONS

The Executive Committee —

- On recommendation of the Committee on Rules of Practice and Procedure and on behalf of the Conference, with regard to a proposed package of style amendments to the Federal Rules of Evidence approved by the Conference in September 2010 and pending before the Supreme Court, restored certain language to Rule 408(a)(1) to avoid a risk that the amendment might be interpreted as substantive, and to Rule 804(b)(4) for clarity and completeness;

- Approved final fiscal year 2011 financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners accounts, as well as an allotment distribution strategy for the Salaries and Expenses account;

- Revised the policy related to the locations for Judicial Conference committee meetings to provide that meetings should be held only in hub cities and that committees that meet semi-annually must hold one of those meetings in Washington, D.C.;

- Agreed to ask every circuit to ensure that they have an up-to-date written policy in place for providing staff to senior judges and that the policy is being enforced; and

- Approved on behalf of the Conference resolutions in honor of Judge Barbara Jacobs Rothstein, who is ending her eight-year tenure as Director of the Federal Judicial Center, and William R. Burchill, Jr., who has served the judiciary for 38 years and is retiring from his position as Administrative Office Associate Director and General Counsel.

COMMITTEE ON AUDITS AND ADMINISTRATIVE OFFICE ACCOUNTABILITY

COMMITTEE ACTIVITIES

The Committee on Audits and Administrative Office Accountability reported that it received detailed briefings from three of the judiciary's independent audit firms regarding the following: cyclical financial audits of the courts and federal defender offices, audits of community defender organization grantees, audits of Chapter 7 bankruptcy trustees in bankruptcy administrator districts, and audits of debtors in Chapter 7 and Chapter 11 filings in bankruptcy administrator districts. The Committee considered ways in which the judiciary can ensure that audit issues are addressed and resolved in a timely manner, and it emphasized the importance of appropriate actions by court unit executives, chief judges and circuit judicial councils to address audit findings and recommendations. The Committee also asked the AO to focus on its follow-up efforts and to provide assistance to the courts and federal defender offices when needed. The Committee passed a resolution honoring the service of AO Director James C. Duff.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

OFFICIAL DUTY STATIONS

On recommendation of the Bankruptcy Committee, and in accordance with 28 U.S.C. 152(b)(1), the Conference took the following actions with regard to official duty stations of bankruptcy judges:

a. Approved a request from the Central District of California and the Ninth Circuit Judicial Council to designate Los Angeles as the official duty station for a vacant bankruptcy judgeship in that district; and

b. Approved a request from the District of South Carolina and the Fourth Circuit Judicial Council to transfer the official duty station for Chief Judge John E. Waites from Columbia to Charleston.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Bankruptcy System reported that it is exploring ways to more effectively use existing bankruptcy judicial resources to address severe judicial workload pressures occurring in several districts. To assist the judiciary in weathering the projected budgetary shortfall, the Committee examined multiple short- and long-term cost-containment ideas, and provided its views to the Budget Committee. In addition, the Committee informed the Committee on Court Administration and Case Management that it (a) endorses, with several qualifications, recommendations for certain inflationary fee increases; (b) recommends that the two committees work together, with assistance from the Federal Judicial Center, to study the impact and feasibility of implementing additional fees for claims transfers in bankruptcy cases and for filing publicly traded and/or mega cases; and (c) recommends approval of a proposed policy on courtroom sharing in the bankruptcy courts. The Committee also recommended that the Director approve certain reports required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law No. 111-203.

COMMITTEE ON THE BUDGET

FISCAL YEAR 2013 BUDGET REQUEST

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Noting the limited funding that Congress is likely to have available in 2013 and after considering the funding levels proposed by the program committees, the Committee on the Budget recommended to the Judicial Conference a fiscal year 2013 budget request that is 3.3 percent over assumed fiscal year 2012 appropriations. This request is $118.6 million below the funding requested by the program committees. The Conference approved the budget request 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.

BUDGET DECENTRALIZATION RULES

Under existing budget decentralization rules, courts can reprogram funds among court operating funds within their own units, among court units within a judicial district, and among circuit and court of appeals units within a

judicial circuit, which allows these units to share administrative services and maximize resource utilization. However the rules do not permit reprogramming across districts or circuits or even between appellate and district units within a circuit. To achieve additional efficiencies, the Committee recommended expansion of reprogramming authority so that local funds can be reprogrammed among court units regardless of type, geographical location, or judicial district or circuit for voluntary shared services arrangements. The new reprogramming authority would be subject to the approval of the Administrative Office, with semi-annual reports provided to the Budget Committee. The Conference approved the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on the Budget reported that it reviewed over 100 cost-containment ideas that had been generated through the Administrative Office's court advisory process as well as ideas that various Judicial Conference committees are pursuing. The Committee participated in a "summit" of committee chairs held on September 12, 2011 to discuss the significant cost-containment ideas the judiciary must consider as it faces a serious budget crisis. In addition, the Committee discussed efforts to focus its congressional outreach program on key members of the judiciary's appropriations subcommittees and to provide court-specific impacts of the fiscal year 2012 House of Representatives mark to judges and members of Congress.

COMMITTEE ON CODES OF CONDUCT

MODEL FORMS FOR WAIVER OF JUDICIAL DISQUALIFICATION

On recommendation of the Committee on Codes of Conduct, the Judicial Conference approved three versions of a Model Form for Waiver of Judicial Disqualification: one for civil pro se cases, one for other civil cases, and one for criminal cases. These forms replace a form originally adopted in September 1985, commonly known as the "remittal" form, which was used by judges to request a waiver of disqualification under Canon 3D of the Code of Conduct for United States Judges. The Conference delegated to the

Committee the authority to make technical, conforming, and non-controversial changes to the forms, as necessary.

MODEL CONFIDENTIALITY STATEMENT

The Model Confidentiality Statement (Form AO-306) is intended for use by courts and judges to promote awareness among judicial employees of their confidentiality obligations under Canon 3D of the Code of Conduct for Judicial Employees. On recommendation of the Committee, the Judicial Conference approved revisions to the Model Confidentiality Statement to reflect new developments, such as the use by judicial employees of electronic social media, and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

FORM FOR APPROVAL OF COMPENSATED TEACHING

Judges who wish to engage in compensated teaching are required to obtain approval from their circuit chief judge, using Form AO-304, Application for Approval of Compensated Teaching Activities. On recommendation of the Committee, the Conference approved a revised Form AO-304 to clarify that a judge may be compensated for time spent grading examinations and term papers. The Conference also delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes to the form, as necessary.

COMMITTEE ACTIVITIES

The Committee on Codes of Conduct reported that since its last report to the Judicial Conference in March 2011, the Committee received 19 new written inquiries and issued 19 written advisory responses. During this period, the average response time for requests was 13 days. In addition, the Committee chair responded to 135 informal inquiries, individual Committee members responded to 99 informal inquiries, and Committee counsel responded to 381 informal inquiries.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

FEES

Miscellaneous Fees. The Judicial Conference prescribes miscellaneous fees for the courts of appeals, district courts, United States Court of Federal Claims, bankruptcy courts, and Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. §§ 1913, 1914, 1926, 1930, and 1932, respectively. On recommendation of the Court Administration and Case Management Committee, the Conference determined to raise many of these fees to account for inflation, as set forth below, effective November 1, 2011. These fees have not been adjusted for inflation since 2003.

Court of Appeals Miscellaneous Fee Schedule

Item	Current Fee	New Fee
2. Record Search	$26	$30
3. Certification	$9	$11
5. Audio Recording	$26	$30
6. Record Reproduction	$71	$83
7. Record Retrieval	$45	$53
8. Returned Check Fee	$45	$53
13. Attorney Admission Fee	$150	$176
Certificate of Good Standing	$15	$18

District Court Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Document Filing/Indexing	$39	$46
2. Record Search	$26	$30
3. Certification	$9	$11
5. Reproduction of Proceedings	$26	$30
6. Microfiche	$5	$6

7. Record Retrieval	$45	$53
8. Returned Check Fee	$45	$53
9. Misdemeanor Appeal	$32	$37
10. Attorney Admission Fee Certificate of Good Standing	$150 $15	$176 $18
13. Cuban Liberation Civil Filing Fee	$5431	$6355

Bankruptcy Court Miscellaneous Fee Schedule

Item	Current Fee	New Fee
2. Certification Exemplification	$9 $18	$11 $21
3. Audio Recording	$26	$30
4. Amended Bankruptcy Schedules	$26	$30
5. Record Search	$26	$30
6. Adversary Proceeding Fee	$250	$293
7. Document Filing/Indexing	$39	$46
8. Title 11 Administrative Fee	$39	$46
12. Record Retrieval Fee	$45	$53
13. Returned Check Fee	$45	$53
14. Notice of Appeal Fee	$250	$293
19. Lift/Stay Fee	$150	$176

United States Court of Federal Claims Miscellaneous Fee Schedule

Item	Current Fee	New Fee
3. Certification	$9	$11
4. Attorney Admission Fee Certificate of Good Standing	$150 $15	$176 $18

5. Sale of Monthly Listing of Court Orders and Opinions	$19	$22
7. Returned Check Fee	$45	$53
9. Audio Recording	$26	$30
10. Document Filing/Indexing	$39	$46
11. Record Retrieval Fee	$45	$53

Judicial Panel on Multidistrict Litigation Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Record Search	$26	$30
2. Certification	$9	$11
4. Record Retrieval Fee	$45	$53
5. Returned Check Fee	$45	$53

Electronic Public Access Fees. Pursuant to statute and Judicial Conference policy, the electronic public access (EPA) fee is set to be commensurate with the costs of providing existing services and developing enhanced services. Noting that the current fee has not increased since 2005 and that for the past three fiscal years the EPA program's obligations have exceeded its revenue, the Committee recommended that the EPA fee be increased from $.08 to $.10 per page. The Committee also recommended that the current waiver of fees of $10 or less in a quarterly billing cycle be changed to $15 or less per quarter so that 75 to 80 percent of all users would still receive fee waivers. Finally, in recognition of the current fiscal austerity for government agencies, the Committee recommended that the fee increase be suspended for local, state, and federal and government entities for a period of three years. The Conference adopted the Committee's recommendations.

COURTROOM SHARING

Based on a comprehensive study of district courtroom usage conducted by the FJC at the Committee's request, the Judicial Conference adopted courtroom sharing policies for senior district judges and magistrate judges in new courthouse and/or courtroom construction (JCUS-SEP 08,

pp. 10-11; JCUS-MAR 09, pp. 14-16; JCUS-SEP 09, pp. 9-11). It also asked the Committee to study the usage of bankruptcy courtrooms, and if usage levels so indicated, to develop an appropriate sharing policy for bankruptcy courtrooms (JCUS-SEP 08, pp. 10-11). At this session, following completion of the bankruptcy study, conducted for the Committee by the FJC, the Court Administration and Case Management Committee in consultation with the Bankruptcy and Space and Facilities Committees recommended a courtroom sharing policy for bankruptcy judges in new courthouse and courtroom construction, for inclusion in the *U.S. Courts Design Guide*. The Conference approved the policy as follows:

SHARING POLICY FOR BANKRUPTCY JUDGES IN NEW COURTHOUSE AND COURTROOM CONSTRUCTION

New courtrooms for bankruptcy judges will be provided as follows:

a. In court facilities with one or two bankruptcy judges, one courtroom will be provided for each bankruptcy judge.

b. In court facilities with three or more bankruptcy judges, one courtroom will be provided for every two bankruptcy judges. In court facilities where the application of this formula will result in a fraction (i.e., those with an odd number of bankruptcy judges), the number of courtrooms allocated will remain at the next lower whole number. In addition, one courtroom will be provided for emergency matters, such as Chapter 11 first-day hearings.

Exemption Policy

In the event this sharing arrangement would cause substantial difficulty in the secure, effective and efficient disposition of cases, a court, as a whole, with the approval of its circuit judicial council, may seek an individual exemption to this sharing policy from the Judicial Conference's Space and Facilities Committee. Such exemptions should be considered the exception and not the rule.

In order to be considered for an exemption, a court must first show that the bankruptcy judge's courtroom is in use over 75 percent of the work day for case-related purposes. Thereafter, a court should demonstrate that deviation from the basic sharing policy is necessary, based on the following:

a. An assessment of the number and type of courtroom events anticipated to be handled by the bankruptcy judge that would indicate that sharing a courtroom would pose a significant burden on the secure, effective and efficient management of that judge's docket.

b. An assessment of the current complement of courtrooms and their projected use in the facility and throughout the district, to reaffirm the necessity of constructing an additional courtroom.

c. Whether a special proceedings, visiting judge, or other courtroom is available for the bankruptcy judge's use in the facility.

Many bankruptcy judges are housed in leased facilities where security concerns may arise due to the configuration of the space. Because of this unique situation, an alternative exemption to the sharing policy, notwithstanding the exemption requirements of the previous paragraph, may be considered for bankruptcy judges in leased facilities based on an assessment of the security of a bankruptcy judge's access from chambers to a shared courtroom.

RECORDS DISPOSITION SCHEDULES

Electronic records. The district court records disposition schedule for civil and criminal case files provides for the transfer of electronic records to the National Archives and Records Administration (NARA) three years after case closing. Noting that this is an inadequate amount of time to maintain the records at the court and that further study on disposition of electronic records was needed, the Committee recommended that the three-year transfer reference be removed from the schedule for civil and criminal case files. Once removed, electronic records will be considered unscheduled and can not

be disposed of until a new disposition schedule is adopted. The Conference approved the Committee's recommendation, and the schedule will be transmitted to NARA for acceptance of the change.

Criminal cases. In March 2011, the Judicial Conference approved a revised district court records disposition schedule for criminal cases that, like the schedule for civil cases, sets retention periods largely by case type (JCUS-MAR 11, p. 10). NARA published this proposed schedule for public comment. On recommendation of the Committee, which considered the public comments, the Judicial Conference approved amending the disposition schedule for criminal case files to designate additional non-trial case types – those pertaining to embezzlement, fraud, or bribery by a public official – as permanent. The schedule will be transmitted to NARA for acceptance of the change.

Bankruptcy cases. Similarly, amendments to the bankruptcy court records disposition schedule approved by the Conference in March 2011 were published by NARA for public comment. After consideration of those comments, the Committee recommended that the Judicial Conference approve amending the schedule to classify as permanent a sample of 2.5 percent of non-trial bankruptcy cases[1] and 2.5 percent of temporary adversary proceedings cases retired by each district each year. The amendments would also reduce the retention period for temporary non-trial adversary proceedings cases from 20 to 15 years after case closing. The Conference approved the Committee's recommendation, and the schedule will be transmitted to NARA for acceptance of the change.

PACER ACCESS TO CERTAIN BANKRUPTCY FILINGS

In September 2010, the Judicial Conference adopted a policy limiting public electronic access to bankruptcy records filed before December 1, 2003 that had been closed for more than one year. The policy was intended to prevent the dissemination of personal information that might be contained in documents that were filed before the judiciary's privacy policy for bankruptcy cases was fully implemented. Under the September 2010 policy, the public could access docket sheets through PACER for these older cases, but full

[1]This would replace a provision in the existing schedule that designates as permanent 25 percent of non-trial bankruptcy cases retired by nine judicial districts, selected each year on a rotational basis.

documents would be available only at clerks' offices (JCUS-SEP 10, pp. 12-13). At this session, on recommendation of the Committee, the Conference adopted an exception to that policy for counsel or parties who are developing potential class actions, as follows:

> Access may be granted pursuant to a judicial finding that such access is necessary for determining class member certification, subject to the following limitations to be set forth in the judge's order:
>
> a. Access is limited to a particular identified list of cases or a specified universe of cases (e.g., lift stay motions filed by a specified lender in a limited period of time);
>
> b. Time limitations on the period of access (corresponding to the scope and number of potential cases involved);
>
> c. Inclusion of a verified statement of counsel that access would be solely for the purpose of determining class member status and that counsel is aware that unauthorized use is prohibited and may result in sanctions; and
>
> d. Any other conditions, limitations, or direction that the judge deems necessary under the specific circumstances of the request.

SEALING AN ENTIRE CIVIL CASE FILE

On recommendation of the Committee on Court Administration and Case Management, in consultation with the Committee on Rules of Practice and Procedure, the Judicial Conference adopted the following standards for sealing an entire civil case:

> An entire civil case file should only be sealed consistent with the following criteria:
>
> a. Sealing the entire civil case file is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and

effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort;

b. A judge makes or promptly reviews the decision to seal a civil case;

c. Any order sealing a civil case contains findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule; and

d. The seal is lifted when the reason for sealing has ended.

COMMITTEE ACTIVITIES

The Committee on Court Administration and Case Management reported that it devoted a significant amount of its June 2011 meeting to cost-containment initiatives for fiscal year 2012 and beyond, and considered more than 40 different ideas and proposals. The Committee also discussed several policy issues related to the development of the Next Generation CM/ECF system to ensure that the system's requirements are synchronized across various court units and court types. The Committee endorsed 14 courts to participate in the pilot project on cameras in the courtroom, which began on July 18, 2011 and selected 14 courts to participate in a 10-year, statutorily required pilot project regarding the assignment of patent cases in U.S. district courts, to begin on September 19, 2011.

COMMITTEE ON CRIMINAL LAW

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

A judgment in a criminal case as well as other national forms contains a set of standard conditions that are automatically imposed in probation and supervised release sentences, including one condition that requires offenders to submit a written report to the probation officer within the first five days of each month. However, such reports may not be necessary in all cases because the information is available from other means, and in those cases in which reports are needed, spreading out the submission dates would provide officers with

greater flexibility to manage their caseloads. Noting this, the Committee recommended that the condition be amended in national forms (AO forms 7A, 7A-S, 245, 245B-D, 245I and 246) to state that the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer. The Conference adopted the Committee's recommendation.

RESEARCH AND DATA SHARING

The Administrative Office collects statistical and other information concerning the work of probation officers pursuant to statute and Judicial Conference policy. Criminal justice researchers frequently request this information, as do executive branch agencies such as the Bureau of Prisons. On recommendation of the Committee, the Conference authorized the Director of the AO to adopt proposed regulations governing the disclosure of federal probation system data to outside entities that establish procedures for handling requests for such data, including factors to consider in evaluating the merits of a request and conditions to be imposed to ensure the continued confidentiality of information released.

SUPERVISION OF CONDITIONALLY RELEASED SEXUALLY DANGEROUS PERSONS

The Committee recommended that the Judicial Conference seek legislation that would amend 18 U.S.C. § 3154 (Functions and powers relating to pretrial services) and § 3603 (Duties of probation officers) to specifically authorize probation and pretrial services officers to supervise sexually dangerous persons who have been conditionally released following a period of civil commitment pursuant to 18 U.S.C. § 4248. While §§ 3154 and 3603 both contain a general provision authorizing officers to perform other duties as assigned by the courts, providing explicit authorization will remove any ambiguity about an officer's role and allow for the development of standardized policies and procedures specifically designed for this population. The Conference adopted the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on Criminal Law reported that it reviewed and endorsed a new sex offender management procedures manual for probation and pretrial services officers. The manual provides detailed instructions on how officers should investigate and supervise persons charged with or convicted of a sex offense. The Committee also considered the U.S. Sentencing Commission's proposed amendments to the sentencing guidelines manual and submitted testimony supporting the Commission's proposal to apply retroactively the amendments to the drug quantity table that implement the Fair Sentencing Act of 2010. In addition, the Committee discussed and submitted recommendations on various cost-containment proposals under consideration for fiscal years 2012 and 2013.

COMMITTEE ON DEFENDER SERVICES

CRIMINAL JUSTICE ACT GUIDELINES

The Committee on Defender Services recommended revisions to chapters 2 and 3 of the Criminal Justice Act Guidelines (*Guide to Judiciary Policy*, Vol. 7A) to provide principles and procedures on the proration of claims by attorneys and other service providers and on the billing of interpreting services. The Judicial Conference approved the recommendation.

COMMITTEE ACTIVITIES

The Committee on Defender Services reviewed the status of its long-range cost-containment initiatives (including the recently completed circuit case-budgeting pilot project and the ongoing federal defender organization staffing study) and received a report on the shorter-term cost-reduction efforts undertaken over the past six months by strategic planning groups and by program administrators. The Committee reviewed additional short- and longer-term cost-containment ideas that were suggested for its consideration and identified possible new areas to explore. It approved a reduced training plan for FY 2012, which is limited to the FY 2010 Committee-authorized level.

COMMITTEE ON FEDERAL-STATE JURISDICTION

COMMITTEE ACTIVITIES

The Committee on Federal-State Jurisdiction reported that it was updated on the progress of patent reform legislation and discussed jurisdictional provisions in the proposed legislation. The Committee also considered a proposal to amend 28 U.S.C. § 1447(d) to provide for a right of appeal from any order remanding an action to state court and determined not to support a change to existing law. The Committee received a report on discussions involving the Judicial Panel on Multidistrict Litigation, the Federal Judicial Center, the Conference of Chief Justices, and the National Center for State Courts concerning means of promoting cooperation between federal and state judges presiding over related cases filed in multiple jurisdictions.

COMMITTEE ON FINANCIAL DISCLOSURE

COMMITTEE ACTIVITIES

The Committee on Financial Disclosure reported that on March 29, 2011, it launched the Financial Disclosure Online Reporting System (FiDO). This transition from paper to an exclusively electronic format should significantly reduce judiciary expenses related to the printing, mailing, processing, and records management of financial disclosure reports. As of July 8, 2011, the Committee had received 3,990 financial disclosure reports and certifications for calendar year 2010, including 1,246 reports and certifications from Supreme Court justices, Article III judges, and judicial officers of special courts; 327 reports from bankruptcy judges; 534 reports from magistrate judges; and 1,883 reports from judicial employees.

COMMITTEE ON INFORMATION TECHNOLOGY

LONG RANGE PLAN FOR INFORMATION TECHNOLOGY

Pursuant to 28 U.S.C. § 612 and on recommendation of the Committee on Information Technology, the Judicial Conference approved the fiscal year 2012 update to the *Long Range Plan for Information Technology in the*

Federal Judiciary. Funds for the judiciary's information technology program will be spent in accordance with this plan.

COMMITTEE ACTIVITIES

The Committee on Information Technology reported that it endorsed the Judiciary Information Security Framework, which provides a high-level approach to information security risk management, and strongly encourages its use by all courts. The Committee concurred in the recommendation of the Committee on Court Administration and Case Management to raise the judiciary's electronic public access user fee (*see* "Miscellaneous Fees, " p. 16). The Committee also discussed a number of initiatives that both strengthen the judiciary's information technology program and promote cost containment, such as the national telephone service on the judiciary's new communications network.

COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

COMMITTEE ACTIVITIES

The Committee on Intercircuit Assignments reported that 117 intercircuit assignments were undertaken by 90 Article III judges from January 1, 2011, to June 30, 2011. During this time, the Committee continued to disseminate information about intercircuit assignments and aided courts requesting assistance by identifying and obtaining the assistance of judges willing to take assignments.

COMMITTEE ON INTERNATIONAL JUDICIAL RELATIONS

COMMITTEE ACTIVITIES

The Committee on International Judicial Relations reported on its involvement in rule of law and judicial reform programs throughout the world. The Committee also reported on its continued participation in the rule of law component of the legislative branch's Open World Program for jurists from Russia, Ukraine, Georgia, Kazakhstan, and Moldova. The Committee received briefings about international rule of law activities involving federal public

defenders, U.S. court administrators, the Federal Judicial Center, the U.S. Department of State, officials from several embassies, the U.S. Department of Justice, the U.S. Agency for International Development, the U.S. Patent and Trademark Office, the World Bank, and the International Association of Judges. In addition, the Committee reported on foreign delegations of jurists and judicial personnel briefed at the Administrative Office.

COMMITTEE ON THE JUDICIAL BRANCH

JUDGES' TRAVEL REGULATIONS

Senior Judges on National Courts. The Committee on the Judicial Branch recommended that the Judicial Conference amend section 220.30.10(g)(3)(B) of the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policy* (*Guide*), Vol. 19, to provide that if a senior judge is commissioned to a court of national jurisdiction and the judge intends to travel a distance of more than 75 miles from his or her residence to hold court or to transact official business for that court and to claim reimbursement for any expenses associated with that travel, such travel must be authorized by the chief judge of the court. The Conference adopted the Committee's recommendation.

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Senior Judges' Commuting-Type Expenses. To make consistent certain travel authorization procedures for senior judges, the Committee recommended, and the Conference approved, an amendment to section 220.30.10(g)(3)(A) of the judges' travel regulations, *Guide*, Vol. 19, to require the authorization of the circuit judicial council rather than the chief circuit judge when a senior judge relocates his or her residence outside the district or circuit of the judge's original commission and intends to seek reimbursement for travel back to the court for official business.

Actual Expense Reimbursement for Meals. On recommendation of the Committee and after discussion, the Judicial Conference approved amendments to sections 250.20.20, 250.20.30, 250.20.50, 250.20.60, and 250.40.20 of the judges' travel regulations, *Guide*, Vol. 19, to limit judges' actual expense reimbursement for meals in connection with official travel, and provided that the limits will be subject to annual and automatic adjustment for inflation in the same manner as the judges' alternative maximum subsistence allowance.

COMMITTEE ACTIVITIES

The Committee on the Judicial Branch reported that it discussed in detail the problem of the recruitment and retention of federal judges. Salary stagnation and salary inversion continue to threaten the federal judiciary's ability to recruit and retain judges. The Committee also reported that it is organizing a program with the Freedom Forum and its First Amendment Center that will bring together a small group of judges and journalism educators to support continued and enhanced education on the coverage of the courts in journalism schools.

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

COMMITTEE ACTIVITIES

The Committee on Judicial Conduct and Disability reported that it asked the Executive Committee to act on behalf of the Conference with regard to pending legislation proposed by the Department of Justice that would loosen the confidentiality requirements of the Judicial Conduct and Disability Act so that information developed in proceedings under the Act could be disclosed to law enforcement officers if it related to a potential criminal offense (*see supra*, "Judicial Conduct and Disability Act," pp. 7-8).

COMMITTEE ON JUDICIAL RESOURCES

EXECUTIVE GRADING PROCESS

Court-sizing formulas are used to determine the appropriate grades and salaries of district and bankruptcy clerks of court and chief probation and pretrial services officers. On recommendation of the Committee on Judicial Resources, the Conference agreed to approve a new grading process for determining the target grades for these executives. The new executive grading process consists of two steps: a) applying a formula that includes a constant factor for core competencies that accounts for 70 percent of the formula and

weighted factors that account for 30 percent of the formula;[2] and b) assigning target grades for these executive positions in Judiciary Salary Plan (JSP) grades 16, 17, and 18, using the 2011 distribution of JSP target grades.

SAVED PAY

The saved pay policy provides salary protection to court employees downgraded through no fault of their own, e.g., when a chambers staff member takes a lower graded position within the judiciary as result of the death of a federal judge. The employee receives the same rate of basic pay that was payable immediately before the reduction to the lower grade or classification level, 50 percent of each employment cost index (ECI) adjustment, and 100 percent of any applicable locality pay increase until the employee's saved rate of pay can be matched in the lower grade or classification level. Noting that the policy can have a negative effect on morale when two employees performing the same job earn different rates of pay and that elimination of the policy would help to contain costs, the Committee recommended that the Judicial Conference eliminate the saved pay policy for the courts, but grandfather for two years any employees currently in a saved pay status under the policy. After two years, the Administrative Office would place those employees who remained in a saved pay status at the top step of their respective grade or classification level. The Conference adopted the Committee's recommendation. The saved pay policy for federal public defender organization personnel is not affected by this change.

TEMPORARY PAY ADJUSTMENTS

An appointing authority may grant a temporary pay adjustment to a non-supervisory Court Personnel System (CPS) employee temporarily assigned leadership responsibilities. Currently, that pay adjustment is set at the lowest step in the employee's current classification level that exceeds the employee's existing rate of pay by three percent. At the time this pay rate was established,

[2]For district and bankruptcy court clerks' offices, the weighted factors include the number of authorized judgeships (15 percent), the number of authorized staff at 100 percent of formula (10 percent), and total allotments (5 percent). For probation and pretrial services offices, the weighted factors include the number of authorized staff at 100 percent of formula (15 percent) and total allotments (15 percent).

the CPS promotion rate was a flat rate of six percent. Since that time, the CPS promotion rate has been changed to be a range from not less than one percent to not more than six percent, to be applied on a uniform, unit-wide basis. On recommendation of the Committee, the Conference agreed to amend the pay rate for CPS temporary pay adjustments from a flat rate of three percent to a range from one to three percent, to be determined by the appointing authority on a case-by-case basis as set forth below:

> An appointing officer may provide a temporary pay adjustment in the full performance range to a Court Personnel System employee who is temporarily in charge of a work project with other employees. A temporary pay adjustment provides for a temporary pay increase within the employee's existing classification level at the lowest step which equals or exceeds the employee's existing rate of pay by anywhere from one to three percent, at the appointing officer's discretion. A temporary pay adjustment may not exceed 52 weeks without re-authorization.

TIME-OFF AWARDS

Time-off awards allow excused absences with pay (*Guide*, Vol. 12, Ch. 8, § 830.35(c)). Considering that the judiciary bases an intermittent employee's pay on hours actually worked with no provision for paid time off, the Committee recommended that the Judicial Conference approve a clarification to the policy for granting awards to court employees to prohibit time-off awards for intermittent employees. The Conference adopted the Committee's recommendation.

TELEWORK

In March 1999, the Judicial Conference adopted a telework policy for the courts that provided for voluntary employee participation in telework (JCUS-MAR 99, p. 28). In 2004, that policy was extended to federal public defender organizations (JCUS-SEP 04, p. 8). In order for courts and federal public defender organizations to have employees available to telework during a continuity of operations (COOP) event or similar emergency situation, on recommendation of the Committee, the Judicial Conference approved a revision to the telework policy to state that a court or federal public defender

organization, at its discretion, may require eligible employees to telework as needed during a continuity of operations event, inclement weather, or similar situation (*Guide*, Vol. 12, Ch. 10, § 1020.20(a)).

TYPE II CHIEF DEPUTY CLERK

In September 2004, the Judicial Conference authorized any unit in a district or bankruptcy court with ten or more authorized judgeships to establish a second JSP-16 Type II deputy position upon notification to the Administrative Office, to be funded with the court's decentralized funds (JCUS-SEP 04, p. 23). The District of Idaho has requested a JSP-16 Type II chief deputy clerk for its consolidated bankruptcy and district court clerk's office even though it does not qualify for one under the policy, citing special circumstances, including the broad span of operational knowledge required in a consolidated court and geographic challenges. The court requested funding, noting that as a small court it does not have the salary flexibility to pay for an additional executive salary. On recommendation of the Committee, the Judicial Conference authorized a second fully funded JSP-16 Type II chief deputy clerk position for the District of Idaho, subject to any budget-balancing reductions.

COURT INTERPRETER POSITION

Using established criteria, the Committee recommended, and the Conference approved, one additional Spanish staff court interpreter position beginning in fiscal year 2013 for the District of Arizona based on the Spanish language interpreting workload in this court. The Conference also approved accelerated funding in fiscal year 2012 for that position.

REALTIME TRANSCRIPT FEES

In March 1999, the Judicial Conference amended the maximum realtime transcript rate policy to include a requirement that a litigant who orders realtime services in the courtroom must also purchase, at the regular rates, a certified transcript (original or copy) of the same pages that were received as realtime unedited transcript (JCUS-MAR 99, p. 25). The policy was adopted to address concerns about the unprofitability of providing realtime services and about the circulation of unedited transcripts that are not backed up

by certified transcripts. At this session, the Committee noted that the requirement has resulted in an increased administrative burden to litigants and court staff, and serves as a disincentive for litigants to use realtime services. Moreover the concerns which led to development of the policy can be addressed through other means. On recommendation of the Committee, the Judicial Conference agreed to eliminate the requirement effective January 1, 2012.

COMMITTEE ACTIVITIES

The Committee on Judicial Resources reported that it submitted to the Committee on the Budget a fiscal year 2013 budget request derived from existing work measurement data using alternative staffing formulas calculated at the 70 percent level, which would result in a 3.9 percent increase over the assumed 2012 funding levels. The Committee considered short-term and longer-term cost-containment ideas and provided its recommendations to the Budget Committee. The Committee supported requests from the Administrative Office's Bankruptcy and District Clerks Advisory Groups to accelerate by one year the delivery dates of the staffing formula updates for bankruptcy and district clerks' offices. Those updates will now be due to the Committee in June 2012 and June 2013, respectively.

COMMITTEE ON JUDICIAL SECURITY

COMMITTEE ACTIVITIES

The Committee on Judicial Security reported that it decided to convene a cost-containment task force comprised of members of the Committee and the U.S. Marshals Service (USMS) staff to gather data and identify cost-containment initiatives in the short, medium, and long term based on the projected budgetary shortfalls in FY 2012 and beyond. The Committee was also briefed on the status of the perimeter security pilot program at seven courthouses where the USMS has assumed responsibility for perimeter security guarding and equipment. The Committee was informed that a follow-up report on the program would be sent to Congress, and was advised that further congressional direction is required to define the future of the program.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

CHANGES IN MAGISTRATE JUDGE POSITIONS

After consideration of the report of the Committee on the Administration of the Magistrate Judges System and the recommendations of the Director of the Administrative Office, the district courts, and the judicial councils of the circuits, and after discussion on the Conference floor on whether to authorize three new full-time magistrate judge positions, the Judicial Conference approved the following recommendations that involved courts that had requested new magistrate judge positions. Changes with a budgetary impact are to be effective when appropriated funds are available.

THIRD CIRCUIT

District of Delaware

1. Authorized an additional full-time magistrate judge position at Wilmington; and

2. Made no other change in the number, location, or arrangements of the magistrate judge positions in the district.

FOURTH CIRCUIT

Middle District of North Carolina

1. Authorized an additional full-time magistrate judge position for the district, to be located at Durham; and

2. Made no other change in the number, locations, or arrangements of the magistrate judge positions in the district.

ELEVENTH CIRCUIT

Middle District of Florida

1. Authorized an additional full-time magistrate judge position at Orlando or Tampa; and

2. Made no other change in the number, locations, or arrangements of the magistrate judge positions in the district.

Southern District of Georgia

Made no change in the number, locations, or arrangements of the magistrate judge positions in the district.

The Conference also agreed to make no change in the number, locations, salaries, or arrangements of the magistrate judge positions in the Western District of North Carolina; Middle District of Louisiana; Eastern District of Michigan; District of Alaska; District of Idaho; and Northern District of Alabama.

ACCELERATED FUNDING

On recommendation of the Committee and after discussion on the Conference floor, the Judicial Conference agreed to designate for accelerated funding, effective April 1, 2012, the new full-time magistrate judge positions at Wilmington in the District of Delaware, Durham in the Middle District of North Carolina, and Orlando or Tampa in the Middle District of Florida.

MAGISTRATE JUDGE POSITION VACANCY

The Middle District of Louisiana requested permission to fill an upcoming magistrate judge position vacancy at Baton Rouge. Noting the decline in the court's per judgeship caseload since a third magistrate judge was appointed, the Committee recommended that the Conference not authorize the district to fill the position when it becomes vacant in May 2012. The Conference adopted the Committee's recommendation and declined to approve filling the vacancy.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Magistrate Judges System reported that it considered short-term and longer-term cost-containment ideas. In response to one short-term idea identified for its consideration, involving reducing or discontinuing staff travel to conduct magistrate judge surveys, the

Committee confirmed the value of staff visits to the courts and agreed that the benefits from visits to the courts exceed the relatively small cost. For the longer term, the Committee agreed to explore cost-containment ideas for the magistrate judge recall program and to work with other committees on various other initiatives.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3001 (Proof of Claim), 7054 (Judgments; Costs), and 7056 (Summary Judgment), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and authorized their transmission 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.

The Committee also submitted to the Judicial Conference proposed revisions to Official Forms 1 (Voluntary Petition), 9A–9I (Notices of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Deadlines), 10 (Proof of Claim), and 25A (Plan of Reorganization in Small Business Case Under Chapter 11) and new Official Forms 10, Attachment A (Mortgage Proof of Claim), 10, Supplement 1 (Notice of Mortgage Payment Change), and 10, Supplement 2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges). The Judicial Conference approved the revised forms to take effect on December 1, 2011.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Criminal Rules 5 (Initial Appearance), 15 (Depositions), and 58 (Petty Offenses and Other Misdemeanors), and proposed new Rule 37 (Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal), together with committee notes explaining their purpose and intent. The Judicial Conference approved the

proposed rules amendments and new rule and authorized their transmission 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.

PROCEDURES GOVERNING THE WORK OF THE RULES COMMITTEE

On recommendation of the Committee, the Judicial Conference approved revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*. The revised procedures take into account the impact of the internet on committee functions, propose ways to make the rules process more efficient, and follow the style protocols used in drafting the rules.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved publishing for public comment proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and Form 4; Bankruptcy Rules 1007, 3007, 5009, and 9006, and Forms 6C, 7, 22A, and 22C; Civil Rules 37 and 45; Criminal Rules 11, 12, and 34; and Evidence Rule 803. Among the proposals is an amendment to Civil Rule 45, governing both trial and discovery subpoenas, to make the rule clearer and easier to apply; and a proposed amendment to Criminal Rule 12 to address motions that must be raised before trial and the consequences of untimely motions. The proposals were published in August 2011; the comment period closes on February 15, 2012.

COMMITTEE ON SPACE AND FACILITIES

FIVE-YEAR COURTHOUSE PROJECT PLAN

The Committee on Space and Facilities recommended that the Judicial Conference approve the *Five-Year Courthouse Project Plan for Fiscal Years* 2013-2017 and grant the Committee authority to remove the Los Angeles project from the *Plan* when appropriate. The Committee indicated that the Los Angeles project requires no additional funding and therefore should be removed from the *Plan* once a contract for design and construction has been awarded. The Conference approved the Committee's recommendation.

FEASIBILITY STUDY

A new courthouse project has been authorized and is underway in Salt Lake City, Utah. The Committee recommended, and the Conference approved, requesting a General Services Administration (GSA) feasibility study for the backfill of the existing Moss Courthouse in Salt Lake City, contingent upon final court approval of the District of Utah long-range facilities plan.

U.S. COURTS DESIGN GUIDE

Over the last several years, the Judicial Conference has adopted a number of policies that affect the planning and design of new courthouses and courtrooms, including asset management planning (a new long-range facilities planning methodology), the circuit rent budget (CRB) program, and courtroom sharing policies for senior and magistrate judges. These policies, as well as the new planning approach discussed immediately below, supersede a number of factors and planning assumptions in the *U. S. Courts Design Guide*. On recommendation of the Committee, the Judicial Conference agreed to update the *Design Guide* to reflect the changes made by these policies.

PLANNING THE SIZE OF NEW COURTHOUSES

On recommendation of the Committee, the Judicial Conference agreed to adopt a new approach to planning the size of new courthouses that reassesses the manner in which space is planned for projected judgeships. The approach includes the following assumptions:

> New courthouse construction projects will be designed to provide space for the existing circuit, district, bankruptcy and magistrate judges (including vacant judgeship positions), and senior judges, as well as space to account for judges who will be eligible for senior status within the 10-year planning period for the project consistent with Judicial Conference policy and congressional direction.

Space for Judicial Conference-approved judgeships not yet created by Congress will be taken into consideration at the design concept phase in that the architects will show how space for these judgeships could fit into the design. Architects will not, however, complete a detailed design that includes space for these judgeships because they have not yet been created by Congress. Should the positions be created by Congress during the design phase, the design documents would be amended to include the new positions and space would be constructed for them.

Space for judgeships that the judiciary projects will be needed, but that have not yet been recommended to the Judicial Conference for approval, will be considered by GSA as part of future expansion plans for the building. Space will not be designed for these projected positions.

COMMITTEE ACTIVITIES

The Committee on Space and Facilities reported that with regard to the circuit rent budget program, it approved 17 Component B requests, and that due to the delay in the approval of a fiscal year 2011 budget, circuits will be allowed to extend the availability of fiscal year 2011 Component C funding through FY 2013 on a one-time basis. The Committee discussed potential short- and long-term cost-containment initiatives involving the space and facilities program, and determined to gather the data necessary to quantify the cost savings and determine the operational impact of the proposed initiatives. In addition, the Committee was updated on the efforts underway to develop an implementation strategy for the Capital Security Program, should that program be funded by Congress in FY 2012 or in subsequent years. The program is intended to assist courts at locations that have security deficiencies, but that may not qualify for a new building.

FUNDING

All of the foregoing recommendations that require the expenditure of funds for implementation 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.

Chief Justice of the United States
Presiding

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Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Proposed Amendment to Rule 803(10) — review of public comment.
Date: March 1, 2012

I. Introduction

At its Spring 2011 meeting, the Committee unanimously approved an amendment to Rule 803(10) for release for public comment. By another unanimous vote, the Standing Committee released the proposed amendment for public comment. The proposed amendment to Rule 803(10) is designed to remedy a constitutional infirmity in the Rule after the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). *Melendez-Diaz* bars the admission of certificates offered to prove the absence of a public record when that certificate is prepared for use in the criminal case — but the current Rule 803(10) allows such certificates to be admissible. Lower courts have recognized that admitting a certificate of absence of public record under Rule 803(10), when it is prepared for the criminal case, violates the accused's right to confrontation after *Melendez-Diaz.*

The proposed amendment to Rule 803(10) adds a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if the defendant, after receiving notice makes a pretrial demand for that production. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure.

This memorandum provides some background on the proposed amendment's consideration and approval by the Committee; sets forth the text of the proposed amendment and Committee Note; and considers the public comment received on the proposal.

It is for the Committee to determine whether anything in the public comment warrants a change to or rejection of the proposed amendment — or whether the proposed amendment should

be referred as is to the Standing Committee with the recommendation that it should be forwarded to the Judicial Conference.

A. The Committee's Approval of the Proposed Amendment

The proposed amendment issued for public comment reflects a number of decisions made by the Committee regarding the details of an appropriate notice-and-demand provision. *The minutes of the Spring 2011 meeting reflect the Committee's determination as to those procedural details:*

In drafting this proposed amendment, the Reporter relied on the following considerations:

1. The basic Texas rule, approved by the Supreme Court in *Melendez-Diaz*, serves as a good template for a notice-and-demand provision.

2. The rule should contain specific time periods.

3. The time for demand should be measured from the date of receipt of notice, rather than the number of days before trial.

4. A good cause provision should be added.

5. The amendment need not address such details as continuance, waiver, and testimony by an expert.

6. The amendment should not provide that if the defendant makes a proper demand, the government must produce the person who prepared the certificate.

In discussion on the proposal, the Committee agreed with all the above principles but for one. A number of members argued against a good cause provision on two grounds: 1) it would undermine the predictability of the rule, as a prosecutor could never be sure that even if a timely demand is not made, the court might still find good cause and then the government would have to produce the witness; 2) good cause would be applied in the context of the confrontation rights found in *Melendez-Diaz* and it is unclear how that might work in practice; and 3) the Court in *Melendez-Diaz* approved a notice-and-demand statute that did not contain a good cause requirement.

One member suggested that a good cause requirement was necessary because of unforeseen circumstances such as phones being out, computers crashing, and the like. But other members responded in two ways: 1) all the defendant has to do is make a demand within seven days of receiving the notice — there is no requirement of a substantial production or significant effort that would be forestalled by an emergency event; and 2) if the defendant truly has a justification for failing to timely comply, a court is likely to grant

relief even without good cause language in the Rule.

The Committee then considered whether, if good cause language were cut from the proposal, the rule should still provide that the court could set a different time for the notice and demand. Members generally agreed that it would be useful to retain such a provision. It was noted that many of the Civil and Criminal Rules provide specifically that a court can set a different time than the period provided by a particular rule. Moreover, courts may want to provide time periods at the outset of a case to require the government to provide notice before the time required by the rule.

Finally, the Committee considered whether the procedural fix of a notice-and-demand statute should be placed somewhere other than Rule 803(10). One member pointed out that certain excited utterances might be testimonial — though this is far less likely after the Supreme Court's decision in *Michigan v. Bryant* — or that other hearsay exceptions might encompass testimonial hearsay. But other members responded that it was only Rule 803(10) that authorizes admission of hearsay that will almost always be testimonial — because certificates of the absence of public record are almost always prepared with the primary motivation that they would be used in a criminal prosecution. It would make no sense to impose notice and demand provisions on other hearsay exceptions that rarely if ever embrace testimonial hearsay. The effect of a notice and demand provision is to require the government to produce a witness in lieu of a hearsay statement, and that effect is not justified unless the hearsay is testimonial.

C. Text of the Proposed Amendment to Rule 803(10) and Accompanying Committee Note

The blacklined version of the proposed amendment, and the accompanying Committee Note, begins on the next page.

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that

intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

II. Public Comment on the Proposed Amendment to Rule 803(10)

The public comment on the proposed amendment was sparse indeed. As of the end of the public comment period, only two comments have been received. Nothing in the public comment supports any argument for rejecting the proposed amendment. The public comment of the Magistrate Judges' Association (11-EV-001) is short and to the point — it describes the reason for the amendment and states the Association's approval of the amendment. The only public comment with any suggestion for change is that filed by the National Association of Criminal Defense Lawyers (11-EV-002).

The NACDL "[i]n principle, does not disapprove of this amendment" but sees "problems with the wording and the timing aspects." The remainder of this section discusses the asserted problems and provides commentary on the NACDL's suggestion for change.

1. Obligation on the "government" rather than "the prosecutor":

The amendment currently provides that a certificate is admissible if "a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial * * * ." The NACDL suggests that the obligation should be on the government, not on any particular prosecutor.

Reporter's Comment:

The Restyled Rules of Evidence, throughout, use the term "prosecutor" rather than "government" whenever the reference is to offering evidence or providing notice. *See*, *e.g.*, Rule 404(b)(2) *(*"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 * * *."). The reason for that stylistic choice was to provide a more active and personalized voice.[1] Whatever the merit of such a choice, it has been made, consistently and finally in the Restyled Rules. Using the term "government" rather than "prosecutor" in this rule alone is likely to be confusing, and may be thought to be some kind of change of emphasis — which is not in fact intended. Moreover, the change would make no difference. The NACDL simply asserts that the "obligation" to provide notice should be placed on the government but the plain fact is that if some prosecutor does not provide notice, then the government cannot take advantage of the notice-and-demand procedure. This is a procedure that *benefits* the government, and it has to be implemented by a particular individual. It is not some obligation like, for example, a disclosure obligation under *Brady*, which might well specify that it is government-wide.

In sum, the change from "prosecutor" to "government" is inconsistent with the Restyled Rules and is unnecessary and unwarranted.

[1] The only use of the term "government" in the entire Restyled Rules is in Rule 803(8)(A)(iii), which refers to public reports offered *against* the government. Obviously the use of the word "prosecutor" there would have made no sense.

2. Framing the Rule "Objectively" Rather Than in Terms of Prosecutor's Intent.

The NACDL asserts, without explanation, that the"obligation" set forth in the notice-and-demand provision "should not depend on any subjective state of mind" but rather should be objective, such as that the government "will rely on such a certification."

Reporter's Comment:

It is common throughout the notice provisions of the Evidence Rules to refer to an "intent" to use the evidence subject to the notice provision. See Rule 404(b)(2) above; Rule 412(c)(1) ("If a party intends to offer evidence under Rule 412(b) * * *"); Rules 413(b) and 414(b) ("If the prosecutor intends to offer this evidence * * *"); Rule 415(b) ("If a party intends to offer this evidence * * *"); Rule 807(b) ("The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement * * *"). So the use of the phrase "intends to offer" in the proposed amendment is completely consistent with the other evidence rules, and any change to an "objective" standard would be likely to create unnecessary confusion.

Moreover, it is common for parties to provide notice of intent in other situations, such as for *in limine* determinations, providing lists of witnesses, etc. None of these notices mandate the party to say that they *will for sure* offer the evidence or present the witness at trial. Finally, requiring the government to aver that it *will* use the certificate is bad policy for both the government and the defendant. Circumstances may change and the prosecutor may decide that she wants to prove the absence of a public record through a live witness — a development that the defendant would presmably favor. Is the prosecutor now bound by her notice in which she personally averred that she *will* rely on the certification? Placing the parties in such a box by way of pretrial notice makes no sense.

In sum, the suggestion to impose an "objective" test on the notice and demand procedure is inconsistent with the other evidence rules and may be unwise as a matter of policy.

3. Adjustment to the 14 day notice period?

NACDL contends that the notice period "should depend primarily on its compliance with Fed.R.Crim.P. 16(a)(1)(E)," which it contends should be mentioned in notice-and-demand provision lest it be misinterpreted as providing an exception to that Criminal Rule for Rule 803(10) certifications. NACDL further states that "14 days before trial is the very latest such notice should be tolerated, and there should not be any hint of a suggestion that 14 days' notice is ordinarily considered sufficient. To effectuate these comments, NACDL proposes the following change to the notice-and-demand provision (blacklined from the amendment as issued for public comment):

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent in connection with its disclosure under Fed.R.Crim. P. 16(a)(1)(E), and in any event at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Reporter's Comment:

The concern about Rule 16 seems inapt for a number of reasons. First, Rule 16 does not set any time periods for providing discovery so it is hard to argue that the time periods set forth in an Evidence Rule would have any bearing on it. Second, the notice-and-demand provision of Rule 803(10) is not in any sense a rule governing the production of information for pretrial preparation; rather it is a procedural hurdle to be satisfied before admitting evidence. A pretrial disclosure obligation is obviously different from a rule that is geared to obtain a waiver for evidentiary purposes, and there is no reason to think that one affects the other. Third, the other notice provisions of the Evidence Rules make no mention of Rule 16, and nobody has argued that these rules create an exception to the discovery rule. For example, evidence covered by Rules 404(b), 413, and 414, may well also be covered by Rule 16(A)(1)(D) (requiring production of the defendant's prior record); and Rule 807 might be used to introduce evidence covered by the production requirements of Rule 16(a)(1)(E) (documents and objects). In all these instances, the evidentiary notice requirements and the Rule 16 production obligations work independently; and possible overlap is handled by complying with both provisions, There is no reason to think that by not mentioning Rule 16, any of these evidence provisions create an exception to the Criminal Rules discovery obligations. Indeed it would be odd at this point to concede a possibility that an evidentiary notice provision provides an exception to the Rule 16 discovery obligations — to do saw would draw into question the existing notice provisions which (rightly) make no reference to Rule 16. Adding such a reference to Rule 803(10) is likely to raise unnecessary confusion and potential litigation.

If the above comment sufficiently makes the case for rejecting any inclusion of a reference to Criminal Rule 16 in the notice provision of the proposed amendment, then it follows that the second suggested change — that there should not be any hint of a suggestion that 14 days' notice is ordinarily considered sufficient — is off the mark. NACDL believes that the disclosure provisions of Rule 16 will require notice well before 14 days before trial, but if that is so, it is because it is demanded by a different rule. As stated above, nothing in the proposed amendment or any other of the notice provisions of the Evidence Rules is intended to or does have the effect of altering the duties of producing evidence before trial. Moreover, the proposed amendment specifically provides that the notice must be given "at least" 14 days before trial — thus 14 days is an outside limit and there is at least a tacit recognition that other considerations might counsel an earlier notice.

For these reasons, it would appear that a reference to Criminal Rule 16, or any change to the 14 day notice period, should be rejected.

4. Suggested Change to the Language: "unless the court sets a different time for the notice or the objection."

NACDL argues that the court's power to alter the time periods should apply only in a one-way fashion — that is, the court's power should be limited to requiring the prosecutor to provide notice earlier and to allowing the defendant to have more time to respond. If NACDL's suggestion were implemented, the last phrase of the rule would look like this:

unless the court sets ~~a different~~ an earlier time for the notice or ~~the~~ allows a later objection.

Reporter's Comment:

The provision allowing a court to alter the time periods was intended to allow the court flexibility. NACDL would limit that flexibility. There might well be situations where the prosecution has a good reason for not meeting the deadline and the defendant would not be prejudiced. Experience indicates that writing an ironclad notice provision may lead to unnecessary litigation. The agenda book contains a discussion of the divided case law on Rule 807's notice provision, which appears to inflexibly require notice to be given before trial without allowing the court to order otherwise. See Continuous Study Report at page 29. There is thus much to be said for allowing the court to have two-way flexibility regarding the notice requirement. It should be noted that — as indicated in the memo to the Committee when this amendment was first considered — a number of state notice-and-demand procedures allow the court two-way flexibility to alter the time periods. *See, e.g.,* Ohio Rev. Code Ann. § 2925.51(c): "The time may be extended by a trial judge in the interests of justice."

It would appear, therefore, that the two-way flexibility provided in the rule as issued for public comment should be retained. But if the Committee does agree with the NACDL position, the proposed amendment could be amended as set forth above.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Evidence Rule 801(d)(1)(B)
Date: March 1, 2012

At the last meeting, the Committee continued its consideration of a possible amendment to Evidence Rule 801(d)(1)(B). The proposal was a suggestion by Judge Bullock, a former member of the Standing Committee.

Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness's credibility. The justifications are: 1) there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements; and 2) the current rule is fatally confusing because it grants substantive effect to certain prior consistent statements that rehabilitate, but not to others — even though the end result is that all rehabilitative consistent statements will be heard by the jury.

The minutes of the last meeting describe the Committee's decision on how and whether to proceed on a proposed amendment to Rule 801(d)(1)(B):

> The Committee ultimately voted to table the proposal and conduct further research so that it could be considered on the merits at the Spring 2012 meeting. The Reporter stated that he would work with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The Reporter stated that he would also send the proposal to the ABA, the American College of Trial Lawyers, the NACDL, and other interested groups for their views on the proposal. The Chair also stated that he would raise the proposal as an information item at the next Standing Committee, in order to seek guidance on whether the amendment was worth pursuing.
>
> ***The working language for the proposed amendment, to be considered at the next [i.e., this] meeting, is as follows:***

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness;

This memorandum is in four parts, and much of it is a reprise of other memo on the subject previously submitted. Part One sets forth the existing rule and describes the problems created by that rule. Part Two sets forth the proposed amendment and Committee Note, and some explanatory background. Part Three discusses some of the case law under Minnesota Rule 801(d)(1)(B), which is the only state rule that approximates the approach taken by the proposed amendment. Part Four sets forth the positions of the DOJ and the Public Defender previously submitted on the proposed amendment, and the Reporter's responses. Part Five, which is completely new, describes developments since the last meeting, specifically: 1) the Standing Committee meeting; 2) the FJC Survey; 3) the unofficial report from the Litigation Section of the ABA; and 4) the report from a subcommittee of the American College of Trial Lawyers. Attached to this report are the FJC survey and the letters received from the Litigation Section and the American College.

I. Background: Rule 801(d)(1)(B)

Rule 801(d)(1)(B), as restyled, reads as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying;

The original Advisory Committee Note to Rule 801(d)(1)(B) reads as follows:

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

The Limited Coverage of the Current Rule 801(d)(1)(B)

The Rule states that only those prior consistent statements that are offered to rebut a charge of fabrication, motive, or influence can be used substantively — i.e., for the truth of the statement as opposed to rehabilitation of a witness's credibility. But many prior consistent statements could be offered for other kinds of rebuttal, such as to explain an inconsistency or to respond to a charge of faulty recollection. As Justice Scalia observed in his concurring opinion in *Tome v. United States*: "Only the premotive-statement limitation [in the existing rule] makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks."

Thus, Rule 801(d)(1)(B) grants substantive admissibility to certain prior consistent statements and not others. Only those statements that are admissible to rebut a charge that the witness has a motive to fabricate testimony are also admissible as substantive evidence under the

Rule. Case law indicates that prior consistent statements can be introduced for *credibility* purposes, to rehabilitate a witness, whenever they are responsive to an attack on the credibility of a witness. One such situation is where the consistent statement is offered to explain or to clarify an inconsistent statement introduced by the adversary. *See, e.g., United States v. Brennan*, 798 F.2d 581 (2d Cir. 1986) (prior statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)"). If the witness claims, for example, that the apparently inconsistent statement was taken out of context, he can explain the context, and this explanation may include the introduction of statements consistent with his testimony. If offered only to prove credibility, the hearsay rule is no bar to the statement. *See United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983) ("proof of prior consistent statements of a witness whose testimony has been allegedly impeached may be admitted to corroborate his credibility whether under Rule 801(d)(1)(B) or under traditional federal rules, irrespective of whether there was a motive to fabricate."). As the court stated in *United States v. Harris*, 761 F.2d 394 (7th Cir. 1985), the general principle set forth in Rule 801(d)(1)(B) — i.e., "the motive to fabricate must not have existed at the time the statements were made or they are inadmissible" — "need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."

However, to be admitted *substantively*, in the absence of some other hearsay exception, a prior consistent statement must rebut a charge of recent fabrication or improper influence or motive and must (under *Tome*) have been made before the motive to fabricate arose. Where a consistent statement is admissible for rehabilitative purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence under Rule 801(d)(1)(B), the adversary is entitled to a limiting instruction on the appropriate use of the evidence. *See, e.g., United States v. Castillo*, 14 F.3d 802 (2d Cir. 1994) (a prior consistent statement can be offered to rehabilitate the witness's credibility even though it is not admissible under Rule 801(d)(1)(B); however, a limiting instruction must be given and the prosecutor cannot abrogate "the court's limiting instructions by improperly arguing the truth of the hearsay testimony" during opening and closing arguments).

The Problems With the Limited Coverage of Rule 801(d)(1)(B)

There are two basic practical problems with the distinction between substantive and credibility use as applied to prior consistent statements. First, as Judge Bullock noted, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. *See, e.g., United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("[T]he line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors."). Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent

has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case. This is in contrast to prior *inconsistent* statements under Rule 801(d)(1)(A), where the prior statement can have an important substantive effect as it by definition does not duplicate the witness's trial testimony.

An example of the lack of practical effect in the Rule 801(d)(1)(B) substantive/credibility distinction is *United States v. White*, 11 F.3d 1446 (8th Cir. 1993). Prior consistent statements were offered not to rebut a charge of improper motive, but to explain away an apparent inconsistency. The court noted that the rehabilitative statements "were admissible when accompanied by a limiting instruction," but they were not admissible for their truth under Rule 801(d)(1)(B) because they did not precede any motive that the witness might have had to fabricate his trial testimony. So the court held that the trial court erred in admitting the statements without a limiting instruction. But the error was by definition harmless because the prior consistent statements were "duplicative" of the witness's testimony at trial. Thus, as Judge Bullock points out in an article on the subject, distinctions between substantive and nonsubstantive use of prior consistent statements "are normally distinctions without practical meaning." Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla. St. U. L. Rev. 509, 540 (1997). This is why Judge Bullock advocates that "the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence." Id.

In terms of the hearsay rule, there is no reason to distinguish between prior consistent statements that rebut an attack on motive, and prior consistent statements that explain an inconsistency or rebut an attack of faulty recollection. There is nothing about a pre-motive prior consistent statement that makes it more reliable, in hearsay terms, than a prior consistent statement that rehabilitates on another ground. The justifications for the hearsay exemption in Rule 801(d)(1)(B), according to the Committee Note, are that 1) the declarant is on the stand subject to cross-examination about the prior statement, and 2) the adversary has opened the door by attacking the witness's credibility. Those same rationales apply to *any* consistent statement that is admissible to rehabilitate an attack on credibility. Thus, the distinction in treatment between prior consistent statements covered by Rule 801(d)(1)(B) and those not covered makes no sense in terms of the hearsay rule or any other evidentiary consideration.

Case Law Inconsistency

The Reporter's previous memo on the subject indicated that most circuits have held that prior consistent statements that do not fall within Rule 801(d)(1)(B) are nonetheless admissible when they properly rehabilitate credibility — and the opponent is entitled to a meaningless limiting instruction that such statements are admissible only for credibility purposes and not for their truth. *See, e.g.*, *United States v. Stover*, 329 F.3d 859 (D.C. Cir. 2003):

> Consistent statements may be introduced for reasons other than their truth. Suppose a witness testifies on direct examination to fact X and then on cross-examination is asked

about his statement, made sometime before trial, suggesting that he believed not-X. Could the party who called the witness ask him to verify his prior consistent statements even though the witness made them after he had a motive to shade the truth? We think the answer is yes, and so do other courts of appeals. *See United States v. Simonelli*, 237 F.3d 19, 26-27 (1st Cir. 2001); *United States v. Ellis*, 121 F.3d 908 (4th Cir. 1997); *United States v. Pierre*, 781 F.2d 329, 331-33 (2d Cir. 1986); *United States v. Harris*, 761 F.2d 394, 399-400 (7th Cir. 1985). * * * These prior statements would not be offered for the truth of the matter asserted - fact X - and therefore would not need to satisfy Rule 801(d)(1)(B). They would be introduced to show that the witness did not give statements on direct that were inconsistent with what he had said before. * * * The prior statements would be admissible on this basis because of the cross-examination. They would be relevant, under Fed.R.Evid. 401, to a matter of consequence – namely, that the witness made inconsistent statements about fact X, which would tend to undermine his credibility. * * *

Here, the only prior statements the Government introduced on redirect that clarified an apparent inconsistency were those concerning whether Ouaffai knew drug dealers other than Harrison. These statements were properly admitted (though not on the ground the District Court recited). The rest of Ouaffai's prior statements were not targeted at rebutting the inconsistencies probed during cross-examination, but served only to show that most of Ouaffai's testimony on direct examination was consistent with his earlier statements. It thus was error to admit them. See FED. R. EVID. 402.

Importantly, the *Stover* court found that Rule 401 permits relevant rehabilitation but that some of the consistent statements offered by the government were not relevant to rebut inconsistencies. Those statements were found improperly admitted. Thus, the court was not about to hold that all prior consistent statements are admissible for rehabilitation purposes. *See also United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, Rule 801(d)(1)(B) and its concomitant restrictions do not apply"; but noting that certain prior consistent statements were improperly admitted because the government "was just presenting again the testimony it presented on direct, this time through the testimony about statements to the grand jury.").

The Reporter's prior memo noted that the Ninth Circuit has created an apparent conflict in the application of Rule 801(d)(1)(B). For convenience of the Committee, the discussion of the Ninth Circuit's fuzzy treatment of Rule 801(d)(1)(B) is replicated here.

Unlike the other circuits, the Ninth Circuit holds that a prior consistent statement must be admissible under Rule 801(d)(1)(B) (and its premotive requirement) or not at all. Thus, in *United States v. Beltran*, 165 F.3d 1266 (9th Cir. 1999), the court held that it was error to instruct the jury that a prior consistent statement may be used solely for credibility. Judge Kozinski, concurring, noted that such an instruction is essentially worthless:

The court here instructed the jurors to use the boy's prior consistent statements solely to evaluate his credibility. However, if they concluded the boy was telling the truth at trial, they also must have concluded that the substance of his statements - that Beltran gave him the

heroin - was true as well. The credibility/substance distinction is illusory in this context.

In *United States v. Miller,* 874 F.2d 1255, 1272-73 (9th Cir.1989), the Court held specifically that a prior consistent statement must be admissible under the requirements of Rule 801(d)(1)(B) or not at all. The Court reasoned as follows:

> Svetlana testified that she and Miller attempted to penetrate the KGB on behalf of the FBI. After the government had used the sidebar to impeach Svetlana's testimony that Miller had never shown nor given her a classified document, Miller sought to introduce seven prior statements of Svetlana to rehabilitate her.
>
> Federal Rule of Evidence 801(d)(1)(B) provides that prior statements are admissible if they are (1) consistent with a witness' trial testimony and (2) offered to rebut a charge of recent fabrication or improper influence or motive. In this circuit, rehabilitative prior statements are admissible as substantive evidence under Rule 801(d)(1)(B) only if they were made before the witness had a motive to fabricate. *Breneman*, 799 F.2d at 473; *United States v. Rohrer*, 708 F.2d 429, 433 & n. 4 (9th Cir. 1983); *United States v. Rodriguez*, 452 F.2d 1146, 1148 (9th Cir. 1972). The district court refused to admit Svetlana's prior statements because they were all made after her arrest, a time when she clearly had a motive to fabricate. Miller argues that this decision was incorrect because, even if the statements were inadmissible as *substantive* evidence under Rule 801(d)(1)(B), they should have been admitted for the limited purpose of rehabilitating the witness' impeached credibility. When introduced for that limited purpose, argues Miller, the statements are not hearsay because they are not being offered for the truth of the matter asserted. The government responds by arguing that the requirement of no motive to fabricate applies regardless of whether the statements are being introduced only for a limited purpose.
>
> We begin by noting that at least two circuits have indeed held that the requirement that there be no motive to fabricate does not apply when the prior consistent statement has been offered solely for rehabilitation and not as substantive evidence. *See United States v. Brennan*, 798 F.2d 581, 587-88 (2d Cir. 1986); *United States v. Harris*, 761 F.2d 394, 398-400 (7th Cir. 1985). In order to decide whether we will follow this rule, we must first examine both the purpose of the requirement that there be no motive to fabricate and the nature of the requirement.
>
> * * *
>
> We reject the distinction drawn in both *Harris* and *Brennan*. We do so for two reasons. First, since the requirement of no prior motive to fabricate is rooted in Rules 402 and 403, and not in the terms of Rule 801(d)(1)(B), there is no basis for limiting the requirement to cases involving prior statements under Rule 801(d)(1)(B). Indeed, we fail to see how a statement that has no probative value in rebutting a charge of "recent fabrication or improper influence or motive," *see* Fed.R.Evid. 801(d)(1)(B), could possibly have probative value for the assertedly more "limited" purpose of rehabilitating a witness. If "repetition does not imply veracity," *see Harris*, 761 F.2d at 399, then proof of repetition cannot rehabilitate.

> Second, the distinction drawn by *Harris* and *Brennan* is inconsistent with the legislative history of Rule 801(d)(1)(B). Prior to the adoption of Rule 801(d)(1)(B), prior consistent statements were traditionally only admissible for the limited purpose of rebutting a charge of recent fabrication or improper influence or motive. *See* Fed.R.Evid. 801(d)(1)(B) advisory committee's notes. The Rule goes one step further than the common law and admits all such statements as substantive evidence. The Rule thus does not change the type of statements that may be admitted; its only effect is to admit these statements as *substantive* evidence rather than solely for the purpose of rehabilitation. Accordingly, it no longer makes sense to speak of a prior consistent statement as being offered solely for the more limited purpose of rehabilitating a witness; any such statement is admissible as *substantive* evidence under Rule 801(d)(1)(B). In short, a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all. The distinction drawn by *Brennan* and *Harris* is therefore untenable.
>
> * * *

The court in *Miller* seems to reject the proposition that a prior consistent statement could be used to rehabilitate credibility for purposes other than rebutting a charge of bad motive or recent fabrication. But a simple hypothetical can show that the court's position in *Miller* is too limited. Assume a witness who testifies that he saw the defendant murder the victim in a drive-by, gang-related shooting. On cross-examination, he is impeached with a prior inconsistent statement, i.e., that when interviewed by the police shortly after the murder, he told the police that he saw nothing. On redirect, he explains that when he was approached by the police, he was afraid to get involved due to the nature of the crime. But when he talked it over with his wife later that week, he decided that he would "do the right thing" and testify against the defendant. The conversation between the witness and his wife involves a prior consistent statement. It is not offered to rebut a charge of recent fabrication or bad motive because the witness is not being so charged. Rather, it is being offered to explain an inconsistency — a purpose not covered by Rule 801(d)(1)(B). Thus, the court in *Miller* appears wrong in its premise, i.e., that prior consistent statements are only probative to rehabilitate a witness when they address a charge of recent fabrication or improper motive.

But the court in *Miller* confusingly softened its disagreement with the majority view by taking an expansive view of the term "recent fabrication". The court elaborated as follows:

> This does not imply that we disagree with the result in either *Brennan* or *Harris*. Although we do not believe that prior consistent statements may be admitted for rehabilitation apart from Rule 801(d)(1)(B), we do not agree with the very strict manner in which those cases apply the requirement of no motive to fabricate. Indeed, the *Harris* and *Brennan* courts seem to have created an end run around Rule 801(d)(1)(B) in order to blunt the apparent harshness of the requirement. For example, in *Brennan*, the Second Circuit first concluded that the prior consistent statements made by a government witness (Mr. Bruno) before a grand jury were inadmissible under Rule 801(d)(1)(B) because Mr. Bruno's fear of prosecution gave him a reason to fabricate. The court then went on to conclude, however,

> that the statements were admissible for the limited purpose of rehabilitation. Bruno had been impeached with other statements he made during his grand jury testimony, and the court therefore concluded that the consistent statements were admissible because they helped to "amplif[y] and clarif[y]" the alleged inconsistent statements, and because they helped to "cast doubt . . . on whether the impeaching statement[s] [were] really inconsistent with the trial testimony." 798 F.2d at 589. *See also Harris*, 761 F.2d at 400 (despite presence of motive to fabricate, which barred admission under Rule 801(d)(1)(B), government was permitted to rehabilitate witness with consistent statements made during same interview as allegedly inconsistent ones; statements were relevant to "whether the impeaching statements really were inconsistent within the context of the interview"); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986) (prior consistent statement that is inadmissible as substantive evidence under Rule 801(d)(1)(B) is admissible for limited purpose of rehabilitation where it "tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony" or where it "will amplify or clarify the allegedly inconsistent statement.").
>
> We believe that these cases interpret the requirement of no motive to fabricate too strictly. The requirement should not be applied as a rigid *per se* rule barring all such prior consistent statements under Rule 801(d)(1)(B), without regard to other surrounding circumstances that may give them significant probative value. Indeed, our conclusion that the requirement emerges from the relevancy concerns of Rules 402 and 403 implies that trial judges should consider motivation to fabricate as simply one of several factors to be considered in determining relevancy-albeit a very crucial factor. Thus, the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant "probative force bearing on credibility apart from mere repetition." *Pierre*, 781 F.2d at 333. This determination rests in the trial judge's sound discretion.

The meaning of the above passage is unclear. It could mean that the Ninth Circuit will admit as substantive evidence all of the consistent statements that other courts find admissible for rehabilitation only. In other words, statements that rebut a charge of inconsistency (as opposed to a motive to fabricate) are admissible *as substantive evidence* because of the court's expansive construction of the term "motive to fabricate." This construction is indicated by the court's statement that the prior consistent statements were not admissible *under Rule 801(d)(1)(B)* because "Svetlana's prior statements in no way help to explain or amplify the inconsistent statement with which she was impeached."

The difference, then, between the Ninth Circuit's view and the majority view appears to be that the statements admissible only for rehabilitation under the majority view appear to be admissible *for their substantive effect* under Ninth Circuit precedent. This is because of the Ninth Circuit's unjustifiably broad construction of the term "recent fabrication or improper influence or motive." The Ninth Circuit appears to construe this language to mean, "whenever the consistent statement is relevant to rehabilitate the witness."

In subsequent cases, however, the Ninth Circuit has appeared to backtrack from its statement in *Miller* that a prior consistent statement must be admissible under Rule 801(d)(1)(B) or not at all.

See *United States v. Collicott*, 92 F.2d 973 (9th Cir. 1996) (noting that prior consistent statements can be admissible outside of Rule 801(d)(1)(B) if the adversary "opens the door" and the consistent statements are necessary to place the adversary's impeachment in proper context).

Conclusion on the Case Law

Whether there is a "conflict" in the case law construction of Rule 801(d)(1)(B) depends on what the Ninth Circuit is really saying when it says that "a prior consistent statement is admissible under Rule 801(d)(1)(B) or not at all." This broad statement must be tempered by the Ninth Circuit's broad construction of the Rule to permit admission of consistent statements under a type of totality of circumstances approach that appears to boil down to whether the statement is probative to rehabilitate the witness–which is the same analysis that other courts use to admit statements for credibility that they say are *not* covered by Rule 801(d)(1)(B).

This difference in analysis may not create a difference in practical result — prior consistent statements that are relevant to rebut impeachment other than for bad motive or recent fabrication apparently will be heard by the factfinder regardless of the circuit. But if the Ninth Circuit means what it implies in *Miller*, there will be a difference in procedure: courts in the Ninth Circuit should not give a limiting instruction that the prior consistent statement offered to explain an inconsistency or lack of memory is only admissible for credibility purposes. Courts in all of the other circuits with case law on the subject would give such an instruction.

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

What follows is a working draft of an amendment to Rule 801(d)(1)(B) — including suggestions for change that were made by the Committee at and after the last meeting.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness;[1]

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

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

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut

[1]. For discussion of the bracketed alternatives to using the word "rehabilitates" see pages 17-18, infra.

a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible for the limited purpose of rehabilitating a witness's credibility, but not admissible for their truth. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are otherwise admissible to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may only be brought before the factfinder if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that all prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

III. Application of Minnesota Rule 801(d)(1)(B)

The Committee asked the Reporter to research the case law under Minnesota Rule 801(d)(1)(B), which provides that a statement is not hearsay if it is

> "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness;"

Thus, like the proposed amendment, the Minnesota Rule provides for substantive admissibility of all prior consistent statements that are otherwise admissible to rehabilitate the witness.

The Minnesota Rule originally tracked the existing Federal Rule 801(d)(1)(B); it was changed in 1990. The Rules Committee Comment that drafted the amendment provides the rationale for the change, and also emphasizes the limits of the new rule:

> As amended, Rule 801(d)(1)(B) permits prior consistent statements of a witness to be received as substantive evidence if they are helpful to the trier of fact in evaluating the credibility of the witness. Originally, Rule 801(d)(1)(B) applied only to statements that were offered to rebut a charge of recent fabrication or undue influence or motive. The language of the original rule, if read literally, was too restrictive. For example, evidence of a prior consistent statement should be received as substantive evidence to rebut an inference of unintentional inaccuracy, even in the absence of any charge of fabrication or impropriety.
> * * *
>
> The amended rule is consistent with the result in *State v. Arndt*, 285 N.W.2d 478 (Minn.1979). Because of the restrictive language of former Rule 801(d)(1)(B), however, the *Arndt* Court did not rely upon that rule. Instead, it relied upon the theory that the prior statement was not offered for the truth of the matter asserted, and hence was not hearsay under the definition set forth in Rule 801(c). As amended, Rule 801(d)(1)(B) eliminates the need for reliance upon this theory, and thereby eliminates the need for a limiting instruction informing the jury that the evidence cannot be used to prove the truth of the matter asserted.
>
> Amended Rule 801(d)(1)(B) only applies to prior statements that are consistent with the declarant's trial testimony and that are helpful in evaluating the credibility of the declarant as a witness. Thus, when a witness' prior statement contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible under this rule.
>
> Even when a prior consistent statement deals with events described in the witness' trial testimony, amended Rule 801(d)(1)(B) *does not make the prior statement automatically admissible. The trial judge has discretion under Rules 611 and 403 to control the mode and order of presenting evidence and to exclude cumulative evidence. Thus, the trial judge may prevent the witness from reading a prepared statement before giving oral testimony, or prevent the proponent from using direct examination of the witness merely as a vehicle for having the witness vouch for the accuracy of a written report prepared by the witness. The trial judge may also exclude prior consistent statements that are a waste of time because*

> *they do not substantially support the credibility of the witness. Mere proof that the witness repeated the same story in and out of court does not necessarily bolster credibility.* (Emphasis added).

Thus, the Committee makes clear that the rule does not provide for admissibility of a greater number of prior consistent statements — the standard rules limiting admissibility to prior consistent statements that truly rehabilitate remain in place.

Presumably the Advisory Committee directed the Reporter to conduct this research to determine whether the Minnesota rule has led to improper expansion of the rules on rehabilitation, i.e., that it has been seen as an invitation to get more prior consistent statements before the factfinder than would have been the case under pre-existing law. A fair reading of the cases finds no such expansion.

The leading case on Minnesota Rule 801(d)(1)(B) is *State v. Nunn* 561 N.W.2d 902, 909 (Minn.1997). Prosecution witnesses were attacked for having faulty recollection, and prior consistent statements near the time of the event were admitted in rebuttal. The defendant argued that the prior consistent statements were not supported by "significant indicia of reliability," but the court held that there was no such requirement under Rule 801(d)(1)(B). The court noted that any reliability concerns were addressed by the right of cross-examination and by the fact that the preexisting limitations on admitting prior consistent statements for rehabilitation remained intact. The court explained as follows:

> We decline Nunn's invitation to read into the rule the requirement that before a prior out-of-court statement can be admitted, the statement must bear "significant indicia of reliability." * * * The rule addresses concerns regarding consistency and helpfulness, not reliability. Further, we see no compelling reason to read such a requirement into the rule. The 1990 amendment to Rule 801(d)(1)(B) effectively addresses the concerns raised by the old rule and, at the same time, safeguards remain in place to ensure that the rule is not abused. Under the rule, prior consistent out-of-court statements are not automatically admitted. The statements must be helpful to the trier of fact in evaluating the witness' credibility. Thus, before the statement can be admitted, the witness' credibility must have been challenged, and the statement must bolster the witness' credibility with respect to that aspect of the witness' credibility that was challenged. Finally, under Rules 403 and 611, the trial court retains authority to either limit or exclude the statement and, if admitted, to control the manner in which it is admitted.

Minnesota courts have rejected admission of prior consistent statements under Rule 801(d)(1)(B) if the witness's credibility has not been attacked. There is no indication that the Minnesota courts are using the exception to expand admissibility of prior consistent statements. Because prior consistent statements, under *Nunn* and the terms of the rule, must truly rehabilitate to be admissible for their truth, there is no evidence that consistent statements are being admitted

that would not have been admitted to rehabilitate under the old rule. *See, e.g., State v. Miller*, 754 N.W.2d 686, 702-3 (Minn. 2008):

> [W]e have held that before [prior consistent] statements are admissible that "the witness's credibility must be challenged and the statement must bolster the witness's credibility with respect to the challenged aspect." *State v. Manley*, 664 N.W.2d 275, 288 (Minn.2003); see also *State v. Farrah*, 735 N.W.2d 336, 344 (Minn.2007). Here, the jury heard testimony from Moats, but the record indicates that the State did not attack Moats's credibility on cross-examination. Therefore, because the State did not challenge Moats's credibility, we hold that the district court did not abuse its discretion when it excluded as inadmissible hearsay Lundeen's proffered testimony recounting Moats's out-of-court description of Anderson's assault on Moats.

One predictable difference between the practice under Minnesota Rule 801(d)(1)(B) and the Federal rule occurs when witnesses are attacked for having a faulty recollection. When that is so, prior consistent statements made near the time of an event are probative of accurate memory, and are admissible in both systems for rehabilitation purposes — but they are also admissible substantively under Minnesota law. *See, e.g., State v. Manley*, 664 N.W.2d 275, 288 (Minn.2003) (prior consistent statements "are not automatically admissible. Before they can be admitted, the witness's credibility must be challenged and the statement must bolster the witness's credibility with respect to the challenged aspect. * * * Manley's trial counsel challenged the credibility of each child, asking if they were confused or if they no longer recalled the events surrounding the death of their mother" so no error in admitting the statements for both rehabilitation and substantive purposes under the Minnesota rule).

Minnesota courts also admit prior consistent statements substantively when they sufficiently explain an inconsistency raised on cross-examination. Thus, in *State v. Bakken*, 604 N.W.2d 106, 109 (Minn.App.2000), a complainant was attacked with prior inconsistent statements. The court noted that not every consistent statement is admissible for rehabilitation because "[i]t is unlikely that mere repetition of a statement implies veracity." However, the consistent statement in this case provided "a meaningful context" (i.e., it put the allegedly inconsistent statement in context and tended to show that it was not in fact inconsistent with the witness's trial testimony). Interestingly, the court found that admission of the complainant's *entire* prior statement was error because it contained some assertions that were not consistent with the complainant's testimony — it added significant details that, if believed, would have resulted in conviction on a more serious charge. The court concluded that "[t]he trial court erred in allowing the significant inconsistent statements into evidence as part of the multi-statement interview that contained some significant consistencies." Thus, it appears that Minnesota courts are attuned to possible misuse of the exception — it can't be used as a way to get otherwise inadmissible statements, or parts of statements, before the jury.

It should also be noted that the Minnesota Rule has been applied on behalf of defendants as well as the government. For example, in *State v. Johnson*, 2012 WL 254476 (Minn.App. 2012), the trial court excluded the defendant's prior consistent statements to his mother as hearsay. The

appellate court found this to be error because the consistent statement — while not rebutting a charge of recent fabrication or bad motive — was nonetheless probative of his credibility.[2]

This is not to say that every reported Minnesota case takes a rigorous and detailed approach to statements offered under Minnesota Rule 801(d)(1)(B). For example, in *State v. Fields*, 679 N.W.2d 341, 348 (Minn.2004), a witness was attacked by an accusation that he had been involved in the shooting at the heart of the case. The court found a prior consistent statement admissible, the totality of the analysis being as follows:

> Testimony that consists of a prior consistent statement of a witness is admissible if it may be helpful to the trier of fact in evaluating the witness' credibility. Before the statement can be admitted, however, the witness' credibility must have been challenged and the statement must bolster the witness' credibility with respect to that aspect of the witness' credibility that was challenged.. Since Fields challenged the credibility of Coleman's testimony, there was no abuse of discretion in the admission of the prior consistent statement.

That's pretty lame. While there is an indication of an attack on credibility, there is no discussion of why and how the prior consistent statement is actually rehabilitative. But the potential of a conclusory analysis should probably not be a sufficient reason for rejecting an amendment — otherwise no amendment would ever be adopted. Under that test, Rule 404(b) should never have been enacted, as it is the poster child for conclusory analysis.

In sum, the practice under the Minnesota Rule 801(d)(1)(B) appears to indicate that it is not being used to provide for wide or random admission of prior consistent statements. Admissibility remains determined by whether the statement is properly admitted to rehabilitate the witness — meaning that prior consistent statements that were excluded from jury consideration before the rule continue to be excluded after it.

---

[2]. As might be surmised, the court found the error to be harmless, because the jury had already heard the defendant's testimony as well as corroborating evidence from other witnesses — but this is only to say that another reason for the amendment is that the distinction between substantive and credibility use is irrelevant when it comes to prior consistent statements.

IV. DOJ and Public Defender Comments on the Proposed Amendment to Rule 801(d)(1)(B)

DOJ Position:

Elizabeth Shapiro of the DOJ provided this email comment to the Reporter, setting forth the DOJ position on the proposed amendment to Rule 801(d)(1)(B):

> The Justice Department supports the proposed amendment to Rule 801(d)(1)(B). We believe that the change eliminates a mostly meaningless distinction between substantive and non-substantive admission of prior consistent statements and makes for a clearer and more sensible rule. We do not believe the rule change raises confrontation concerns (the declarant is available to be cross-examined). We also do not believe the rule change will lead to improper bolstering. Regardless of which side is offering the prior consistent statement – and the rule of course would apply to both sides – the evidence is still subject to the limitations of Rules 401 and 403.
>
> One additional point with regard to the most recent draft (suggested at the end of the last meeting): The language suggested for the new subsection (B) was the following:
>
> > (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross examination about a prior statement, and the statement:
> >
> > * * *
> >
> > (B) is consistent with the declarant's testimony and rehabilitates the declarant's credibility as a witness.
>
> It seemed to us that "rehabilitates" may not be the best word here, as it does not appear elsewhere in the Rules of Evidence. We may want to consider instead the word "supports," which is used in both FRE 806 and 608. Thus, Subsection (B) would read:
>
> > (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross examination about a prior statement, and the statement:
> >
> > * * *

(B) is consistent with the declarant's testimony and supports the declarant's credibility as a witness.

Reporter's Comment:

The DOJ's position that the current distinction is unworkable received strong support at the last Standing Committee meeting. During the Evidence Committee presentation Judge Schiltz, a Standing Committee member (and an Evidence professor), stated that he was strongly in favor of the proposed amendment. He essentially said — to knowing nods from his fellow judges — that he was tired of watching jurors' eyes glaze over when being given the impossible and illogical instruction that they were to use some prior consistent statements for their truth but others only for credibility. The FJC survey, discussed below and attached to this Report, indicates that Judges strongly agree with Judge Schiltz that jurors cannot and do not follow the limiting instruction made necessary under the current Rule.

The DOJ is clearly correct that the proposed amendment is not inconsistent with the Confrontation Clause. By definition, the declarant is produced and trial and must be subject to cross-examination for the hearsay statement to be admissible. The *Crawford* outline included in this agenda book sets forth a number of cases holding — as the Supreme Court did in *United States v. Owens* — that admission of hearsay does not violate the Confrontation Clause if the declarant is subject to cross-examination about the statement. Certainly the consistent statements that the amendment would admit for truth are no more or less problematic under the Confrontation Clause than the consistent statements that are *already* admitted under Rule 801(d)(1)(B).

The DOJ suggests substituting "supports the credibility of the witness" for "rehabilitates the credibility of the witness." It notes correctly that the word "support" is used instead of "rehabilitate" in Rules 608(a) and 806. But while "rehabilitate" is not used in the Rules, there seems to be little mystery about what it means. The Justices in *Tome* use the term "rehabilitate" 16 times (while noting that the McCormick treatise uses the term "support").

It is also arguable that "rehabilitate" takes into account *all* of the aspects of admitting prior consistent statements, specifically: 1) the witness must first be attacked (otherwise there is nothing to rehabilitate); and 2) admissibility is dependent on Rule 403, which is to say that the statement must be sufficiently rehabilitative that prejudice, confusion and waste of time do not sufficiently outweigh the rehabilitative value. In contrast, a prior consistent statement could well be argued to "support" credibility even though the witness's credibility had never been attacked, and even if there is a risk of substantial negative consequences in admitting the statement. In other words, "supports" sounds more like "relevant" while "rehabilitates" sounds more like responding to an attack and satisfying Rule 403.

Another alternative: A statement is not hearsay if it:

is consistent with the declarant's testimony and <u>is otherwise admissible to</u> rehabilitate~~s~~ the

declarant's credibility as a witness.

It can be argued that adding "is otherwise admissible" is a better and more explicit reference to the existing law on rehabilitation. It sounds a bit stronger, more stringent, than simply "rehabilitates." In other words, compared to the alternatives, it seems to sound more like a Rule 403 standard. But in the FJC survey, some respondents thought that the term "otherwise admissible" would be vague and confusing.

Public Defenders' Position:

Margy Myers submitted a letter to the Reporter on behalf of the Public Defenders, in opposition to the proposed amendment. The text of the letter is reproduced in full, starting on the next page.

FEDERAL PUBLIC DEFENDER

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September 2, 2011

Professor Daniel J. Capra

Philip Reed Professor of Law

Fordham University School of Law

140 West 62nd Street

New York, New York 10023

via email

RE: Fed. R. Evid. 801(d)(1)(B)

Dear Professor Capra:

After canvassing the Federal Public Defenders, I can report that we do not believe that an amendment to Federal Rule of Evidence 801(d)(1)(B) is warranted, and, in fact, it could be more harmful than beneficial.

As you outline in your thorough memorandum, the current rule excludes from the definition of hearsay a prior statement that is "consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper motive." Fed. R. Evid. 801(d)(1)(B). The Supreme Court held in Tome v. United States, 513 U.S. 150 (1995), that a prior consistent statement is admissible as substantive evidence only if it was made ***before*** the charged fabrication or improper influence or motive arose. Your review of the case law reveals that the majority of the circuits permit introduction of consistent statements made after the improper motive arose but only for purposes of evaluating credibility.

Judge Bullock and others have criticized the current rule because it is confusing to the jury (and law students). The potential for confusion exists with respect to most limiting instructions on

evidence offered solely for impeachment. For example, a jury is instructed to consider a prior conviction only for impeachment but it is highly likely that this instruction is ignored at least as often as it is followed.

Judge Bullock proposes an amendment that would eliminate the distinction between the types of consistent statements, allowing all of them to be admitted as substantive evidence. We think that such an amendment is not necessary and would actually be counterproductive. For the reasons outlined in Tome, the proposed amendment would allow a party to build an appearance of truthfulness. In Tome, the Court was concerned that the government had presented a parade of sympathetic witnesses to repeat the complainant's statements even though the statements did not rebut the claim that her motive for alleging abuse by her father was to live in comfort with her mother.

The Sixth Amendment generally requires cross-examination in the presence of the accused and the trier of fact precisely because such confrontation may expose the errors in the witness's testimony. See Crawford v. Washington, 541 U.S. 36, 61 (2004) (Sixth Amendment requires reliability to be tested in the "crucible of cross-examination"). Allowing substantive consideration of all prior consistent statements may create an incentive to craft the perfect statement out of court as a substitute for the imperfect live testimony. This undermines the essence of confrontation.

A good lawyer prepares her witness by going over the testimony. The repetition does not, however, make the statement more true. In fact, if a party tries to introduce multiple out-of-court consistent statements, the court's repeated limiting instructions will not confuse the jury but may drive the appropriate point home that the fact that the witness has said the same story many times does not make it truer. At some point, the court will exclude such statements as cumulative.

An alternative remedy would be to consider all prior consistent statements only for impeachment or to preclude them entirely. Neither remedy is satisfactory. A statement made prior to the motive to lie is more probative because it is not subject to manipulation by the parties and less subject to manipulation by the witness. While it may be cumulative because the jury hears the statement live from the witness stand, these pre-prevarication statements have a ring of truth that others do not.

Daniel Broderick, the Federal Public Defender for the Eastern District of California put it this way:

> To me the limitation on prior consistent statements is a necessary application of 403's limitation on cumulative evidence. The witness has testified and been cross examined. If the weakness of the witness's testimony flows from continuous bias then prior consistent statements add nothing to the trial. On the other hand, if the weakness of the direct testimony relates to some event occurring before trial (a deal or offer from the government), then the current rule makes sense in that the jury should be able to consider what the witness said before this event in evaluating the witness's credibility and in determining what actually happened. But absent some intervening event (that creates a motive to lie), the fact the witness has previously told someone else the same thing they are telling the jury does not make any material fact more or less probable. It simply bolsters that statement in the exact same

manner that argument bolsters the statement. And the jury is quite likely to give too much weight to repeated testimony.

Judge Kozinski opines that prior statements are helpful in assessing credibility only if the jury thinks they are true. This is not always the case. For example, a suspect's statements at the time of detention, or lack thereof, often are admitted for credibility. Assume that two individuals are detained at a checkpoint and drugs are found hidden in the vehicle. The driver is prosecuted but the passenger is not. At trial, the passenger testifies for the defendant that they were drinking at a bar and some guy asked them to drive a car across the bridge because he was more intoxicated than they were but they had no idea there were drugs in the car. If the passenger did not give this story when detained, the prosecutor will surely cross-examine him about this. On the other hand, if the prosecutor cross-examines him suggesting that he has made this up to help his friend, it would be relevant to credibility that the passenger told the same story to the arresting agent in a separate interrogation room. This statement would not meet the requirements of Fed. R. Evid. 801(d)(1)(B) because the passenger had a motive to exculpate the two of them even when interrogated but it bears on his credibility that he told this story from the beginning. The jury could disbelieve both statements but the existence of the first statement assists in an evaluation of whether the trial testimony is true.

Finally, the fact that appellate courts have deemed the erroneous admission of certain consistent statements without a limiting instruction to be harmless does not gauge the importance of the rule at trial. The trial judge tries to make the right ruling on the evidence regardless of whether an appellate court will deem an error subject to reversal. Judge Bullock's proposal to allow all such statements into evidence for the truth would change the dynamics at the trial.

I look forward to seeing you in October.

Very truly yours,

Marjorie A. Meyers

Federal Public Defender
Southern District of Texas

Reporter's Comment:

With respect, the Federal Defenders' position makes way too much of the amendment. The amendment does not make a single prior consistent statement admissible that would have been inadmissible before the amendment. The only difference is that all previously admissible prior consistent statements would be treated exactly the same way — they can be used for rehabilitation and for their truth. Mr. Broderick seems to argue that the amendment will abrogate Rule 403, but of course this is not true. If a consistent statement is not sufficiently rehabilitative under Rule 403, it is no more admissible under the amendment than it is today. Mr. Broderick focuses on prior consistent statements that are offered to rebut a charge of bad motive, and notes that those predating the motive to falsify should be excluded under Rule 403. That is precisely correct — under the law today *and* under the law post-amendment. What Mr. Broderick does not consider is that rebutting a charge of bad motive is only one way to rehabilitate a witness with a prior consistent statement. Nothing in the amendment changes that form, or any other form, of rehabilitation. All the amendment does is to treat consistently all the forms of rehabilitation, including two that Mr. Broderick ignores — explaining inconsistent statements with a prior consistent statement, and rebutting an allegation of faulty recollection.

With regard to Confrontation and the citation to *Tome*, again there is nothing in the amendment that will shift the focus to prior consistent statements that is not already permitted by the current rule as interpreted by *Tome*. The Court in *Tome* found that the pre-motive statements were erroneously admitted because *they did not properly rehabilitate the witness.* In doing so, the Court rejected the permissive "relevance" test proposed by Justice Breyer. That rejection was well-supported by the existing case law on rehabilitation generally — under which prior consistent statements are not admissible simply because they are relevant to credibility. Under the case law, prior consistent statements are admissible to rehabilitate only if offered in response to an attack and then only if they withstand a Rule 403 balancing test. In other words, the majority in *Tome* strongly implied that the way to protect a criminal defendant was to apply the existing common law standards on rehabilitating a witness. That is exactly what the amendment does.

At the last meeting, Ms. Meyers also expressed concern that if a witness had made both consistent and inconsistent statements, all of them admissible for impeachment or rehabilitation, then under the amendment all of the consistent statements would be admissible for their truth while the prior inconsistent statements — if not made under oath — would be admissible only for impeachment and not for their truth. She argued that in this situation the judge would completely confuse the jury by giving different instructions for consistent and inconsistent statements. But in fact the judge in such a situation would not give *any* instruction about the consistent statements because, under the amendment, the consistent statements would be admissible for both rehabilitation and substantive use. This means that under the amendment there will be fewer, not more, instructions.

Finally, it should be remembered that the question before the Committee at this point is only whether the proposed amendment should be referred to the Standing Committee with the recommendation that it be released for public comment. Given the Committee's expressed desire

to get the proposed amendment properly vetted, it would seem to follow that the Committee might wish to seek public comment on whether the amendment will be seen as an invitation to expand admissibility of prior consistent statements, despite text and Committee Note to the contrary. Especially given the apparent interest of at least some members of the Standing Committee in the proposed amendment, the Committee might wish to consider sending the amendment to the next step in the process.

V. Summary of Input Received Since the Last Meeting

Since the last meeting, the Committee has received information from four sources on whether the amendment to Rule 801(d)(1)(B) should be recommended for release for public comment. This section summarizes the input received from the Standing Committee, the FJC survey, the ABA Section of Litigation, and the American College of Trial Lawyers. The full reports from FJC, the Litigation Section, and the American College are attached to this memo so only a brief summary is provided here.[3]

A. Standing Committee

At the last Standing Committee meeting Judge Fitzwater described the proposed amendment to Rule 801(d)(1)(B), and specifically requested guidance from the Standing Committee as to whether the Evidence Rules Committee should continue with and propose the amendment. The Standing Committee did not formally vote on any proposal as there was none before it. But it is fair to say that there was a consensus that the proposed amendment had merit and that the Committee should continue its work on the amendment. Judge Fitzwater will provide more information at the Evidence Rules meeting.

B. FJC Survey

The FJC survey, as might have been predicted, shows that Federal judges are not of one mind about a proposed amendment that would allow any prior consistent statement otherwise admissible for rehabilitation to also be admissible as substantive evidence. The basic conclusions are as follows:

- Most judges were in favor of an amendment that would exempt prior consistent statements from the hearsay rule when they are admissible to rehabilitate the witness's credibility.

- Most judges believe that more prior consistent statements will be admitted under the amendment than under existing law.

- Most judges are in favor of more prior consistent statements being admitted.

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[3]. Special thanks is due to Tim Reagan for his excellent and indispensable work on the Judges' survey, and to Bill Hangley for his great assistance in getting input from the Litigation Section and the American College.

C. ABA Litigation Section Letter

Those consulted at the Litigation Section were in favor of the amendment because it would simplify — actually eliminate confusing — jury instructions. While the amendment was generally favored, enthusiasm was apparently not too high.[4] The Section members indicated that if a rule is to be proposed, it should emphasize that it is not a means to admit more prior consistent statements — and that very point is emphasized in the last paragraph of the Committee Note to the proposed amendment.

The Section's letter indicates that JoAnn Epps opposed the proposal, or more accurately preferred a different proposal that would make prior consistent statements admissible *only* to rehabilitate. That proposal would essentially require repealing the existing Rule 801(d)(1)(B). Bill Hangley, in a separate letter attached to this Report, ends up after consideration to agree with Dean Epps's proposal that would eliminate Rule 801(d)(1)(B) from the Federal Rules of Evidence.

The Committee has already considered whether to repeal the existing Rule 801(d)(1)(B). The minutes of the Spring 2011 meeting summarize that prior consideration:

> One member agreed with the point that the current rule was problematic in treating some rehabilitative prior consistent statements differently from others, but suggested that the proper result is that *none* of them should be admissible substantively — i.e., the Committee should propose deleting Rule 801(d)(1)(B). But this suggestion was rejected by other Committee members, who found no good reason for upsetting the current practice in this way. The Department of Justice member was also opposed to any proposal to limit the current substantive admissibility of prior consistent statements.

If the Committee does wish to reconsider the possibility of repealing Rule 801(d)(1)(B), one further thing should be added — the repeal would *exacerbate*, rather than remedy, the existing problem, which is that the instruction to use a prior consistent statement for rehabilitation and not for its truth is impossible to follow. The repeal would mean that *every* prior consistent statement would require such an instruction. In contrast, the proposed amendment to Rule 801(d)(1)(B) would do away with the need for that incomprehensible limiting instruction.

D. American College of Trial Lawyers

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[4]. It's not surprising that there is a lack of excitement about what is, on its face, a narrow and technical amendment of limited applicability. One might actually think twice about the Litigation Section if it got all excited about an amendment like this one.

The letter from the American College essentially covers all the arguments in favor of and against the amendment that the Committee has already considered, with the exception of one new argument against the rule. Those opposed in the College argue that there are a lot of instructions that are confusing, and yet we live with them. Once we start changing rules because instructions attendant to them are confusing, we will end up changing a lot of rules. A possible response to that argument, though, is that some instructions are in fact more confusing and harder to follow than others — this is not a new idea, indeed the whole *Bruton* line of cases is based on the very premise that some instructions go over the line of being impossible to follow and therefore cannot be used. Arguably Rule 801(d)(1)(A) calls for an instruction that is impossible to follow.

Moreover, the instruction given under Rule 801(d)(1)(B) is different from most if not all others because it *makes no difference.* It doesn't matter whether the jury misuses a prior consistent statement for its truth because the witness will have already testified to the same thing and so there is no extra *substantive* effect — the only effect will go to credibility, and the jury is permitted to use it for that purpose. So the situation is unlike, for example, a Rule 404(b) instruction, where if the jury misuses the evidence it makes a *big* difference. One can argue that we need to live with instructions that are necessary to protect a party — and hope the jury follows them. But it is another thing to have an instruction that the jury can't follow and yet makes no real practical difference to the jury's determination. That is a futile and fanciful exercise that arguably should be terminated by an amendment that will allow the judge to admit the evidence without an instruction.

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TAB 3A

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Survey of District Court Judges on a Proposed Amendment to Federal Rule of Evidence 801(d)(1)(B) Concerning Prior Consistent Statements

Tim Reagan
Margaret S. Williams
Federal Judicial Center

March 2, 2012

Prior consistent statements are admissible to rehabilitate a witness's credibility if (1) they rebut evidence of fabrication because they occurred before the witness's motive to lie, (2) they rebut evidence of faulty recollection, or (3) they explain an inconsistent statement. According to the current version of Federal Rule of Evidence 801(d)(1)(B), prior consistent statements are admissible for their substance as well as for their rehabilitation only in the first circumstance—only if they rebut recent fabrication because they occurred before the fabrication motive.

If a prior consistent statement is admissible for credibility but not admissible for substance, the opposing party is entitled to a jury instruction. Because of perceived difficulties with such an instruction, an amendment to Rule 801(d)(1)(B) has been proposed to the Evidence Rules Advisory Committee.

In collaboration with the Committee's chair and reporter, the Federal Judicial Center developed an eight-question email questionnaire, which the Center sent to 961 federal district judges over the chair's signature on January 5, 2012.[1] As the suggested completion date of January 21 approached, the Center sent email reminders to judges who had not yet responded on January 18. The Center received responses from 506 judges (53%) by February 4, 2012.

Current Rule

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

> **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> . . .
>
> **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying;
>
> . . .

1. Two additional judges, one active and one senior, have not registered their email addresses. The text of the cover email is in the Appendix. The text of the questions is reproduced in the body of this report.

Proposed Rule

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

. . .

(B) is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ is otherwise admissible to rehabilitate the declarant's credibility as a witness;

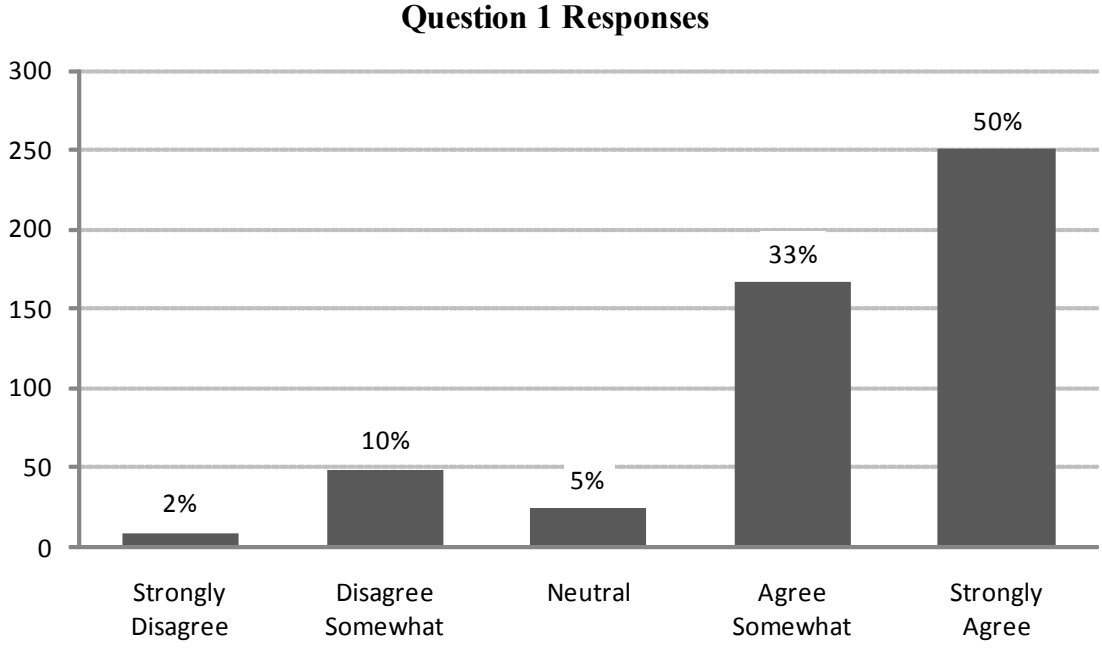
. . .

. . . . .

The perceived difficulties with jury instructions that prior consistent statements be used as evidence of credibility rehabilitation but not as substantive evidence are (1) jurors frequently do not understand the instruction, and (2) even if the instruction is understood it has no practical effect. The first two questions of the questionnaire ask judges to draw on their experience to assess the validity of these two perceived difficulties.

Question 1. Jury Comprehension

Question 1: It is difficult for jurors to understand the instruction that a prior consistent statement is admissible only to rehabilitate and not for the truth of the matter asserted in the statement. There was 84% agreement with this statement; 50% of responding judges agreed strongly.[2]



2. Six judges who responded to the survey did not answer this question.

Question 1 Comments

From Judges Who Strongly Agree

- Do not believe that in the context of an entire case the average juror will remember to make the distinction and I am not sure that it makes a great deal of difference.
- If the jury determines the prior statement isn't substantively true, it couldn't possibly rehabilitate. So they will make a de facto determination about truth even if they are instructed only to consider the statement for rehabilitation purposes.
- In the jurors' minds, the question is whether or not the witness should be believed. That spells "truth" to those jurors. Technicalities don't count to them.
- The complexity of the required cautionary instruction unduly highlights the testimony which is the subject of the instruction.
- It is also difficult and challenging for the trial judge to explain this principle in lay terms.
- It is difficult because it is challenging for us judges to explain the distinctions in a brief and accurate manner when the evidence is admitted in an ongoing trial.
- My post-judgment interviews of jurors indicate that they do not understand the concept of evidence being admitted for a limited purpose, regardless of how many times it is explained during trial.
- I don't think lawyers understand the concept either.
- Many lawyers do not get it!
- It would be helpful to make the language of section 801(d)(1)(b) more plain spoken and less cumbersome.
- Some lawyers attempt to offer hearsay statements by saying, "Judge, I'm not offering this statement for the truth of the words, only that the words were spoken." Ruling: "Objection is sustained."
- I do not allow impeachment from reports made by investigators or FBI 302's because they are not taped or recorded or signed by the witness.
- Not frequently encountered in my experience, but certainly a difficult concept to explain.
- Hopeless rule.
- This issue has never come up in seventeen years on the federal bench.

From Judges Who Agree Somewhat

- It is always difficult for a jury to consider evidence for a limited purpose regardless of the limiting instruction we give.
- I think at least some jurors are able to understand such an instruction, but, in practice, it is too difficult to follow, with the result that they consider the statement for its truth.
- As I recall, in the half dozen times when I have had this come up at trial I can only recall once when I received a juror question that implicated the instruction. What that may mean I cannot be certain but I think if it was a thorny problem for jurors I would have received more questions.
- Understandable instructions can be given, however. This is the same as prior inconsistent statements which are admissible only for credibility purposes. Admittedly, many attorneys try to impeach with prior statements (usually deposition testimony) with the anticipation that the inconsistent statement is evidence of the fact asserted. This is a misunderstanding on their part and should be addressed with education on the issue.

- Without all of the background that lawyers and judges bring to this issue, it may be difficult for jurors to understand. I, however, believe that a very good jury instruction on this issue can cure the problem.
- Because the prior consistent statement is, by definition, consistent with admissible testimony, I do not know that this is much of a problem.
- To ensure that the jury will apply the rule correctly, it is incumbent upon the judge to give the appropriate instruction and provide an explanation that will make the application of the rule clear. Whenever possible, the judge should give a limiting instruction soon after the use of the prior consistent statement.
- Generally agree; but, juror's understanding of instructions depends upon many variables, including juror intellect and circumstances surrounding introduction of statement.
- However, I believe it is important for the jury to be allowed to consider relevant matters.

From Judges Who Are Neutral

- It depends on the way the instruction is worded.
- Depends on the facts of the case and the particular jury
- I think a properly worded instruction could make the distinction clear to the average juror.
- I believe the instruction can be adequately explained.
- I have never, in more than 11 years as a district judge, or the 10 years I served as a state trial judge, been asked to give such an instruction and cannot envision being asked to do so. If such an instruction is given, I have doubts that a juror would appreciate the distinction.
- I have never so instructed a jury; no party in any case has ever requested such an instruction.

From Judges Who Disagree Somewhat

- A good explanation of hearsay usually is quite helpful to a jury. For example, explaining to a jury that if my brother told me in a telephone conversation that it is raining in Topeka, if the purpose is to prove it was raining in Topeka at that time, it is hearsay. If, however, it is simply a recitation of the telephone conversation, and not to prove the truth of any of the matters discussed in the conversation, it is not. A bit of time explaining things to a jury eliminates significant amounts of confusion.
- I think jurors understand these distinctions so long as the instruction is clear. I see no difference here than in the instruction given to distinguish statements admitted under FRE 801(d)(1)(A)—prior inconsistent statements under oath, etc., admitted substantively—from inconsistent statements under FRE 613, admitted for credibility only.
- A good explanation from the trial judge makes this bare statement more understandable and believable to juries.
- Over the years jurors have, through post-trial comment, demonstrated to me that they very well understand such distinctions, and apply them.
- When carefully instructed, they seem to catch the nuance.
- This is no more difficult than many other limiting instructions.
- Jurors can follow proper instructions.
- Judge can explain to jury, no problem.
- It is hard to know what jurors think, but I routinely find them to be very conscientious and strive to follow my instructions.
- The quality of the limiting instruction is important.

- Jurors' reaction depends upon the actual statement and attendant circumstances. One cannot generalize.
- Often times, out-of-court statements are received in evidence for non-substantive purposes. Examples include notice, impeachment, and circumstantial evidence about a person's state of mind. It is no more difficult fashioning a limiting instruction for these statements than it would be for prior consistent statements offered for a non-hearsay purpose.
- Jurors would have witnessed the allegation that the statements are new and would understand that the prior consistent statement was admitted to counteract that allegation.
- I have had very few instances that I can recall where this rule was applicable. As this relates to the credibility determination of a witness by a jury, I cannot say that this rule and the jury instruction are more difficult for a juror to understand or apply than any other facet of credibility determinations by a juror. I would defer to other judges who have actually had instances where this has been a specific issue.
- I don't believe prior consistent statements are admissible except in accordance with the Rule admitting them to rebut charges of recent fabrication. When such a charge occurs the door is open to what would otherwise be hearsay. Admitting prior consistent statements in other circumstances is inconsistent with the hearsay rule.
- I always give the jury a copy of my charge and if this is an important issue I go over with them in lay language and point out the difference.
- The instruction would have to be very carefully worded for the average juror to understand it. If the statement is written, I suggest it not be included in the physical evidence given to jurors during deliberations. It is like self-serving testimony that the jury can continue to review.

From Judges Who Strongly Disagree

- If the judge uses plain language and bothers to explain the reasons for the hearsay rules to the jurors, and tells them the prior statement is only coming in so that they can decide whether or not they believe the testimony of the witness at trial, they get it. If the judge uses words like "rehabilitate" or "not for the truth of the matter asserted in the statement," they probably won't understand.
- The only reason I have found for juror confusion is the giving of the instruction "you may consider this statement only to rehabilitate the believability of the witness and not for the truth of what he or she said at the prior time." To get a jury to avoid considering evidence for its truth is to give examples tailored to the specific case e.g. when a statement comes in to explain someone else's conduct or reaction you can use the old example of someone rushing into a courtroom shouting "the courthouse is on fire" which explains why "all of you in the jury, the lawyers in the courtroom and I, the judge, left quickly and used the staircases to exit the courthouse even though there was no fire and the man who shouted there was a fire was either mistaken or a lunatic."
- If true, it argues for better instructions rather than lessening the rigor of admissible evidence.
- It is my understanding that since the statement is not hearsay it can be admitted for the truth so that no instruction is necessary.
- If it is not hearsay, why is a limiting instruction being given?

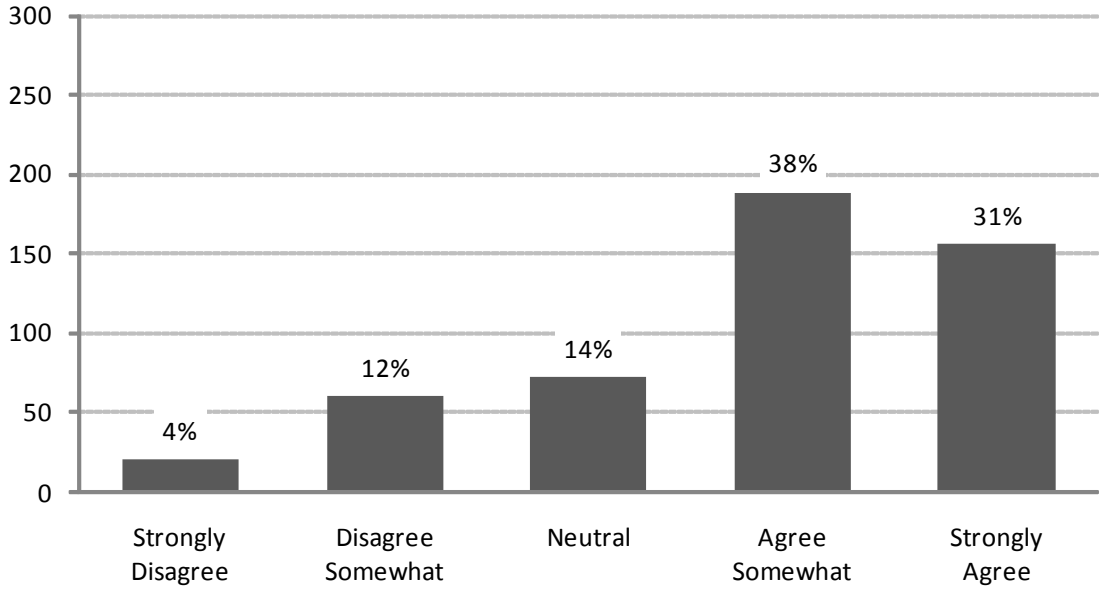
From a Judge Who Did Not Answer

- Don't know. Can't recall it coming up so no occasion to question jurors.

Question 2. Practical Effect

Question 2: Amending Rule 801(d)(1)(B) to state that a prior consistent statement is exempt from the hearsay rule whenever it would be otherwise admissible to rehabilitate a witness would have little practical effect on the outcome of jurors' deliberations. There was 69% agreement with this statement; 31% of responding judges agreed strongly.[3]

Question 2 Responses



Question 2 Comments

From Judges Who Strongly Agree

- When otherwise admissible, the statement is generally reliable and thus questionable why it should not be used substantively.
- Jurors are unlikely to apply the sophisticated distinction of admissibility for a limited purpose. It is likely evidence admitted at trial is weighed as being admitted for its truth even if a cautionary instruction is given. My view is that the Rule change will have no identifiable effect on deliberations.
- I think there are very few cases where this would be material.
- Because jurors don't appreciate the difference in the first place. Legal mumbo jumbo.

From Judges Who Agree Somewhat

- Trying to explain that a prior consistent statement is exempt from hearsay when used to rehabilitate a witness is gobbledygook even for a judge. It will make no sense to jurors.
- These finely parsed rules are not useful to people of ordinary experience and education. Because they are not useful, they are ignored.
- I truly believe that lawyers and judges think such an amendment would be helpful to *them*, but jurors have already amended the rule—every time they deal with the issue in a trial.

3. Nine judges who responded to the survey did not answer this question.

- But I also do not think the current rule has a big impact either.
- However, it could have significant practical impact on appeal. Georgia allows prior consistent and inconsistent statements to be admitted for substantive purposes.
- It's not just the instruction that affects the jury's deliberations. Probably more significant is the scope of permissible attorney argument.
- There may be tactical uses not foreseen or anticipated that might have more than minimal effect on the jurors' deliberations.

From Judges Who Are Neutral

- Jurors already treat the prior statements for the truth despite the instruction.
- Generally speaking, jurors will tend to view all admitted evidence for its truth or falsity.
- It would depend on the extent of rehabilitation needed, the nature of the prior statement and how strong a value it has in rehabilitating the witness.
- It depends on the centrality and importance of the statement.
- Really depends on case and facts and statement at issue. Hard question to answer in a vacuum.
- It depends on the case.
- Depends on the case.
- I tend to agree as written, but the amendment seems to relax the standard and could change the evidence that is actually admitted. If so, it could have a big impact depending on the circumstances.
- The bottom line is that the juror is assessing testimony of a witness at trial (witness under oath, subject to cross examination, demeanor, other testimony/evidence, etc.). That the witness had previously said something similar to his/her testimony at trial may or may not have some influence to the juror in determining how much, if any, of the witness' testimony the juror is going to believe. Unless this is the absolute key witness on a factual issue, and unless a prior statement is the absolute key to the credibility of the witness, I seriously question whether a rule change will have a practical effect on the outcome. Again, I defer to other judges who have specific examples of where the current rule has had a significant enough effect on the outcome of the deliberations to warrant a change in the rule.
- This is an ad hoc determination. Difficult to generalize.
- Too difficult to make this type of prediction since there are so many other factors that could affect jury deliberations given the unique nature of each trial.
- Can't speculate as to the effect of jury deliberations. Doubt that speculation should drive rule changes.
- This statement is still cumbersome. Maybe you could delete the language above, "whenever it would be otherwise admissible to" and instead just say, "if it rehabilitates a witness."
- I am not entirely clear how to interpret the "otherwise admissible" part of this question. Would that still require "offered to rebut a charge of recent fabrication?"
- I'm not sure I understand this one: if it means that a prior statement would be admissible for its truth, then I believe it would have a lot of effect.

From Judges Who Disagree Somewhat

- I think limiting instructions have significant effect, though not perfect effect.
- In general, jurors try really hard to follow our instructions. The current situation breeds more confusion than jury nullification of the charge. It also likely promotes lots of time-wasting objections and sidebars by counsel.

- I have not given this enough thought to have any strong feeling about it one way or another. It would seem, however, that reinforcement of testimony with a prior consistent statement would have some impact on deliberations.
- Depends on the particular case.
- How would we be in a position to know whether the statement would have any practical effect on the outcome of juror's deliberations?

From Judges Who Strongly Disagree

- Allowing such statements could substantially bolster the weak in-court testimony of a questionable witness. It effectively would allow another witness to recast the information in more favorable terms. Several examples come to mind from cases involving employment discrimination, sexual misconduct, and a variety of conspiracies.
- This rule change would encourage a calculating declarant to deliberately contrive to take advantage of the Rule in contemplation of litigation.
- To admit prior consistent statements to rehabilitate a witness seems to me (except in the rarest of cases) to ask a jury to find that the prior statements were true because if the jury does not find this to be the case then it does not rehabilitate the witness. I have permitted a lawyer to ask a witness whether the witness has ever given a different version of the event in words or in writing. I am reluctant now to allow even this. A lawyer is permitted to argue the absence of inconsistent statements and note that this is not rebutted. My basic point is that for a jury to decide whether a witness is rehabilitated by what a witness has said earlier (when not under oath or subject to cross), the jury must decide whether he told the truth and once they find that to be the case, it is hard to believe that they limit the use of these true statements to the limited purpose of rehabilitation.
- This would depend on the case, but changing the rule could have significant impact on the way the case is tried.
- I think it would be unduly confusing, since the Circuits are split as to when a PCS can be admitted solely to rehabilitate, and this would exacerbate the confusion.
- If a juror is led to believe that a witness has changed his testimony, the juror may strongly discount everything the witnesses has said. Permitting a prior consistent statement to be introduced very well could rehabilitate the witness so that the jury will weigh all of what the witness has testified about.
- I am opposed to the amendment.

From a Judge Who Did Not Answer

- It will depend on the content of the statement. It seems that if it is admissible for rehabilitation purposes a jury ought to be able to consider its content in the context of the witness's entire testimony.

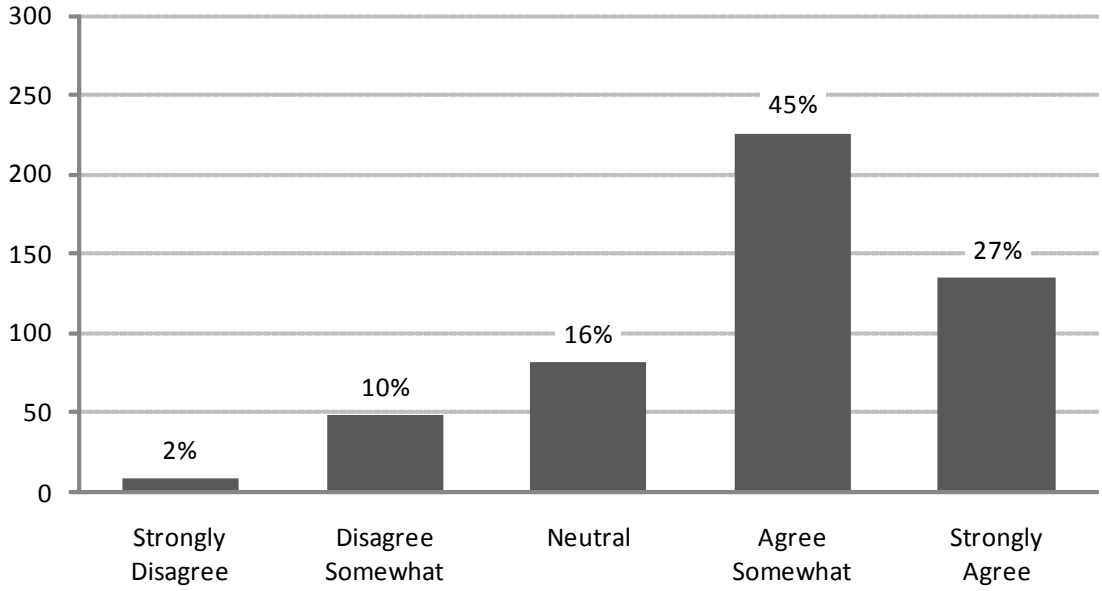
. . . . .

One concern regarding the proposed amendment is that it might appear to invite an increase in the admission of prior consistent statements, not just an expansion of use for prior consistent statements that would otherwise be admitted. The third question asked judges whether they expected this to occur.

Question 3. More Statements Admitted

Question 3: Amending Rule 801(d)(1)(B) to state that prior consistent statements are exempt from the hearsay rule whenever they are otherwise admissible to rehabilitate the witness's credibility would lead to more prior consistent statements being admitted. There was 72% agreement with this statement; 27% of responding judges agreed strongly.[4]

Question 3 Responses



Question 3 Comments

From Judges Who Strongly Agree

- Could lead to the admission of redundant and cumulative evidence and is arguably contrary to the instruction that the jury should not make a decision based upon how many witnesses are called to decide a fact. Encourages attorneys to use prior statements and jurors to make a decision based on the quantum of evidence (number of statements) presented rather than their assessment of the credibility of the testimony that they have seen and heard.
- I agree that the substantive/impeachment issue confuses juries, but I could see this opening up big issues at trial. The current language places a governor on admissibility and ties it in part to the timing of the statements—which is a check on reliability. Unless I am misreading this, the amendment ties admissibility to the need for rehabilitation, and almost all witnesses need that to some degree. The focus would then shift to 403, but that will raise some tricky issues about credibility and weighing the evidence.
- It would be harder to limit the number of prior consistent statements under Rule 403.
- I am concerned that the person who calls the witness will bring the prior statement up "preemptively" and then basically lead the witness through his or her prior statement. So, if you change the rule, make sure a prior consistent statement cannot be brought up unless the opposing party has opened the door to that statement.

4. Seven judges who responded to the survey did not answer this question.

- Very capable and skilled lawyers are likely to exploit any arguable attack on a witness's credibility as the basis for admitting any arguably consistent prior statement and to note its non-hearsay weight as significant to the case.
- Yes, which is why this is a bad idea. Parties could then parade a whole army of witnesses to testify that prior consistent statements were made prior to trial.
- That this is so is demonstrated by a recent trial of a former Governor who sought admission of hours worth of prior statements he made during FBI overhears to show his innocence. It is true that much of this was excluded on the ground that the non-criminal conduct was demonstrated on many days. This was excluded on the grounds that even competent proof of non-criminal conduct on some days has little relevance. A man who robs two banks on two separate days is not entitled to show that he did not rob a bank on any of the other 363 days of the year. Parenthetically I note that this defendant never offered the prior consistent statements on the grounds of rehabilitation largely because they would not want the jury to be instructed that evidence is offered for rehabilitation since the instruction implies that rehab is needed.
- And why is this a good idea? It's cumulative evidence and gives it more credence than it deserves.
- The amendment takes the evidence out of rehabilitating a witness into a new avenue of admissibility. This will be the practical effect.
- I don't think admitting such evidence would enhance the truth-seeking process.
- To the detriment of the rights of witnesses.

From Judges Who Agree Somewhat

- If it were my witness, I would seriously consider introducing a prior consistent statement even if opposing side did not claim recent fabrication. It could reinforce the credibility of the in-court statement.
- Absent the exact wording of the rule, I can't be sure. The current language that ties the admission to rebutting a charge of recent fabrication has proven to be quite a limiter. If that is removed, there will be many more statements.
- Lack of specificity generally allows for greater latitude in application.
- It would certainly lead attorneys to attempt to get more out-of-court statements into the trial.
- I wonder if it would lead to more prior consistent statements being made and therefore available for admission.
- I'm not sure that more statements would be admitted. More statements would be admitted without limiting instructions.
- I am assuming that these prior statements are oral.
- My experience does not reflect significant use of the rule, and my questions to counsel in the State have received a similar response.
- As previously stated, an infrequent occurrence in any event.
- It would increase the number of statements which technically could be admitted, although I anticipate the number admitted would be somewhat insignificant.
- If cross examination realistically raises the specter of recent fabrication, it would be proper for the judge to permit the use of the prior statement. The prior statement should, however, be one spoken or written when it is clear that at the time the witness had no reason to fabricate testimony in anticipation of the trial.
- Not a helpful directive to jurors.

From Judges Who Are Neutral

- It seems unlikely the rule change would affect a proper 403 analysis. So the same statements should be admissible before and after the change, just for an additional purpose. Even so, the practical effect could be an increase in admitted statements, because of the removal of the language on recent fabrication or motive. My guess is that that language sometimes drives the decision—even when, on a proper analysis, the statement is admissible on other grounds. Research might indicate whether district judges have gotten this wrong, though this is the kind of thing that rarely makes it into an appellate decision.
- There are so few statements of this type that have been offered that I can't remember a prior *consistent* statement ever being offered more than a few times in my nearly 10 years on the bench.
- I don't really have a feel for how often this would occur.

From Judges Who Disagree Somewhat

- They still would have to relate to recent fabrication.
- It is very easy to meet the threshold requirement that the statement is being offered to rebut an express or implied charge of recent fabrication. Therefore, the proposed change would not seem to significantly increase the number of prior statements that will be admitted.
- This does not come up often and I do not believe a change will materially increase the offering of such statements.
- It would make a difference to perhaps 5% of the criminal bar. (The *top* 5% who actually read and understand and apply the rules of evidence.)
- Judge should be able to limit statements used.

From a Judge Who Strongly Disagrees

- Even in its present form, I cannot see why a proponent attorney would not attempt to admit a prior consistent statement if it might benefit in any way the credibility of his/her witness.

From a Judge Who Did Not Answer

- Who knows?

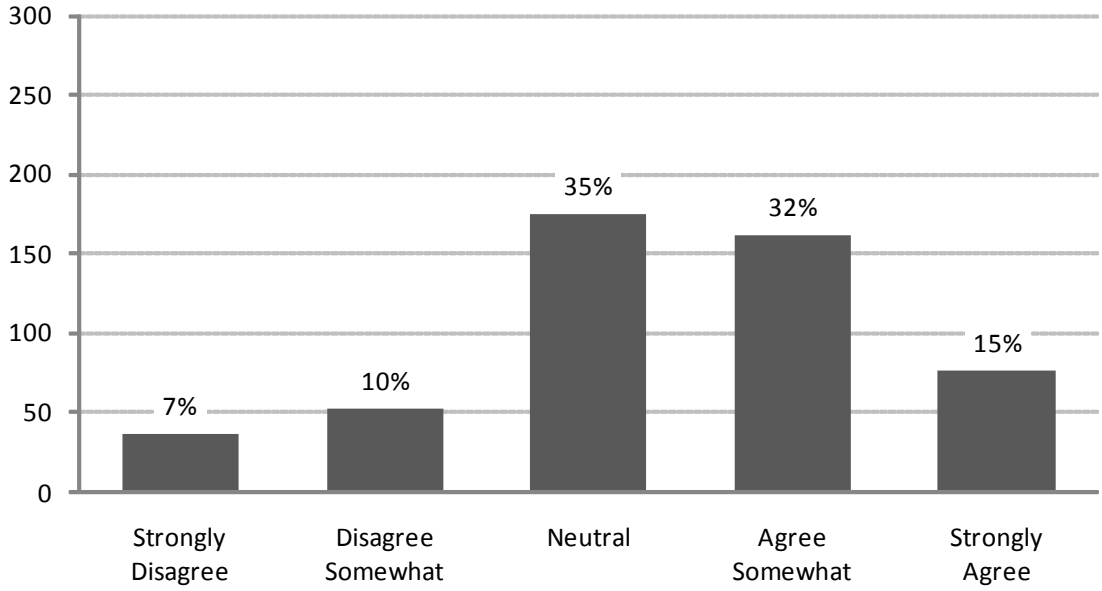
. . . . .

Two principal responses to this concern have been offered: (1) an increase in the admission of prior consistent statements would be a positive development, and (2) an increase would not, in fact, occur, because judges would use Rule 403 to keep the possible increase in check. The fourth question assesses each judge's policy agreement with the first response, and the fifth question asks for each judge's agreement with the second response's empirical prediction.

Question 4. More Statements Would Be Good

Question 4: If the proposed amendment to Rule 801(d)(1)(B) increased the frequency with which prior consistent statements were admitted into evidence, that would be a good result of the amendment. There was 48% agreement with this statement, including 15% strong agreement; 34% of responding judges were neutral, and 18% disagreed, 7% strongly.[5]

Question 4 Responses



Question 4 Comments

From Judges Who Strongly Agree

- Where the statement otherwise meets the requirements for admissibility and the declarant is subject to cross, I believe prior consistent statements are useful for the jurors' consideration.
- Our mission is to serve the platter of reasonable choices to the jury that allows them to reach the goal of truth.
- Juries have a remarkable capacity for sorting things out. I believe more mistakes occur from excluding matters from jury consideration than from admitting them.
- Good? I guess so, but I would think there should be a 403 analysis before the prior statement gets in.

From Judges Who Agree Somewhat

- Assuming some indicia of reliability, the result would be good.
- If the witness and his credibility are important to the resolution of the ultimate issue, admission of prior consistent statements assumes critical importance to the controversy. Again, the judge has discretion and can exercise when necessary (Rule 404).
- Extensive use of marginally rehabilitative prior consistent statements may cause some trial delay.

5. Five judges who responded to the survey did not answer this question.

- In some circumstances, it may assist in establishing a witness's credibility.

From Judges Who Are Neutral

- I have some concerns that it might create a trial within a trial. That said, at some point a cumulative objection can be made and sustained.
- This would greatly depend and be contingent upon the presiding judge, the rulings he or she makes, and the instructions given to the jury.
- I am not convinced that the proposed amendment would increase the frequency of use. By "good result" I assume this refers to its value as a truth-seeking mechanism, and we are all in favor of ascertaining the truth.
- I am not sure how I feel about this. It could invite a lot of bolstering.
- I don't think this is a relevant factor.
- Credibility is always for the jury to decide.
- Cooperating witnesses have often testified that initially they have made untruthful statements to law enforcement.

From Judges Who Disagree Somewhat

- I suspect lawyers will seek to put such statements into evidence much more frequently, potentially complicating the examinations.
- It will lengthen trials without improving them, especially if misused as stated above.
- Nothing that lengthens jury trials is a good result.
- The amended rule would, in my opinion, open the door to more statements, and without the safeguards that now exist in the rule, we will see a lot of self-serving prior statements of questionable reliability. That said, there are certainly cases where fairness demands admission—such as those circumstances that would currently satisfy the rule.
- This result would probably be good in that it avoids a perhaps troublesome instruction, but the practical effect might be a boot-strapping contest. In other words, the affected witnesses would be engaged somewhat in boot-strapping his or her own credibility and adding to the weight of the substantive evidence at the same time. I am not convinced that the jurors' deliberations would necessarily be made easier.
- I think it leads to admitting a lot of self-serving statements.
- Consistent statements that suffer from the same bias or motive as the testimony may be admitted.

From Judges Who Strongly Disagree

- I worry about whether relaxing the rule would encourage witnesses to make more statements to bolster credibility.
- Now we've gone from the importance of what the witness says on the witness stand to what the witness said on other occasions, perhaps many other occasions in the past outside of court, and perhaps at the request and direction of the lawyer calling the witness.
- If admitted for truth of statement, it is not subject to cross examination and should not get that status.
- In judging credibility, the demeanor of the declarant is extremely important. If the rule were amended to allow evidence of prior consistent statements without restrictions, criminal cases would be impacted the most. Frequently, defendants will have given some denial to police at the time of arrest. If this were admissible, the jury would have no way to gauge whether the de-

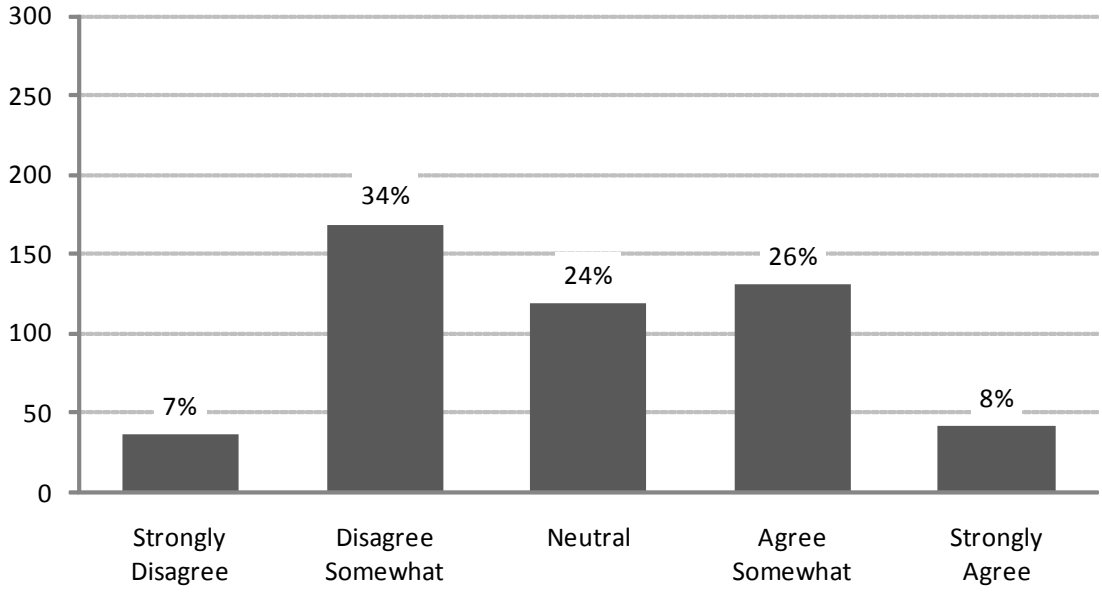
clarant was sweating, averting his gaze, hesitant in his statement, or other indices of untruthfulness. I encourage the committee to retain the current rule as it is now formulated.

- As I see it, the purpose is to let the statement be given whatever probative value the jury deems appropriate.

Question 5. Use of Rule 403

Question 5: Although the proposed amendment might result in litigants offering more prior consistent statements as evidence, because of Rule 403, trial judges are unlikely to actually allow substantially more prior consistent statements into evidence. There was 35% agreement with this statement, including 8% strong agreement; 24% of responding judges were neutral, and 41% disagreed, 7% strongly.[6]

Question 5 Responses



Question 5 Comments

From Judges Who Strongly Agree

- And, again, not a good thing.
- The judges have always exercised an important role in determining whether such statements should be admitted.
- Judicial discretion will continue to be ad hoc—as it should be.

From Judges Who Agree Somewhat

- Either Rule 403 or Rule 611 afford the court the requisite control.
- I'm sure the circumstances of the prior consistent statement would be scrutinized.
- This will cause judges to do increased 403 analysis as objections will increase.

6. Nine judges who responded to the survey did not answer this question.

From Judges Who Are Neutral

- I think 403 is the safeguard against abuse.
- Rule 403 will certainly become more important, but it will raise some very tricky issues. In many cases, fairness would dictate allowing admission, but the limits on admissibility have been removed, and some of the statements may seem self serving and unreliable. That said, credibility issues usually go to the jury, so Rule 403 may be of limited value.
- Again, this depends on the 403 findings of the judge and the specific facts of the case.
- Depends on the judge and the culture of the district.
- Rule 403 always depends upon the situation when it is invoked. Many considerations enter into a ruling on that basis. Not possible to predict the outcome.
- Depends on the judge, but runs counter to the case law in my circuit that 403 exclusion should not be routinely used.
- There will be more Rule 403 objections made for the court to consider and rule on.
- I am really not sure. My gut feeling is that more statements would be introduced into evidence.
- This will be hard to know until the question has already been asked, so the cat may be out of the bag in front of the jury.
- Hard to predict that more offers of such statements would be made and harder to predict whether "substantially more" are less likely to be granted.
- What 403 issues? Undue consumption of time? I don't recall any significant 403 issues relating to this rule. But again, I defer to other judges.

From Judges Who Disagree Somewhat

- Depends on the moderation of the use. I would not permit a parade of witnesses to testify as to prior consistent statement. It's a point of 403 judgment.
- The balancing test of Rule 403 is so fact-specific to the individual case, I doubt generalized predictions like 5) are accurate.
- The rules are rules of inclusion, not exclusion. The 403 exception would entail having to make many prejudice decisions without much guidance. The question is one of reliability more than the items set out in 403.
- I don't think most judges use 403 to move away from other legitimate rules of evidence.
- I can only speak for myself, and, as noted in the previous comment, I prefer to include rather than exclude.

From Judges Who Strongly Disagree

- If the statements would be admissible for substantive purposes, what would be the source of the unfair prejudice that would support a ruling to exclude the evidence under Rule 403?
- The probative value of substantive evidence is inherently greater than the probative value of a third prior statement offered only to rehabilitate.
- I don't think that many federal judges pay much attention to Rule 403. I'm an exception to that. When I first came on the bench, I asked our senior-most judge, with at least 20 years experience, how often he ruled out evidence under 403. He didn't even know what I was talking about. More important, if the rule is expanded many judges will logically assume that 403 is more limited in this context.
- Rule 403 requires substantial prejudice. This is rare.
- Rule 403, as interpreted by the Tenth Circuit, will not keep these statements out.

- Rule 403 is "an extraordinary remedy, and is applied infrequently." Also, it would mean tons of motions in limine about prior consistent statements.

From Judges Who Did Not Answer

- I don't think this would change much at all.
- I don't speak for other trial judges and I don't know what I would do until confronted with the question.

. . . . .

The final three questions asked judges' endorsements of three possible courses of action by the Committee: (1) amend as proposed, (2) amend some other way, or (3) do not amend.

Data for the individual questions follow, but they can be summarized by determining which of the three courses of action each judge appeared to prefer. Preference for one of the three courses of action could be inferred from the judge's agreeing, either strongly or somewhat, to the suggested course of action and not agreeing with either of the other two suggestions—either disagreeing, expressing neutrality, or not responding. A preference could also be inferred from disagreement with two courses of action and neutrality or no response for the impliedly preferred choice. A preference for one or another of the three courses of action was expressed in this way by 81% of the judges.

A majority of judges, 58%, expressed agreement with the proposed rule amendment; 6% supported an alternative amendment; and 17% endorsed leaving the rule as is. Several judges, 6%, answered "neutral" to all three questions.

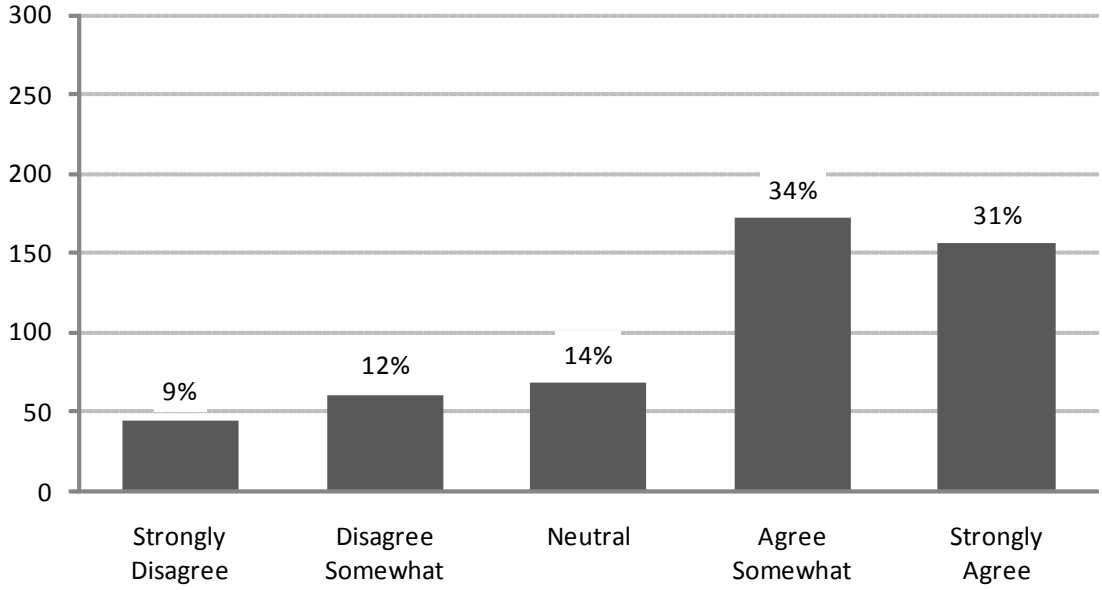
For 13% of the judges, the response patterns were more complicated. Agreement with both the proposed amendment and an alternative amendment was expressed by 6%; agreement with either the proposed amendment or an alternative amendment and with not amending the rule was expressed by another 6%. Four judges disagreed with all three courses of action; one judge only disagreed with adopting the proposed amendment, and one judge only disagreed with adopting an alternative amendment. One responding judge did not answer any of these three questions.[7]

7. This judge agreed with the first two questions, was neutral with respect to the next three, and did not answer the last three questions.

Question 6. Proposed Amendment

Question 6: Rule 801(d)(1)(B) should be amended to state something like [the proposed amendment recited above.] There was 65% agreement with this proposal; 31% of responding judges agreed strongly.[8]

Question 6 Responses



Question 6 Comments

From Judges Who Strongly Agree

- The key is that the witness's credibility has been assailed during cross. Once that happens and the prior statement was made when the witness had no reason to fabricate, the prior consistent statement should be eligible for use.
- This is an area where state courts may differ from federal court. There were no problems with this approach that I know of in California state court.
- This would be an excellent change.

From Judges Who Agree Somewhat

- I believe the amendment will help establish the credibility of some witnesses and aid in the search for truth.
- I tend to think that the existing language should be kept, and that the rule should add the phrase, "or is otherwise admissible . . . ."
- I do not believe that the "rehabilitate" is necessary—leave it as "is otherwise admissible."
- Add the following substitute ending to the sentence: ". . . is otherwise admissible in an effort to rehabilitate . . . ."

8. Four judges who responded to the survey did not answer this question.

- I think I might suggest that, because there are other reasons than rehabilitation of credibility for admitting such statements (i.e., to explain apparent inconsistencies), such other uses should be signaled in the revised text of the rule.
- I think there is potential for confusion. If it read, ". . . is consistent with the declarant's testimony and is otherwise admissible, to rehabilitate . . . ," would that change what you are trying to accomplish? I'm confused whether "is otherwise admissible to rehabilitate" is intended to be a phrase or whether there should be a comma in there.
- I don't know what "otherwise admissible" means. I think it might be clearer to say "(B) is consistent with the declarant's testimony and explains or rebuts impeachment resulting from cross-examination." That way we don't end up dealing with this on direct, where it has no place.
- It should say "has been subjected to cross-examination about a prior statement" to confirm that the prior consistent statement can only be used in rehabilitation, not in direct evidence.
- The statement should be limited to the fact of the prior consistent statement, but if a written statement that written statement, as opposed to testimony concerning it, should not be admitted as an exhibit, similar to Rule 803(18).
- I don't think that saying the statement is simply "not hearsay" makes it clear that the statement is substantively admissible.
- The proposed revision is insufficient to accomplish the intended result. It must also add language that the circumstances under which the consistent statement was made would reasonably be expected to have resulted in an honest verbal expression by the declarant. If the reason why prior inconsistent statements are admissible is generally that people do not generally go around incriminating themselves, merely allowing consistent statements has no other baseline rationale, unless the trial judge can determine, from all of the circumstances, that a prior consistent statement was made at a time and place where honesty was likely, or at least that dishonesty was unlikely. Examples: Prior coached consistent statements made for litigation purposes pose a particular problem. Also the prior denials of guilt in a criminal case would thus become potentially admissible. We all know, however, that early denials in a criminal case are often just for posturing and public relations. Admittedly, cross-examination is one tool to point out such problems but opening the floodgates to all sorts of prior consistencies without some gatekeeping function by the court seems to create more problems than a change in the rule would solve. If the rule is changed, perhaps some *Daubert*-style gatekeeping process can also be included setting forth the kinds and types of factual scenarios wherein consistent statements are allowable once credibility has been attacked.

From Judges Who Are Neutral

- I think the amendment makes sense from a policy point of view. I think, as a practical matter, it will have very little change in day-to-day trial practice. If a witness is actually on the stand, most prior statements of that witness are going to find some legitimate pathway to admission right now. When the witness who made the prior statement is actually on the stand testifying, everyone has a fair chance on direct or cross to deal with any prior statements of the witness. Furthermore, I don't think most jurors care about the finer points of using a prior statement for truth, or only for rehabilitation.
- Probably worth adding a line or commentary reinforcing that this provision is not intended to reduce the scrutiny given to such statements to ensure that they satisfy all the criteria of the rule and were not made in anticipation of litigation.
- Why not say the prior statement is admitted as an exception to the hearsay rule if it's just admitted to rehabilitate the witness? We are back with the question of telling the jury it's not for its truth but only to rehabilitate, which is where we started (I thought).

- Why not just put a period after the word "testimony"?
- Otherwise admissible to rehabilitate the declarant's credibility as a witness is very broad. Perhaps some parameters would be helpful to promote consistent application.
- The statement should have been made before the witness had a motive to fabricate (lie).
- Judicial discretion will continue to be ad hoc—as it should be.
- No real change that I can see. Rehabilitation is always a purpose.
- I have no comment regarding the exact wording of a proposed amendment. My concern would be the exact wording of a jury instruction.
- I have a hard enough time following the rules. I definitely am not the one to help write the rules.

From Judges Who Disagree Somewhat

- I am not convinced that present instructions are so difficult for jurors to understand that the proposed change is needed. The change has the potential of creating more evidentiary contests and challenges than simply reducing feared or perceived juror confusion.
- I do not think the present rule is problematic. The condition that the statement tend to rebut an express or implied charge of recent fabrication seems an appropriate one that simultaneously (1) permits rebuttal of the charge (2) without opening the door to prior consistent out-of-court statements more generally. In sum, I don't see the evil to be remedied.
- I believe the instruction provides too little guidance as to situations in which a statement should be admitted. The current rule appears to cover the most significant one.
- I do not believe this clarifies the rule; it opens the door to argument about when a witness's credibility has been challenged rather than specifying what type of challenge triggers the use of the prior statement.
- The proposed change might be tough to apply in practice. One could foresee frequent attempts to improperly use the amended rule to bolster a witness.
- The proposed rule is somewhat vague. Must there be a demonstrable need to rehabilitate the declarant shown before the statement is allowed in?
- In my twenty-plus years on the bench, I have not had a Rule 801(d)(1)(B) problem, so far as I can recall. I am satisfied with the rule as it now exists. I have a concern with the proposed amendment because I do not know what is meant by the words "otherwise admissible." Perhaps there is something in the case law that would explain the use of those words. I would better understand the proposed amendment if the words "otherwise admissible" were changed to "offered."
- This is very broad and also indefinite. What does "otherwise admissible" to rehabilitate mean?
- I don't understand what the language of "is otherwise admissible to rehabilitate . . . witness" refers to.
- What does "otherwise admissible" mean? Does this refer to some other rule or doctrine?
- I would not change the rule.
- I would leave the rule the way it is.
- Would the proposed rule change permit someone else testifying about a prior consistent statement? If so, it could lead to mischief.
- If the goal is to remove the substantive/impeachment problem, then the amendment could remove the "offered to rebut" language and clearly state that it comes in as substantive evidence.

It could then keep the restrictions regarding charges of recent fabrication. I am concerned that this amendment, as worded, will raise a number of unexpected evidentiary issues.

- OK, but you should change (1) to make sure the prior consistent statement cannot come in unless the declarant's credibility has been called into question during cross-examination. You should also require the party who wants to bring up the prior statement to get a ruling from the judge as to whether or not it is proper to do so before doing so.
- My tentative view on 15 seconds thought: it would be better to leave in the recent-fabrication-or-motive language and follow it with "or," followed by the new language, perhaps with a vertical separation. Judges and litigants know the recent fabrication or motive standard, and it is useful to have it in the rule. The "or" would make clear that there are other grounds for admitting the statement to rehabilitate.
- I would affirmatively state that the statement may be admitted as substantive evidence.

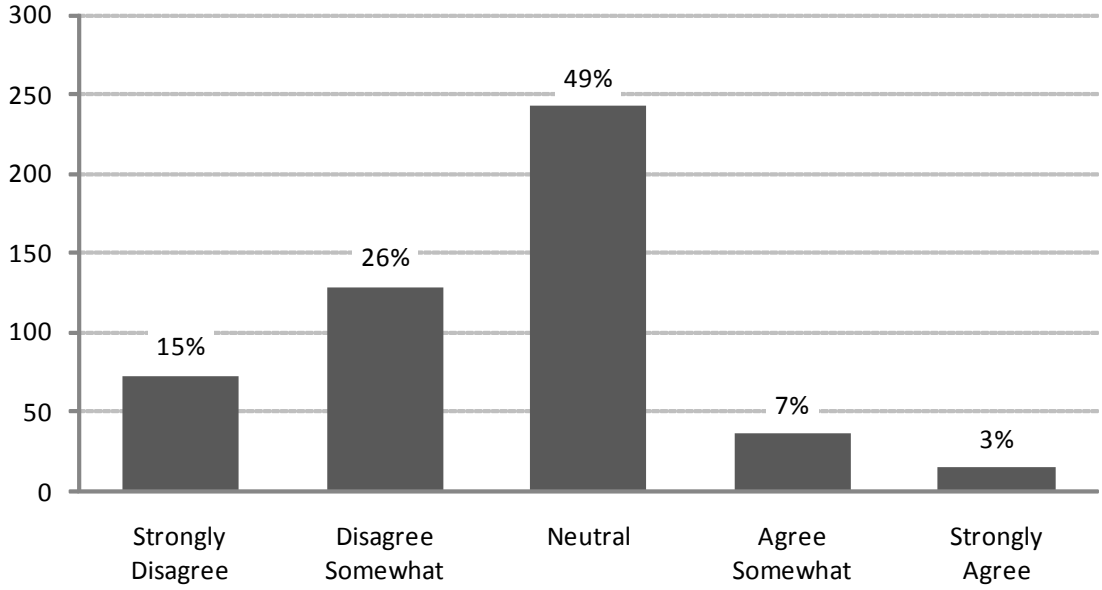
From Judges Who Strongly Disagree

- The current version is easily understood by judges and attorneys. I fail to appreciate the need to tinker with it.
- There was nothing wrong with the rule as it was stated. The problem was whether it was admitted for the truth of the words.
- If it ain't broke, don't fix it is a good rule and I think it applies here.
- Leave the rule as is.
- I see no need for the amendment.
- This is too vague a standard.
- This is amorphous and confusing—when would it be otherwise admissible? The entire purpose of the FRE 801(d)(1) non-hearsay classification is to admit out-of-court statements substantively that have some internal guaranty of trustworthiness and reliability (as the pre-motive requirement supplies in the case of a PCS). In the proposed amendment, what would provide the internal reliability?
- When would it be "otherwise admissible"? Doesn't this beg the question?
- The explanation is essential to admission of the prior consistent statement.
- The amendment as proposed will allow a witness to spread self-serving prior consistent statements before he or she were to testify.
- The windows this would open would be very great and the additional benefit to the jury would be minimal.
- Now it is offered for the truth of the statement but it is not subject to cross-examination and in criminal cases there is an *Anderson* problem of confrontation.

Question 7. Alternative Amendment

Question 7: Rule 801(d)(1)(B) should be amended, but in a way different from the proposal stated. There was 10% agreement with this statement, including 3% strong agreement; 49% of responding judges were neutral, and 41% disagreed, 15% strongly.[9]

Question 7 Responses



Question 7 Comments

From Judges Who Strongly Agree

- As an exception to the hearsay rule, but subject, of course, to cross-examination and 403.
- I think consistent statements that are made before bias or motive arises should be admissible for their truth irrespective of whether the witness testifies.
- Just drop the word "recent" before "fabrication" and otherwise leave it alone.

From Judges Who Agree Somewhat

- As an original matter, I would make the statement admissible as substantive evidence, but keep in the rule the language requiring a recent fabrication or motive. Whether the change is worth the cost of change is a closer question.
- Keep restrictions to ensure reliability but state that it may be used as substantive evidence.
- Since the amendment is to ease the jury's burden, the amendment should be simple, direct, and understandable to most jurors.
- Whether or not you tinker with Rule 801(d)(1)(B) to expand those statements made admissible, I would prefer seeing it moved to Rule 803 and made an exception to the hearsay rule, which would be cleaner, less confusing, and more in keeping with the treatment of similar statements Rule 803(1)-(6).
- But I don't have any suggestions off the top of my head.

9. Ten judges who responded to the survey did not answer this question.

- I am not sure an amendment is necessary. The proposed change might result in more bench conferences and prolong trials. The proposal might benefit from further study.

From Judges Who Are Neutral

- I am comfortable with the proposed change, but always willing to look at any reasoned alternative.
- Drafting can always be improved—but usually only after we are confronted by problems prompted by the initially chosen draft—so you have to do the best that smart minds can do when tackling the challenge.
- I'd have to see what the different way would be. The farther a rule departs from a simple declarative sentence, the less useful it becomes.
- Without knowing what the alternative version proposed, it is hard to evaluate what "different from" means.
- Without knowing what else would be proposed, I cannot comment
- I would need to see the alternative to take a position on this question.
- I would not amend at all.
- Poor survey question.

From Judges Who Disagree Somewhat

- The proposed amendment is okay subject to the caveat under (1) above ("The instruction would have to be very carefully worded for the average juror to understand it. If the statement is written, I suggest it not be included in the physical evidence given to jurors during deliberations. It is like self-serving testimony that the jury can continue to review.").[10]
- I have not spent time imagining the alternative language possibilities. The proposal appears workable to me.
- I would disagree with the need, but I would agree that if there is a need to amend it should be different from the proposal stated.
- If it ain't broke, don't fix it.
- I believe it is better as is.
- Without the benefit of knowing the "different way," I really am unable to respond.

From Judges Who Strongly Disagree

- I like the suggested new rule. It'll save a lot of needless objections, and jurors tend to take the statement for its truth regardless of a limiting instruction.
- Nothing wrong with the rule as it is. Do not know of other proposals for change, though.
- Leave it alone. It is fine as is.

From Judges Who Did Not Answer

- (B) is consistent with the declarant's testimony and was made under circumstances indicating reliability and if the interests of justice will best be served by admission of the statement into evidence.

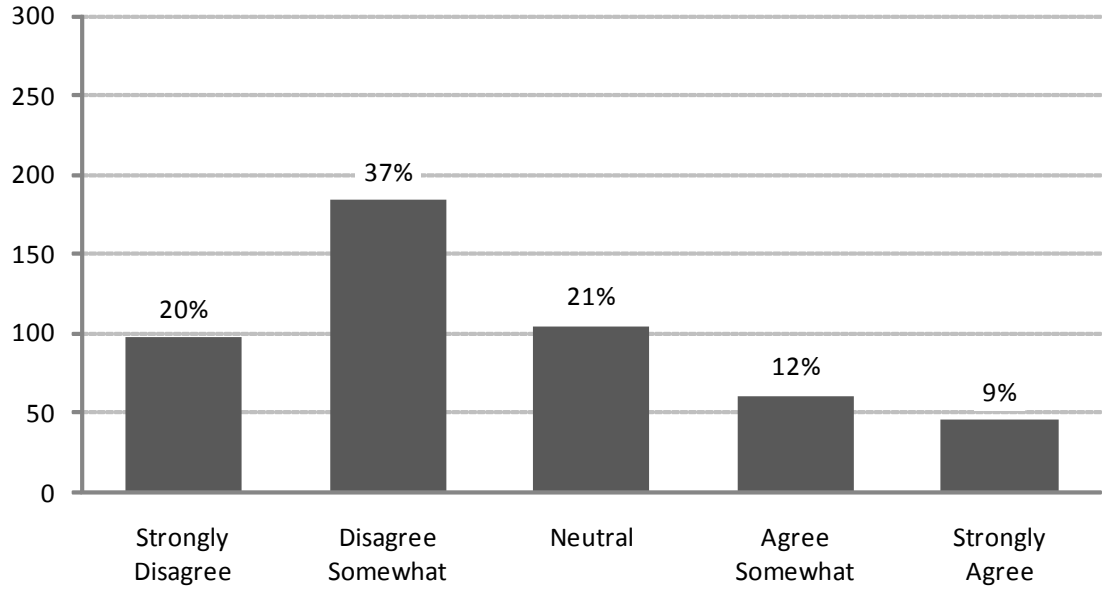
10. Other self-references to the judge's comments on other questions—in the nature of "see my response to Question X"—have been omitted, because the reader of this report has seen those other comments.

- See my prior comment concerning the fact that the rehabilitative use of a "statement" should be limited to testimony concerning the making of the prior consistent statement, but should not open the door to the introduction of a written statement as an exhibit.

Question 8. Do Not Amend

Question 8: Rule 801(d)(1)(B) should not be amended. There was 22% agreement with this statement, including 9% strong agreement; 21% of responding judges were neutral, and 57% disagreed, 20% strongly.[11]

Question 8 Responses



Question 8 Comments

From Judges Who Strongly Agree

- I frankly do not see the point of the proposed change. Under present law, the witness says, under oath, X. The adversary impeaches, suggesting recent fabrication. The proponent adduces a prior consistent statement to rehabilitate. The jury either will be persuaded by the witness's testimony under oath that X is so or it will not. In order for it to be persuaded, it will have to conclude that the charge of recent fabrication is unpersuasive, a point to which the prior consistent statement is directly pertinent. Whether the prior consistent statement is admitted also for its truth would make absolutely no difference whatever to the outcome of the case. The only differences it possibly could make would be to motivate counsel to offer more prior consistent statements than they otherwise would offer and to lead to pointless appeals if the trial judge excludes them as cumulative or for other reasons. With great respect to all concerned, this proposal seems to me to be a solution in search of a problem.
- Unnecessary tinkering which has confrontation problems and underrates the abilities of the jury.

11. Twelve judges who responded to the survey did not answer this question.

- The current rule is concise and has a specific purpose that is important. The amendment strikes me as being at best naive and at worst essentially doing away with the current rule, not just amending it. It won't take long for lawyers to recognize this amendment as a way to build a case with out-of-court statements. You are simply trading one problem for a greater problem: that a jury cannot follow an instruction about restricting the use of certain testimony v. understanding the difference between in-court testimony and out-of-court statements not subject to cross-examination, etc.
- This is an education issue—prior statements (consistent or inconsistent) should not be admitted for the truth of the matter asserted (they are hearsay by definition), but the statement may be relevant as to credibility of in-court testimony
- In my experience, prior consistent statements rarely come up, and when they do it is to address the items covered in the rule.
- This seems largely an academic debate. I have been a trial judge for more than 20 years, have taught Evidence for more than 20 years, and co-authored an Evidence book. I don't think I've had any problems teaching, or instructing jurors, on the different uses of different types of PCSs (or, for that matter, different types of PISs). I'd be happy to discuss this with anyone. Jerry Rosen

From Judges Who Agree Somewhat

- I think it is a good, long-standing rule.
- Sometimes witnesses are cross-examined and the jury is led to believe that the witness is lying. Permitting the witness to clear this up is a good thing. It is helpful to the jury.
- The rule seems clear on its face the way it stands now; however to the extent it fails to provide or authorize additional authority to use prior consistent statements to rebut implications of motive to fabricate, the rule as set forth in question 6 [*comment not completed*].
- It is better to do nothing than to change the rule as drastically as proposed in question 6.
- This looks like a solution searching for a problem.

From Judges Who Are Neutral

- I can't imagine that there isn't some way to improve the rule, but I'm not sure making it easier to have prior consistent statements admitted is appropriate. Some of the witnesses are defendants seeking substantial assistance, and this might encourage them to make "consistent" statements. I think some people repeat a story in hopes that eventually they will believe the story too.
- If there is enough information from other judges (or attorneys) who have faced this issue, and there is sufficient merit, then I have no opposition. I have not had any significant issues with this rule that would cause me to advocate for a change in the rule. But I believe that I can work with the current rule or any amendment to the rule.
- I don't think it will have much impact on proceedings and what was or is not admitted either way.
- As I said before, I don't think the amendment will make much practical difference.
- In my 21 years on the bench I don't think I have had to make a decision under this rule. In my experience, it's a non-issue.
- I reiterate that this issue has never been a problem, and a dispute over prior consistent statements is such a rare event it is not worth an amendment.
- In 25 years, I do not remember this problem ever arising. If it ain't broke, why fix it?

- I do not believe that this is an issue of significance, and there is an argument that no rule should be changed unless there is an important need for the change.

From Judges Who Disagree Somewhat

- Life will go on without this amendment, because the situation comes up so infrequently, but if there is a perceived need to change it, this revision is a good one.
- If we have come to the point of realizing that fairness dictates bringing the rule into conformance with truth finding and what jurors already do, then amend it.
- If Rule 801(d)(1)(B) is not amended, we judges will continue to do our best to explain the distinctions the amendment will eliminate.
- Clarity in rules is the paramount consideration and this rule needs more clarity for jurors' sake.
- Although I have not given the matter much thought before, my guess is that this is a little trickier than it appears at first blush.
- The substantive/impeachment issue should be addressed.

From Judges Who Strongly Disagree

- Prior consistent statements should have a larger place in trials than they do at present.
- It is hard for the court and lawyers to apply, let alone a jury.

Conclusion

This survey of district judges showed substantial support for the proposed amendment to Rule 801(d)(1)(B). The survey also showed support for the empirical prediction that the amendment would lead to an increase in prior consistent statements coming into evidence. The two suggested rebuttals to this concern received only modest support.

Appendix. Text of Survey Invitation Email

Dear Judge ___:

The Advisory Committee on the Federal Rules of Evidence is considering an amendment to Federal Rule of Evidence 801(d)(1)(B), which concerns prior consistent statements. The input we receive from judges is an important aspect of our work. We would appreciate a few minutes of your time to answer 8 survey questions. Unless you choose to be identified, your answers are confidential and will be reported only in the aggregate.

Rule 801(d)(1)(B) provides that certain prior consistent statements are admissible not only to rehabilitate a witness but also substantively, for their truth—specifically, statements that rebut a charge of recent fabrication or recent improper influence or motive and that predate the alleged motive to falsify. In contrast, federal cases provide that other consistent statements can be admissible to rehabilitate a witness but not for their truth—for example, statements that explain an inconsistency or rebut a claim of faulty recollection.

Some have suggested that it is difficult to explain to jurors the difference between consistent statements that are admissible only to rehabilitate but not for their truth. And it has also been suggested that there is no practical difference between rehabilitation and substantive use of prior consistent statements.

In response to these suggestions, we are considering an amendment to Rule 801(d)(1)(B) that would allow prior consistent statements to be admitted for their truth (thereby exempting them from the hearsay exclusion) when they are otherwise admissible to rehabilitate a witness's credibility.

Please click on the following link to complete the survey. We would be especially grateful to receive your response by January 21, 2012. Your views are very important to our committee.

http://vovici.com/l.dll/JGsB6C8E8B5A5lsDq9U5J.htm

Very truly yours,
Sidney A. Fitzwater
Chief Judge, U.S. District Court for the Northern District of Texas
Chair, Advisory Committee on the Federal Rules of Evidence

Technical questions about this survey may be directed to Dr. Margaret Williams at the Federal Judicial Center, (202) 502-4080, mwilliams@fjc.gov.

TAB 3B

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March 8, 2012

Email

Daniel J. Capra
Philip Reed Professor of Law
Fordham University School Of Law
140 West 62nd Street
New York, NY 10023

Re: **Some Further Thoughts Concerning the Possible Amendment of Rule 801(d)(1)(B)**

Dear Dan:

In my letter of February 14, 2012, I reported on the responses of members of leadership of the American Bar Association Section of Litigation (the "Section") regarding a possible amendment to Fed. R. Evid. 801(d)(1)(B) (the "prior consistent statement" rule) that would, if adopted, make all prior consistent statement evidence ("PCS evidence"), once admitted by the court, substantive evidence rather than rehabilitation evidence. In that letter, I advised you that the leadership members I consulted were favorably disposed (although not enthusiastically so) toward the amendment, provided that it did not broaden or encourage judges to broaden the range of PCS evidence that is admitted in the first place. I also reported that one respected member of leadership, Dean JoAnne Epps, opposed any expansion of the scope of substantive PSC evidence, and even suggested that the rule be amended in the opposite direction, to provide that *no* PCS evidence is treated as substantive, so that PCS evidence (like most prior inconsistent statement evidence) is admitted solely for rehabilitation purposes.

Finally, I pointed out that Dean Epps' suggestion had come too late to work its way into the fabric of my discussions with other members of Section leadership, but that I would give you my own thoughts separately. After taking the time to think about

the idea and read a couple of cases, I am taking this opportunity to tell you I agree with Dean Epps. I have come to believe that changing the rule to broaden the class of substantive PCS evidence would be a mistake, while a return to the pre-Rules approach, under which PCS evidence was rehabilitative only, would be appropriate. Here's some of my thinking:

1. Even under the present formulation of Rule 801(d)(1), it is hard to rationalize the imbalance between the deference given to prior inconsistent statement evidence ("PIS evidence") and PCS evidence. To qualify as substantive, PIS testimony must have been given live and under oath at a previous trial, hearing or deposition; all other PIS evidence is just impeachment. But a declarant's unsworn words or writings will be given the force of substantive evidence if they rebut an express or implied charge of recent fabrication or improper influence or motive. In theory, two self-contradictory statements from the same conversation could be given differing evidentiary force. I don't know why our predecessors on the Advisory Committee chose to treat PIS and PCS so differently; my guess is that the final formulation was what came out of the sausage factory after the product passed through the judicial conference committees, the Supreme Court and Congress, but I have no idea what the details were. One thing is clear: Expanding the range of substantive PCS evidence would only serve to increase the imbalance.

2. It would not be unfair to say that all PCS evidence is rehabilitation, as was the common law rule, even though some PIS evidence is substantive. To the limited extent that PIS evidence is given substantive status, that treatment is both rational and comprehensible to a jury. W, a third-party witness for defendant, testifies that the light was red. Plaintiff's counsel introduces W's deposition testimony that the light was green. It seems to me that the latter statement should be substantive evidence, that the jury is in a position to decide not just whether they believe W's direct testimony, but also what color the light actually was. I have a hard time though, with the idea of giving substantive status to some of the PCS evidence that might follow. Later in our hypothetical trial, W's husband H is permitted to testify that W always told him that the light was red, consistent with the direct at trial and inconsistent with the deposition testimony. Certainly the trier of fact can consider that testimony as rebutting the inference of recent fabrication or improper motive (or, for that matter, of forgetfulness or senility), and in deciding whether W was confused at her deposition or lying at trial, but is it really substantive evidence that the light was, in fact, red?

3. I don't really understand what drove the decision by our predecessors on this Committee to depart from the common law and make some PCS evidence substantive.[1] The lengthy Comments on Rule 801 that accompanied the proposal for a new Federal Rules of Evidence contain only one reference to Rule 801(d)(1)(B) or PCS evidence, and it is singularly unsatisfying. It boils down to the assertion that "[i]f the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally." That statement speaks to admissibility and relevance, not to whether the evidence should be substantive. And while we're at it, wasn't it the declarant who actually decided to "open the door" on the subject by giving his direct testimony in the first place? So why wasn't the PIS evidence also given substantive weight?

4. There wouldn't appear to be any practical need to anoint the PCS evidence – any of it – as substantive evidence. The obvious predicate for a PCS is the existence of direct, already-admitted, substantive evidence from the mouth of the declarant asserting the fact in question. So if it's already in the record, who cares whether, if it comes in a second time, the encore is also substantive evidence! Its actual and legitimate purpose is to repair the declarant's credibility by explaining away or denying the impeaching evidence, so that the real substantive evidence is accepted. And, to the extent that the new evidence is not merely redundant, why shouldn't the system impose the same sorts of safeguards of reliability on the "new" information that it imposes with respect to PIS evidence, if not with respect to case-in-chief evidence?

5. Finally, I have become increasingly concerned about "creeping admissibility," the subject that has worried some of the opponents of the suggested change over the past year or so. To be sure, I agree with you that Rule 801(d)(1)(B) does not – and its amendment would not – purport to make *any* PCS evidence more or less admissible, or seek to encourage or discourage any evidence's admission; I agree that the sole function of the Rule (and the amendment we've discussed) is to say that evidence that *is* admitted shall be treated as non-hearsay rather than admissible hearsay, and will be substantive rather than rehabilitative evidence.

---

[1] I am comforted that Judge Friendly couldn't figure it out either. *Cf., United States v. Rubin,* 609 F.2d 51, 70 n. 4 (2d Cir. 1979) (Friendly, J., concurring), *aff'd,* 449 U.S. 424 (1981)]("It is not entirely clear why the Advisory Committee felt it necessary to provide for admissibility of certain prior consistent statements as affirmative evidence. . . . [T]his had been a non-problem") .

But that is not what people think, even smart people, because it is simply too easy to start talking about Rule 801 as a rule that (like the other hearsay rules) tells the court when it should or should not admit evidence. After all, judges and lawyers look to the 800 series Rules to decide what out-of-court statements can or cannot be introduced in court. In my discussions with both the members of Litigation Section leadership and the members of the American College of Trial Lawyers Evidence Committee,[2] I repeatedly heard smart, sophisticated trial lawyers talking about what the amended Rule 801(d)(1)(B) would "admit" or "make admissible." I saw emails and draft letters that talked about what the amended rule would "make admissible." As you reported in your memo on the possible amendment, there is a broad range of PCS evidence that is considered and sometimes admitted by courts for reasons other than rebutting inferences of recent fabrication or improper motive. I think it is actually quite possible that expanding the scope of substantive evidence under the rule could lead to an expansion of the scope of PCS evidence that is admitted in the real world.

6. The possible amendment would not, of course, eliminate the problem of having to tell juries about the difference between substantive and rehabilitative evidence. That instruction would still have to be given with respect to PIS evidence in most cases. Moreover, as one of the ACTL Evidence Committee members observed, a fear that the jurors won't "get it" when we explain the law doesn't mean we should change the law to fit their presumed misunderstanding.

7. Going back to something that more closely resembles the pre-Rules treatment would not actually be a terribly radical step. I haven't done a survey, but at least one jurisdiction (mine) rejects the proposition that PCS evidence can ever be substantive evidence. Pennsylvania's treatment of the material covered by Federal Rule 801 is interesting (and, I dare say, pretty logical).

a. Statements of parties do receive substantive treatment, but as admissible hearsay, rather than "not hearsay." *See* Pa. R. Evid. 803(25) and Comment.

b. PIS evidence of the type given substantive stature by Federal Rule 801(d)(1)(A) and (C) is also given substantive stature under Pennsylvania Rule

[2] I am a member of that committee and was privy to the dialogue leading to the College's own response to your inquiries about the possible amendment.

803.1(1), but as a hearsay exception for which the declarant must be available.[3]

c. PCS evidence is not mentioned *at all* in the Pennsylvania hearsay rules, simply because it is never treated as substantive evidence in a Pennsylvania court, and the hearsay exceptions are essentially about the exceptional circumstances in which hearsay can be received for its truth. The sole discussion of PCS evidence in the Pennsylvania Rules is in Rule 613, which makes clear that such evidence is admissible solely "for rehabilitation."[4]

I have thought about the question whether a move away from substantive treatment in Rule 801(d)(1)(B) would be an affront to or "overrule" the Supreme Court's decision in *Tome v. United States,* 513 U.S. 150, 155 S. Ct. 696 (1995), and I certainly don't think it would. *Tome's* essential holding was that post-motive statements could not be admitted as substantive evidence under Rule 801(d)(1)(B). The *Tome* majority observed that our Committee had departed from the common law rule by affording substantive stature to the evidence coming within its narrow scope, but does not appear to have either lauded or criticized that departure; the Court simply held that the common law temporal requirement was tacitly incorporated into the new rule. Nor did the Supreme Court or the lower *Tome* courts address the question whether, or the circumstances in which, PCS evidence that did not qualify as "not hearsay" could be considered for rehabilitative purposes. *See*. *Tome,* 513 U.S. at 154, 155, 166-67, 115 S. Ct. at 700, 705.

In fact, it might be argued that the suggested amendment would be in tension with *Tome,* while Dean Epps' suggested amendment would not. After all, *Tome* squarely held that post-motive statements could not come in for their truth. Under the suggested amendment, they would.

For the reasons stated above, I would like to see Rule 801(d)(1)(B) amended to eliminate the treatment of PCS evidence as substantive evidence in any circumstances. And whether or not that could be accomplished, I would recommend against an

[3] Pennsylvania Rule 803.1(1) extends "substantive" treatment to a broader class of inconsistent statements; 803.1(2)is narrower than Federal Rule 803(d)(1)(C) in its requirement that the declarant testify to having made the identification.

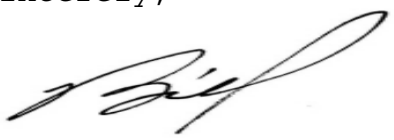
amendment that increased the range of PCS evidence treated as substantive.

In closing, Dan, I remind you that this second letter reflects only my personal ruminations. You should also remember my concession that – like a lot of civil trial lawyers, apparently – I have almost no experience conjuring with the niceties of PCS evidence in a trial setting. I am mindful of the Advisory Committee's 1972 statement that, in this area, "[t]he judgment is one more of experience than of logic."

I look forward to discussing all this with you. You've taught me a lot of evidence during my six years on the Advisory Committee, and I'm sure you'll have a lot to teach me about this rule, too.

Warmest regards.

Sincerely,



William T. Hangley

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February 14, 2012

Email

Daniel J. Capra
Philip Reed Professor of Law
Fordham University School Of Law
140 West 62nd Street
New York, NY 10023

Re: **Possible Amendment of Rule 801(d)(1)(B)**

Dear Dan:

As Reporter for the Advisory Committee on Evidence Rules, you have solicited the views of members of the American Bar Association Section of Litigation (the "Section") regarding a possible amendment to Fed. R. Evid. 801(d)(1)(B) (the "prior consistent statement" rule) that would, if adopted, make all prior consistent statements ("PCS evidence"), once admitted by the court, substantive evidence rather than rehabilitation evidence. At present, some PCS evidence may be considered for its truth, *i.e.,* as substantive evidence, while other such evidence may be considered only to bolster the credibility of the declarant.

As you know, the Section cannot offer formal positions on questions such as this; such positions can come only from the ABA itself, after a process nearly as labyrinthine and time consuming as those under the Rules Enabling Act. But when an important matter is brought to the attention of the Section, our leadership addresses it promptly and thoughtfully. We provide a response, not of the Section as such, but of attorneys and judges who are actively involved in leadership and are conversant with the subject matter.

Leadership Members Consulted: I brought the question to the attention of our Section Chair, Ron Marmer, and then to the members (federal judges and lawyers) of a task force in the Section that I happen to co-chair, the Federal Practice Task Force. The FPTF is a "first response" team respecting court, Judicial Conference or Congressional developments that may affect practice in the federal courts. In addition, I discussed the possible rule

amendment in detail with the Co-Chairs of the two Section committees whose members, Ron and I thought, would be most concerned with such an amendment, the Criminal Litigation Committee and the Trial Evidence Committee. I reported in writing to Council of the Section (*i.e.,* the board of directors), and participated in a discussion of the possible amendment at Council's meeting on January 14, 2012. Your October 1, 2011 memorandum on this topic, and the minutes of the October Advisory Committee meeting in Williamsburg, VA were distributed to all of the foregoing, and were invaluable aids.

General Responses: With one significant exception, discussed below, the Section lawyers and judges with whom I talked favored the change because, as you have explained to all of us, it would simplify jury instructions and make them more intelligible to jury members. But, while the favorable response was nearly unanimous, the level of enthusiasm in support of the change was not particularly high.

The Opening-the-Floodgate Issue: Although the suggested rule does not seek to broaden the range of prior consistent statement evidence that may be admitted, the simple fact is that lawyers – good and sophisticated lawyers – tend to read it as doing so when, in fact, all the amendment would do would be to treat that narrow class of prior consistent evidence that gets past the gatekeeper trial judge as substantive evidence.[1] Lawyers in Section leadership repeatedly voiced the fear that the change might usher in a regime in which more PCS evidence got to the jury. It is fair to say that the members' receptiveness to the amendment is given with the expectation that any amended rule-comment package would make clear that this is not what is intended by the amendment.

The Question whether PCS Evidence should ever be substantive: This was an issue that I had not anticipated, and that you and I have not discussed. It was raised by a highly respected scholar and dear friend, JoAnne Epps, Dean of the Temple University School of Law, who is also a Section Delegate to the ABA House of Delegates and serves on Council.

JoAnne is intellectually troubled by the idea of letting more of what is fundamentally hearsay – "W said the same thing to me years ago, long before he got old and crotchety" – into the substantive evidence tent. She says it's just not direct evidence. It is difficult to rebut that assertion. JoAnne suggests that, if we insist on treating all admitted PCS evidence the same, we should simply make all admitted PCS evidence competent for rehabilitation purposes, instead of making it competent as substantive evidence.

I regret that this idea came to the fore at the very end of a months-long conversation – in a hallway conversation after the public discussion at the January 14 Council meeting –

[1] Section members are not alone in this misapprehension of the suggested rule's effect. The Evidence Committee of the American College of Trial Lawyers (of which I am also a member) also considered the possible amendment. On several occasions I heard College Fellows argue that the draft language, if adopted, "would admit" or "would make admissible" a larger range of PCS evidence.

so that I was not able to not air it earlier with the Chairman, my Task Force colleagues, or the Committee Co-Chairs. I have my own thoughts on the topic, but I will discuss them with you by separate letter in order to avoid conflating my views and the leadership response on which I have reported in this letter.

Summary: Although I cannot give you a formal position of the Section of Litigation, the overwhelming majority of leadership people to whom I presented the question agreed with the proposition that the Rule should be amended to treat all admitted PCS evidence uniformly. The concern about somehow broadening the range of admissible PCS evidence was ever-present, and several members stated that the amended rule, or an accompanying comment, should make clear that such broadening is not intended by the amendment. The single dissenter, Dean Epps, did not so much oppose uniform treatment as the elevation of more PCS evidence to substantive evidence. Rather, she believes that, if there is to be uniformity, all PCS evidence should be admissible solely for rehabilitation or similar purposes, and not as substantive evidence.

I hope this report is helpful. The Section's Chair, Ron Marmer, has asked me to communicate his pleasure that the Advisory Committee saw fit to solicit our views before making a formal proposal respecting these amendments. The Section of Litigation considers itself the voice of the trial lawyers (and, ultimately, the parties) for whom rules of procedure and evidence have the most meaning and the greatest consequence. We are grateful for the opportunity to consider and discuss these suggested amendments at an early stage, and we hope that you will invite us to do so again in the future.

Sincerely,

William T. Hangley

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James R. Asperger, Chair
Federal Rules of Evidence Committee
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February 14, 2012

Daniel J. Capra
Philip Reed Professor of Law
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

Re: American College of Trial Lawyers Federal Rules of Evidence Committee Views on Possible Amendment to Rule 801(d)(1)(B) of the Federal Rules of Evidence

Dear Professor Capra:

The American College of Trial Lawyers is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the legal profession. The Federal Rules of Evidence Committee of the College (the "ACTL Committee") is charged with monitoring the operation of the Federal Rules of Evidence and, when requested, evaluating proposed changes.

The ACTL Committee has reviewed an amendment that has been suggested to Rule 801(d)(1)(B) of the Federal Rules of Evidence in order to provide comments to the Advisory Committee on Evidence Rules ("Advisory Committee") as requested at its meeting on October 28, 2011. There were a range of differing views among members of the ACTL Committee, and no consensus could be reached on whether Rule 801(d)(1)(B) should be amended as suggested or retained in its current form. This letter sets forth a summary of these differing views, based on the collective trial experience of the members of the ACTL Committee.

The Suggested Amendment to Rule 801(d)(1)(B)

The Advisory Committee is considering a possible amendment to Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the suggested change, according to the Advisory Committee, "Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility." ***Minutes, Advisory Committee on Evidence Rules, Meeting of October 28, 2011 in Williamsburg, Virginia, p. 3.*** In considering the possible amendment, the Advisory Committee stated: "[t]he justification for the amendment is that there is no meaningful

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distinction between substantive and rehabilitative use of prior consistent statements." ***Id***.

The Advisory Committee further explained the rationale in favor of the possible change to Rule 801(d)(1)(B) as follows:

> Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

Id. Accordingly, the suggested amendment would change the wording of the Rule (1) to delete language defining as "not hearsay" prior consistent statements in which the statements are offered to rebut a charge of recent fabrication or recent improper influence or motive, and (2) to state that prior consistent statements are not hearsay when offered to "rehabilitate" the witness (which according to a case law analysis by Professor Capra is already permitted in most jurisdictions). The specific language for the suggested amendment under consideration is as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > (1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness.

This amendment will be considered at the Spring 2012 meeting of the Advisory Committee. The ACTL Committee sought the perspective of its members with both criminal and civil trial experience. Summarized below are the reasons for ACTL Committee's differing views on the suggested amendment.

Perspective of Those Opposed to the Suggested Rule Change

Those on the ACTL Committee who opposed the suggested change to the Rule offered a number of reasons in support of their position.

First, amending Rule 801(d)(1)(B) because of jurors' perceived inability to understand the difference between substantive and limited-purpose admissibility sets a questionable precedent and arguably calls into question much of our hearsay jurisprudence. The hearsay rule excludes out of court statements only if those statements are offered for the truth of the matter asserted. But courts routinely admit out of court statements if they are offered for a non-substantive purpose. For example, out of court statements are admissible if they are offered for the limited purpose of the effect on the listener or the subsequent actions taken by the listener. A juror's ability to understand the distinction between substantive and limited-purpose use of prior consistent statements is no better or worse than his or her ability to understand the distinction between substantive and non-substantive use of any other out of court statement. Adopting the amendment suggests that the Rules of Evidence should be changed whenever jurors do not understand the limiting instruction required by the Rules.

The hearsay rules are not the only rules that rely on fine distinctions that may be difficult for jurors to understand. Consider Rule 404(b). Under

this rule, prior bad acts of a person, ordinarily inadmissible to prove action in conformity therewith, are admissible for the limited purpose of proving motive, plan, knowledge, or identity. For example, a juror in a robbery case may be allowed to hear testimony about a prior robbery the defendant committed, but would be forbidden from concluding that the defendant committed the present crime just because he had committed the past offense. Rather, the judge would instruct the juror to use the evidence of the previous crime for the limited purpose of determining whether the defendant has a unique modus operandi and whether he is guilty of the present crime because it was committed in that same unique manner. Thus, Rule 404(b) expects that a juror will understand the distinction between an impermissible propensity inference and a permissible identity inference. While this distinction may be somewhat different from the one made by Rule 801(d)(1)(B), it shows that the Rules rely on our courts to explain, and our jurors to understand and follow such fine distinctions. Changing the Rules because of jurors' perceived tendency to ignore such fine distinctions sets a precedent that could call into question the viability of several other evidentiary rules.

Second, as a purely practical matter, the need for changing the current rule does not appear to be urgent. Rule 801(d)(1)(B) is not a heavily litigated rule of evidence in the civil arena. Additionally, criticisms of the current rule are not of a nature that demand urgent change. No one accuses the current rule of producing unjust results or leading to unfair proceedings. The Eighth Circuit has even said that the difference between granting prior consistent statements substantive and rehabilitative effect is tantamount to harmless error. *United States v. White*, 11 F.3d 1446 (8th Cir. 1993). The most serious criticism of Rule 801(d)(1)(B) is that the limiting instruction it requires may leave some jurors confused. But many evidentiary rules probably leave jurors (and lawyers) confused. In short, the concerns regarding the current rule do not seem to justify a change to our relatively well settled hearsay jurisprudence.

If anything, the proposed amendment may do more harm than good. The amended rule gives the substantive force of sworn testimony to *any* consistent statement made prior to the witness's testimony that rehabilitates the witness's credibility. This broad language could arguably admit statements made by the witness during trial preparation, statements made to the press or other media outlets, or even written statements drafted with the assistance of counsel. Because of the substantive effect granted to these statements, a party may have the incentive to build an appearance of truthfulness by carefully crafting

statements before trial that are consistent with the party's story at trial.[1] The expansion to include general "rehabilitation"--whatever that may mean--will simply create contests as to how many times the witness has told the same story, which is of course a contest weighted heavily to one side. Additionally, judges may be faced with a flood of 801(d)(1)(B) disputes because of the breadth of the proposed rule and its departure from current jurisprudence. The amendment may end up creating more practical problems than it solves.

Third, the proposed amendment seems to be contrary to the purpose of the Rule. The purpose of admitting prior consistent statements is to rehabilitate the witness's credibility. Whether the need for rehabilitation arises because of a charge of recent fabrication, the introduction of a prior inconsistent statement, or an accusation of faulty memory, the purpose of the prior consistent statement stays the same — to rehabilitate the witness by showing the jury that the witness has not changed his story. The goal, therefore, is to show the jury consistency in the witness's testimony, not to offer the witness another avenue for admitting substantive evidence. Amending the rule to grant all prior consistent statements substantive effect seems contrary to this goal.[2]

Lastly, some members of the ACTL Committee agreed with the concern of the Public Defenders that bolstering is potentially a serious problem with the proposed change, especially in criminal cases. The federal bench generally is more rigorous in controlling this problem. When federal rules of evidence are changed, however, state rules also tend to be amended to track the federal rules. State court judges may be more inclined to allow broader admissibility of prior consistent statements, creating greater risks of improper "bolstering" evidence, if the state court rules are amended to track this change.

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[1] Under the current rule, the incentive for manipulation is tempered by the fear that each time a prior consistent statement is introduced, the jury receives a limiting instruction from the judge. In the absence of such a limiting instruction, the jury receives no reminders that a lie repeated does not become true.

[2] Carried to its logical limit, this argument may lend support to the view that Rule 801(d)(1)(B) should be deleted in its entirety, and prior consistent statements should never be admissible substantively.

In short, a number of ACTL Committee members believed that the present use of prior consistent statements is legitimate, logical and understandable.

Perspective of Those in Favor of The Suggested Change

By contrast, other members of the ACTL Committee strongly favored the suggested change in the Rule. This included members who had tried many criminal and civil cases in federal and state courts.

As a starting point, the perception of these members was that juries do not understand the limiting instructions they receive on prior consistent statements, whether given mid-trial, in the Court's closing charge, or both. As a result, no one can be sure how any particular juror will interpret the instruction and the likelihood is that the jurors will not follow it. Such confusion benefits no one and harms the judicial process. Moreover, in the case of prior consistent statements, there is no need for the jury to understand the difference between statements offered for their truth and statements offered for the more limited purpose of rehabilitation, nor is there a need for there to be a difference at all. The proposed amendment will remove the problem without causing any significant problems of its own.

Second, any issues as to the reliability of the prior statement can be addressed, in the first instance, by the judge in exercising his or her discretion under other rules of the Evidence Code. For example, a judge may exclude unreliable or repeated prior consistent statements either because such evidence is "cumulative" or because its prejudicial impact outweighs its probative value under Rule 403. Attorneys can argue inadmissibility under other provisions of the Evidence Code, and judges will continue to consider the reliability and cumulative nature of prior consistent statements, as they already do under the case law cited by Professor Capra. Accordingly, the proposed amendment is not likely to result in wholesale admission of more prior consistent statements or in much, if any, change in the ways judges decide the admissibility of prior consistent statements.

Third, the proposed change does no more than conform the Rule to existing case law, because prior consistent statements are not presently limited to those that are offered to rebut charges of recent fabrication or recent improper influence or motive. As discussed in detail in Professor Capra's memorandum, every circuit other than the Ninth admits prior consistent statements to rehabilitate testimony against suggestions of

confusion, faulty memory, or apparent inconsistency affecting the initial direct testimony. (As Professor Capra's memorandum shows, even the Ninth Circuit rulings have inconsistencies, and courts in the Ninth Circuit arguably admit prior consistent statements more in line with other courts.) The problem addressed by the proposed amendment is that prior consistent statements generally are admitted into evidence, but some come in as substantive evidence because Rule 801(d)(1)(B) says they are not hearsay, while the others come in only as rehabilitation evidence because they are hearsay statements that do not fit within any of the other hearsay exceptions. Since prior consistent statements are already admissible for purposes other than rebutting bad motive, what is the point of the distinction between rehabilitating credibility and truth? The proposed amendment does not make any evidence admissible that is not already admissible.

Fourth, to the extent there are concerns about "bolstering" and increased admissibility of prior consistent statements, the Advisory Committee should consider further changes to the suggested Rule and the commentary that would make clear that judges can and should consider "reliability" before admitting prior consistent statements. The commentary could also explicitly note that a statement made prior to a motive to fabricate is a relevant consideration in deciding "reliability" and admissibility. The "pre-motive" element of the existing Rule is a powerful basis for admissibility and should continue to be a consideration. By explicitly referring to consideration of "reliability" in the Rule itself, and by explaining more specifically in the commentary that judges should continue to consider exclusion of unreliable and cumulative prior consistent statements and, of course, to apply Rule 403, the concerns over bolstering and expanded admissibility can be mitigated.

Lastly, even if there were to be an increase in the admission of prior consistent statements into evidence, attorneys can address issues of unreliability or attempts at "bolstering" in summation. This is what we as trial lawyers do every day. A persuasive argument explaining why a prior consistent statement would likely be a lie or should be disbelieved will do much more for a party to a lawsuit than a confusing instruction on the admissibility of prior consistent statements for a limited purpose.

Conclusion

As a result of the different view of its members, the ACTL Committee is not in a position to offer a recommendation on whether the suggested amendment to Rule 801(d)(1)(B) should be adopted. We appreciate the opportunity to provide comments to the Advisory Committee and hope that the views set forth above are helpful. If there is anything more we can provide to the Advisory Committee, please let us know.

Sincerely,

James R. Asperger
Chair, Federal Rules of Evidence Committee

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Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Possible Amendment to the Trustworthiness Clauses of Rules 803(6)-(8) — New Development at the State Level
Date: March 1, 2012

Evidence Rule 803(6) provides a hearsay exception for records of regularly conducted activity, so long as "neither the source of information nor the method or circumstances of preparation indicate lack of trustworthiness." Rules 803(7) and 803(8) contain the same lack of trustworthiness proviso for absence of business records and public records respectively.

When these Rules were being restyled, Professor Kimble proposed a change to the lack-of-trustworthiness clauses. Using 803(6) as an example, and blacklined from the original rule, the first draft of the Restyled Rule provided as follows:

> ***(6) Records of a Regularly Conducted Activity.*** A ~~memorandum, report,~~ record~~, or data compilation, in any form,~~ of an act~~s~~, event~~s~~, condition~~s~~, opinion~~s~~, or diagnose~~is~~~~,~~ if:
>
> > (A) the record was made at or near the time by~~;~~ – or from information transmitted by~~;~~ – ~~a person~~ someone with knowledge~~;~~ ;
> >
> > (B) the record was ~~if~~ kept in the course of a regularly conducted business activity~~;~~ ~~and~~ ;
> >
> > (C) making the record ~~if it~~ was ~~the~~ a regular practice of that business activity ~~to make the memorandum, report, record or data compilation,~~ ;
> >
> > (D) all ~~as~~ these conditions are shown by the testimony of the custodian or ~~other~~ another qualified witness, or by a certification that complies with Rule 902(b)(11)~~;~~ ~~Rule 902~~ or (12)~~;~~ or with a statute permitting certification~~;~~ ; and

(E) ~~unless~~ the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The blacklined change to the trustworthiness clause clarified that the burden of showing untrustworthiness is on the *opponent* of the evidence. That is, once the proponent showed that the record was regularly kept, contemporanously made, etc., the record would be admitted unless the opponent showed untrustworthy circumstances by a preponderance of the evidence under the terms of Rule 104(a). The restyling was a clarification because the original rule does not explicitly allocate the burden of proof on the issue of trustworthiness.

The Reporter determined that the proposed change to the lack-of-trustworthiness clause was substantive because a few courts had held that the *proponent* has the burden of showing that a business record is trustworthy.[1] Therefore the amendment would change the evidentiary result in at least one federal court — and under the protocol developed for the restyling project it could not be proposed as part of the style package. The Restyled Rule 803(6) as adopted by the Advisory Committee and the Standing Committee therefore provides as follows:

> (6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> **(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.**

That same basic language is used in Rule 803(7) and (8).[2] The language returns to the passive, ambiguous position of the original rule.

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[1] That case law is discussed infra.

[2] The difference is that Rule 803(6) refers to "the method or circumstances of preparation" while the other Rules refer "other circumstances." That difference is found in the original Rules.

Last year, the Committee considered whether to propose an amendment to the Restyled Rules 803(6)-(8) to clarify that it is the opponent who has the burden of showing that the proffered record is untrustworthy. The Committee sought input from the ABA Litigation Section and the American College of Trial Lawyers. Both the Section and the College supported the proposed amendment. Nonetheless the Committee refused to proceed with a proposed amendment. The explanation for the Committee's refusal to act is set forth in the minutes of the Spring 2011 meeting:

> Members stated that any problem in the application in the rule was caused by a few wayward cases; that an amendment could simply invite parties to raise trustworthiness arguments that would not otherwise be raised; that courts need flexibility to deal with trustworthiness arguments; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.
>
> The Committee noted for the record that the burden of proving untrustworthiness is on the opponent and that this is clear enough in the existing language of the rule, so that clarification is unnecessary.

Since that time the Reporter has received email correspondence from the Restyling Committee for the State of Texas. Here is the first email, sent to me by Professor Steven Goode of the University of Texas:

> Dear Prof. Capra—
>
> Texas is in the process of restyling its evidence rules to conform as closely as possible to the restyled FRE, and I am chairing the Texas drafting committee. One of our committee members raised an interesting point about restyled Rule 803(6). The restyled rule seems to place on the proponent of the business record the burden of demonstrating that neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness. The former version of Rule 803(6) placed that burden on the opponent of the evidence. The same applies to Rule 803(8). Has this issue been raised within your Advisory Committee or elsewhere? If so, do you expect that these rules will be rewritten?

Here is my response:

> Dear Prof. Goode,
>
> The initial restyling draft specifically placed the burden on the opponent, but that would have been a substantive change because a few courts have placed the burden on the

proponent. The restyled rule retains the passive voice, in order to keep the placement of the burden as vague as it was under the original rule.

I am attaching a report to the committee explaining the issue and proposing that the restyled rule be amended to specifically put the burden on the opponent. The Committee ultimately decided that no change was necessary.

Here is Professor Goode's response:

Thanks very much. I understand the difficulty the Committee confronted here given the existence of a few cases placing the burden on the proponent. For what it's worth, however, I will relate that *everyone on our committee viewed the restyled version as placing the burden on the proponent*. While I appreciate that the passive voice of the restyled 803(6)(E) doesn't foreclose arguments about the burden, the tenor of the language is certainly different. This may be one of the places where it will be interesting to see how courts react to the restyling: Will the directive that no substantive change is intended prevail over an argument that a change in the text has actually produced such a change?

Again, many thanks for your prompt reply.

(Emphasis in the original).

This memo addresses whether the change to Rules 803(6)-(8), previously considered by the Advisory Committee, should be reconsidered in light of the possibility that the restyled rule can be read to constitute a substantive change — by putting the burden on the proponent to prove the trustworthiness of the record. For purposes of refreshing recollection, the memorandum restates some of the background material included in prior agenda books.

I. Case Law on Allocating Burden of Proving Trustworthiness

A. Cases Imposing Burden on the Opponent.

Almost all of the reported cases impose the burden of proving "lack of trustworthiness" on the opponent of the evidence.

For business records, see, e.g.,

United States v. Kaiser, 609 F.3d 556, 576 (2nd Cir. 2010) ("Kaiser has succeeded in raising questions about the trustworthiness of the [records], but he has failed to show that the district court abused its discretion in finding that they were sufficiently trustworthy under Rule 803(6). * * * Residual doubts on the question of trustworthiness would go to the weight of the evidence, not its admissibility.");

In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238, 289 (3d Cir. 1983), *rev'd in part on other grounds*, 475 U.S. 574 (1986);

Dunn ex rel. Albery v. State Farm Mut. Auto. Ins. Co., 264 F.R.D. 266, 274 (E.D. Mich. 2009) ("The proponent of the evidence bears the initial burden of establishing that it meets the requirements of Fed.R.Evid. 803(6); if the proponent satisfies its burden, the opponent bears the burden of demonstrating a reason to exclude the evidence. 2 McCormick on Evidence § 88.");

United States v. Fujii, 301 F.3d 535, 539 (7th Cir. 2002) ("Consequently, because [the opponent] fails to establish that 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness,' see FED. R. EVID. 803(6), we conclude that the district court did not abuse its discretion in admitting check-in and reservation records under Rule 803(6).");

Shelton v. Consumer Products Safety Com'n, 277 F.3d 998, 1010 (8th Cir. 2002) ("The language of Fed.R.Evid. 803(6) parallels the principles we articulated in *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir.1983), where we held that the public records exception assumes admissibility in the first instance and provides that the party opposing admission has the burden of proving inadmissibility. We therefore apply the same principles to admission of business records that we articulated for admission of public records in *Kehm*, and hold that once the offering party has met its burden of establishing the foundational requirements of the business records exception, the burden shifts to the party opposing admission to prove inadmissibility by establishing sufficient indicia of untrustworthiness.");

Freitag v. Ayers, 468 F.3d 528, 541, n.5 (9th Cir. 2006) ("The district court did not err in admitting the IG's report into evidence at trial. Under the hearsay exceptions for business records, FED. R. EVID. 803(6), and public records, id. 803(8), the report was afforded a presumption of reliability and trustworthiness that the defendants failed to rebut."); and

Barry v. Trustees of the International Ass'n, 467 F. Supp. 2d 91, 106 (D.D.C. 2006) ("The structure of [Rule 803(6)] places the initial burden on the proponent of the document's admission

to show that it meets the basic requirements of the rule, and the 'unless' clause then gives the opponent the opportunity to challenge admissibility, albeit now bearing the burden of showing a reason for exclusion.").

For public records, see, e.g.,

Bridgeway Corp. v. Citibank, 201 F.3d 134, 143 (2d Cir. 2000) ("Once a party has shown that a set of factual findings satisfies the minimum requirements of Rule 803(8)(C), the admissibility of such factual findings is presumed. The burden to show 'a lack of trustworthiness' then shifts to the party opposing admission.");

In re Complaint of Nautilus Motor Tanker Co., Ltd, 85 F.3d 105, 113 n.9 (3d Cir. 1996) ("Moreover, we note that public reports are presumed admissible in the first instance and the party opposing their introduction bears the burden of coming forward with enough 'negative factors' to persuade a court that a report should not be admitted.");

Kennedy v. Joy Technologies, Inc., 269 Fed. Appx. 302, 310 (4th Cir. 2008) ("As we recognized in *Zeus Enterprises, Inc. v. Alphin Aircraft, Inc.*, '[t]he admissibility of a public record specified in the rule is assumed as a matter of course, unless there are sufficient negative factors to indicate a lack of trustworthiness.' 190 F.3d 238, 241 (4th Cir.1999) (internal citations omitted). Furthermore, the party opposing the admission of such a report bears the burden of establishing its unreliability. *Ellis v. International Playtex, Inc*., 745 F.2d 292, 301 (4th Cir. 1984).");

Moss v. Ole South Real Estate, Inc., 933 F.2d 1300, 1305 (5th Cir. 1991) ("In light of the presumption of admissibility, the party opposing the admission of the report must prove the report's untrustworthiness.");

Reynolds v. Green, 184 F.3d 589, 596 (6th Cir. 1999) ("Because records prepared by public officials are presumed to be trustworthy, the burden is on the party opposing admission to show that a report is inadmissible because its sources of information or other circumstances indicated a lack of trustworthiness.");

Klein v. Vanek, 86 F. Supp. 2d 812, 820 (N.D. Ill. 2000) ("If a public officer's finding meets the Rule's threshold requirement that it be a factual finding resulting from an investigation made pursuant to authority granted by law — as is the case here — the burden is on the party opposing admission to show that the finding lacks trustworthiness.");

Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 600-1 (8th Cir. 2005) ("Once the evaluative report is shown to have been required by law and to have included factual findings, the burden is on the party opposing admission to demonstrate untrustworthiness.");

Johnson v. City of Pleasanton, 982 F.2d 350, 352 (9th Cir.1992) ("The trial court is entitled to presume that the tendered public records are trustworthy. If the Johnsons seriously think the

documents are untrustworthy, they can challenge them on that ground. When public records are presumed authentic and trustworthy, the burden of establishing a basis for exclusion falls on the opponent of the evidence."); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770 (9th Cir. 2010) ("A party opposing the introduction of a public record bears the burden of coming forward with enough negative factors to persuade a court that a report should not be admitted." – DOL report found untrustworthy because it was incomplete (with exhibits not attached); author was unknown; no hearing was held; and it appeared to be an internal draft); and

In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1482 (D.C. Cir. 1991) ("Rule 803(8)(C) 'assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present.' FED.R.EVID. 803 advisory committee note. The burden is on the party disputing admissibility to prove the factual finding to be untrustworthy.").

Rationale:

These cases generally rely on four arguments for imposing the burden on the opponent:

1) Language in the Advisory Committee Note to Rule 803(8) seems to allocate the burden of proving untrustworthiness to the opponent. The Note states that "the rule, *as in Exception (6), assumes admissibility in the first instance* but with ample provision for escape if sufficient negative factors are present." This sentence is most logically read to mean that if the other admissibility factors are met, the record is *presumed* admissible and the trustworthiness clause is included as a safety valve for opponents to use to overcome that presumption.

2) The language of the existing rule points toward imposing the burden on the opponent. It says that statements fitting the other requirements are within the rule "*unless* the source of information or the method of circumstances indicate *lack* of trustworthiness." First, the use of "unless" indicates that the requirement is an exception to the basic rule. Second, the use of "lack" indicates that it is an *absence* of trustworthiness that must be shown — certainly the *absence* of trustworthiness is something that the opponent, not the proponent, would want and need to show. Given the way the language is pitched, imposing the burden on the proponent would mean that he would be expected to show the *absence of a lack of trustworthiness* — which is an odd way to state a burden, to say the least.

3) The case law relies on statements of treatise-writers, all of whom state that it is the opponent's burden to show lack of trustworthiness. *See, e.g.*, Weinstein's Federal Evidence § 803.10[2] (Because public records are presumed to be trustworthy, "[t]he burden of proof concerning the admissibility of public records is on the party opposing their introduction."); Mueller and Kirkpatrick, §450 ("Sound policy suggest that if the offering party shows a business record satisfies

the basic requirements, the exception applies and the record is considered trustworthy unless the other side shows it is not."); Saltzburg, Martin and Capra, Federal Rules of Evidence Manual at 803-53 ("[I]f the proponent of the record has shown that the admissibility requirements of the Rule are met, the proponent need not make an independent showing of trustworthiness. It is up to the objecting party to show that particular circumstances render the records unreliable.").

4. Policy arguments support allocating the burden of showing lack of trustworthiness to the opponent. In the context of business records, the admissibility requirements in the Rule are more than enough to establish a presumption of reliability; requiring an extra and independent showing of trustworthiness would improperly limit the scope of the exception. As Mueller and Kirkpatrick put it:

> The basic requirements (regular business with regularly kept record; source with personal knowledge; record made timely; foundation testimony) are enough in the run of cases to justify the conclusion that the record is trustworthy.

Similarly, public records are properly presumed trustworthy because it is the job of the government to maintain trustworthy records. As the court put it in *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984):

> Placing the burden on the opposing party makes considerable practical sense. Most government-sponsored investigations employ well-accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. * * * It is far more equitable to place that burden on the party seeking to demonstrate why a time-tested and carefully considered presumption is not appropriate.

B. Cases Imposing Burden of Showing Trustworthiness on the Proponent

Some cases either by holding or by dicta state that the proponent has the burden of showing that business and/or public records are trustworthy.

For business records, see, e.g.,

Byrd v. Hunt Tool Shipyards, Inc., 650 F.2d 44, 46 (5th Cir. 1981) ("Under Rule 803(6), the business records exception, it is the duty of the proponent to establish circumstantial guarantees of trustworthiness.") **Note:** There is conflicting case law in this circuit. See *Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 118 (5th Cir. 1997) (stating that the burden of establishing the untrustworthiness of business and public records "is on the opponent of the evidence.").

Equity Lifestyle Properties v. Florida Mowing & Landscape, 556 F.3d 1232, 1244 n.19 (11th Cir. 2009) ("Under Fed.R.Evid. 104(a), in determining that the invoices were admissible [as business records], the district court first had to find as fact that they were trustworthy. See *City of Tuscaloosa v. Harcros Chemicals, Inc*., 158 F.3d 548, 565 (11th Cir.1998).").

For public records, see, .e.g,

United States v. Dowdell, 595 F.3d 50, 72 n.18 (1st Cir. 2010) ("We have not yet considered who should bear the burden in this context, although our default position seems to be that it would be the party seeking admission, *United States v. Bartelho*, 129 F.3d 663, 670 (1st Cir.1997), which in this case is the government.").

It should also be noted that the Supreme Court's language in *Beech Aircraft v. Rainey*, 488 U.S. 153, 169 (1988), could be read in support of imposing the burden on the proponent to prove trustworthiness under Rule 803(8) (and therefore under the substantially identically worded Rule 803(6)). The Court in *Rainey* stated that "the trustworthiness provision requires the court to make a determination as to whether the report, or any portion thereof, *is sufficiently trustworthy to be admitted*." Further, in rejecting the proposition that opinions in public reports were never admissible, the Court declared that "[a]s long as the conclusion is based on a factual investigation *and satisfies the Rule's trustworthiness requirement*, it should be admissible along with other portions of the report." Finally the Court concluded that "[a]s the trial judge in this action determined that certain of the JAG Report's conclusions *were trustworthy*, he rightly allowed them to be admitted into evidence." All of these statements seem to describe the Rule as having a positive trustworthiness requirement. If the Court is reading it that way, it would appear that trustworthiness would be a positive admissibility requirement and thus would be allocated to the proponent.

III. Views of ABA Litigation Section and American College of Trial Lawyers

Pursuant to the Committee's direction, the Reporter sought the input of the ABA Litigation Section and the American College of Trial Lawyers.[3] Briefly summarized, they state support for the proposed amendment.

ABA Litigation Section: The letter is not the formal position of the Section, but of attorneys actively involved in the leadership and conversant in the subject matter. Those attorneys unanimously approved the proposed amendments as "good policy" and in order to provide "needed uniformity among the circuits."

American College: The Federal Rules of Evidence Committee of the American College supports the proposed amendment, listing the following reasons: 1) it accords with the majority practice and so will not be disruptive; 2) a contrary rule would accomplish very little in practice, as proponents would simply add trustworthiness language to the affidavits they use to qualify business records; 3) the other admissibility requirements of Rules 803(6) and (8) already contain substantial guarantees of trustworthiness and so it would be overkill to require an extra showing; and 4) the proposed amendment will set forth a helpful process for courts and counsel to follow.

IV. Can the Restyled Rule Fairly Be Read to Allocate the Burden of Showing Trustworthiness to the Proponent?

The Committee was clear in its prior discussions that, on the merits, the Rule should provide that it is the opponent that has the burden of proving untrustworthiness — and not that the proponent has the burden of proving trustworthiness. Allocating the burden to the opponent makes sense for a number of reasons, among them: 1) that result is consistent with the vast majority of case law; and 2) requiring the proponent to establish that the other admissibility requirements of the rule are met provides a sufficient indication of reliability — if the proponent must show affirmative trustworthiness beyond the other requirements, the business records exception would be of little utility; or alternatively the trustworthiness clause could be read completely out of the rule when courts end up saying that satisfying all of the other admissibility requirements is sufficient to satisfy the proponent's burden of showing trustworthiness.

Accordingly, on the merits, the Restyled Rule should not be read to question or reject the majority rule that the opponent must show the record is untrustworthy before an otherwise admissible record can be excluded.

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[3] Recall that another important organization, the DOJ, supports an amendment that would specifically allocate the burden of proving untrustworthiness to the opponent of the evidence.

As stated above, the trustworthiness language of the Restyled Rule provides an exception to the rule against hearsay for "record of an act, event, condition, opinion, or diagnosis if:

* * *

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

This is a change from the original, which stated that a business record fitting the admissibility requirements is admissible

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The Texas restyling committee was of the view that the change from "unless" to "neither" — together with the listing of admissibility requirements in the restyled rule — shifted the burden to the proponent to show that there is no lack of trustworthiness. Given the fact that everyone on the Texas committee was of the same view, it is hard to conclude that the argument is specious. Looking at the restyled rule as a whole, it can be looked at as setting a list of admissibility requirements — and admissibility requirements are ordinarily for the proponent to meet. There is no differentiation between the trustworthiness requirement and any other requirement, they are all listed together. While it does seem nonsensical to force the proponent to prove the *absence* of a *lack* of trustworthiness, the uniform listing in the Restyled Rule can be looked at stating exactly that. In contrast, under the original rule, the "unless" clause was clearly a separate consideration from the rest of the rule. It was exceptional, it was a shift in the text of the rule from the admissibility requirements to a separate concern for the court to address.[4]

It should be noted that Judge Hartz expressed the same concern at the Restyling Symposium — that the Restyled Rule 803(6) could be read to allocate the trustworthiness burden to the proponent. To say the least, Judge Hartz's view, reached independently from the Texas Committee, shows that the argument is colorable — and one that may be espoused in the future by other state committees and courts when they review the Restyled Rules.

The question is whether the Texas Committee's view is enough — together with the other considerations previously expressed — to justify proposing an amendment. The possible importance of the Texas Committee's view is not only that *courts* might agree with it. What could be equally important is that Texas — and perhaps other states — will be implementing a rule that is *different* from the Federal Rule. One of the goals of restyling — indeed of any amendment to the Federal Rules — is to encourage states to modify their own rules to accord with the improved federal model.

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[4] Any ambiguity in the Restyled Rule could have been eliminated by placing the trustworthiness clause in a hanging paragraph at the end of the rule — but that is anathema to the restylists.

It would be unfortunate if the restyling led to variances that are based on disputes over whether the Federal model has made a substantive change.

It should be noted that if the Committee were to propose a change to Rules 803(6)-(8), it would not have to expressly recognize that the change was animated by a concern that the restyling had made a substantive change to the trustworthiness clause. There is no reason at all to make such a concession. The reasons that justified the change as previously considered would appear to be sufficient — to clarify the law and mandate a uniform result, promoting a substantive change the need for which was uncovered by the restyling effort.

IV. Draft Amendments and Committee Note

The previous memo contained two drafting choices — one that put the burden on the opponent and the other that put it on the proponent. The latter alternative has been dropped from this memo as it is not supported by policy or reason, and moreover it is opposed by the Litigation Section and the American College.

The drafts below cover all three rules, 803(6)-(8). If one of them is going to be amended, then all should be, because they all have a trustworthiness clause. Amending only one or two would leave unnecessary questions about how to construe those left unamended.

What follows is a draft amendment and Committee Note to Rule 803(6).

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

Possible Committee Note to Rule 803(6)

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then

the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable. *See* Mueller and Kirkpatrick, Federal Evidence, §450 ("The basic requirements (regular business with regularly kept record; source with personal knowledge; record made timely; foundation testimony) are enough in the run of cases to justify the conclusion that the record is trustworthy.")

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

What follows is a draft amendment and Committee Note to Rule 803(7):

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

Possible Committee Note to Rule 803(7)

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

What follows is a draft amendment and Committee Note to Rule 803(8)

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

Possible Committee Note to Rule 803(8)

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability and it should be up to the proponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Continuous Study of the Operation of the Evidence Rules
Date: March 1, 2012

Section 2073 of the Enabling Act requires the Judicial Conference to publish the procedures that govern the work of the Standing Committee and the Advisory Committees. Section 440.20.10 of the Rules of Procedure for the Standing Committee and Advisory Committees provides that each Advisory Committee "must engage in a continuous study of the operation and effect of the general rules of practice and procedure nor or hereafter in use in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary."

Judge Fitzwater suggested that the Reporter provide the Committee with a report on the process "continuous study" by the Advisory Committee — both in the past and for the future. This memo is divided into three parts. Part One is an account of the studies conducted by the Evidence Rules Committee since it was reconstituted in 1993, and the results of those studies. Part two discusses matters considered by the Advisory Committee that resulted from case law changes or suggestions by members of the public or Congress. Part Three describes the Reporter's top-to-bottom review of the Evidence Rules, case law, and scholarship — a new venture in the "continuous study" — and lists some areas that the Committee might wish to consider for future amendments.

I. Studies Conducted by the Advisory Committee Since 1993

A. 1993-6:

The Advisory Committee was reconstituted in 1993. At that time it undertook a comprehensive review of the Evidence Rules to determine the necessity for any amendments. One aspect of this review was to release a statement for public comment listing all of the Rules that the Committee, after consideration, had decided did *not* need amending. I was not the Reporter at that time, but my understanding is that no public comment was received suggesting the need for an

amendment of any Rule that the Committee had decided not to amend. At any rate, after its comprehensive review, the Committee proposed amendments to the following Rules, and these amendments became effective on December 1, 1997:

- Rule 407: providing that proof of product liability issues was barred, and also that changes made before the plaintiff's accident or injury are not covered by the Rule.

- Rule 801(d)(2): providing that a court must consider the hearsay statement itself in determining whether the proponent has provided sufficient evidence of agency or conspiracy.

- Rules 804(b)(5) and 803(24): abrogating these rules and reconstituting them as a single residual exception in a new Rule 807.

- Rule 804(b)(6): a new forfeiture exception to the hearsay rule.

- Rule 806: technical amendment.

B. 1997-2000

I became the Reporter in the Fall of 1996. In 1997 the Committee began another comprehensive review of the Evidence Rules. The review was thought to be necessary due to all the case law that was coming down after *Daubert* — so the major focus was on the expert rules. The systematic review of the Evidence Rules led to the following changes, effective December 1, 2000:

- Rule 103: providing that a party need not renew an *in limine* objection or offer of proof at trial, if the *in limine* ruling was definitive.

- Rule 701: providing that if a lay witness gives testimony on the basis of scientific, technical or other specialized knowledge, that testimony is governed by the requirements of Rule 702.

- Rule 702: providing a three-part test for assessing the reliability of all expert testimony, scientific and non-scientific.

- Rule 703: providing that if otherwise inadmissible evidence is used by an expert, it may not be disclosed to the jury unless its probative value in assessing the basis of the expert's opinion substantially outweighs its prejudicial effect.

- Rule 803(6): providing that a qualified witness could submit an affidavit in lieu of live testimony to qualify a business record.

- Rules 902(11) and (12): providing that a qualified witness's affidavit self-authenticates

a business record.

C. 2002-2006

In 2002, the Committee once again embarked on a systematic review of the Evidence Rules, to determine whether any amendments were required. This time around, the Committee used specific criteria for determining whether any Evidence Rule would be usefully amended. Those criteria were: 1) the rule was subject to conflicting interpretations in the circuits, and that conflict was unlikely to be resolved by Supreme Court ruling or legislation; 2) the rule had become demonstrably unworkable in the view of courts and litigants; 3. there was a credible suggestion from the public for change.

The amendments that resulted from this comprehensive study — effective date December 1, 2006, were as follows:

- Rule 404(a): clarifying that evidence of character offered circumstantially to prove conduct is never admissible in a civil case.

- Rule 408: providing that the protections of the rule generally apply in subsequent criminal cases; that the rule prohibits compromise evidence even if proffered by the party who proposed the compromise; and that statements made in compromise cannot be offered to impeach a witness by way of prior inconsistent statement or contradiction.

- Rule 606(b): providing for a limited clerical error exception to the rule prohibiting juror testimony to impeach a verdict.

- Rule 609: providing that a conviction is not automatically admissible to impeach unless it can be readily determined that it involved dishonesty or false statement.

In addition:

1) an amendment to Rule 804(b)(3) was proposed to resolve a conflict on whether the prosecution must provide corroborating circumstances for a proffered declaration against penal interest. That amendment, for one reason or another, was delayed until December 1, 2010.

2) an amendment to Rule 806 was considered, to resolve a conflict on whether a hearsay declarant can be impeached with a bad act; but the Committee decided not to proceed with an amendment.

3) an amendment to Rule 410 was considered, that would have specifically protected

prosecutors' statements made during guilty plea negotiations; but the Committee decided not to proceed with an amendment because case law sufficiently protected such statements.

4) an amendment to Rule 412 was considered, that would have allowed evidence of false complaints to be excepted from the rape shield protection, but the Committee decided not to proceed with an amendment.

5) an amendment to Rule 803(4) was considered, that would have excluded statements made to doctors solely for litigation purposes, but the Committee decided not to proceed with an amendment.

D. 2007-2011

No systematic review was conducted during this period because the Committee became involved in two major time-consuming developments: Rule 502 and the Restyling Project. Nonetheless, the Committee did consider some other amendments based on 1) the Reporter's determination that certain rules had been subject to conflicting interpretations in the courts, or 2) possible substantive problems uncovered during the restyling project. Examples include:

- A possible amendment to Rule 804(b)(1) to clarify when and whether exculpatory grand jury testimony is admissible against the government as prior testimony.

- A possible amendment to resolve a conflict on who has the burden of proving trustworthiness or untrustworthiness under Rules 803(6) and (8).

- A possible amendment that would specifically cover vacated guilty pleas, and other matters, in Rule 410.

The Committee decided not to proceed on any of these proposed amendments.

II. Matters Considered by the Advisory Committee That Resulted from Case Law Changes or Suggestions By Members of the Public or Congress

Since 1996, the Committee has reviewed more than three dozen suggestions for amendments to the Evidence Rules by members of the public or by Congress, or by changes in case law.

Congress

The amendments that came from Congressional suggestion or action are:

- Rule 615: to recognize an exception to sequestration for victim-witnesses, made necessary by enactment of the Victims Rights Act — effective December 1, 1998.

- Rule 404(a): providing that if the defendant attacks the victim's character in a self-defense case, the government can attack the same character trait of the defendant — effective December 1, 2000, made necessary because Congress threatened to amend the rule directly.

- Rule 502: effective September 19, 2008.

Congress has provided a number of suggestions for change that the Committee has successfully opposed. Some of these include:

- An amendment to Rule 804(b)(6) that provides that the defendant forfeits a hearsay objection by joining a conspiracy in which a witness is made unavailable during the course and in furtherance of that conspiracy. (Opposed because courts had already construed the rule in accordance with the proposal.)

- An amendment to Rule 404(b) to accommodate hate crimes legislation. (Opposed because it would have altered the application of Rule 404(b) in a problematic way.)

- An amendment that would codify a harm-to-child exception for the marital privileges. (Opposed because there is no codified marital privilege.)

Public Comment

Public comment has provided a number of suggestions for changes to the Rules. The Committee has carefully considered each comment. One comment has resulted in an amendment:

- Rule 608(b): clarifying that the ban on extrinsic evidence applies only if the witness has been attacked for having a character for untruthfulness. Effective December 1, 2003.

Examples of proposals considered and rejected include: a) a package prepared by a group of doctors for changes to Rules 407 and 702-3); b) a proposal to amend Rule 803(18) to allow treatises to be used by the jury during deliberations over the objection of a party; and c) a proposal to turn Rule 703 into a hearsay exception; and 4) a proposal to reformulate and reorganize the "not hearsay" categories of Rule 801(d).

Of course, comments received during the public comment period have been instrumental in shaping amendments that have originated with the Committee.

Case Law

As to case law changes, the Committee has proposed an amendment, currently out for public comment, to respond to the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*. That is the proposed amendment to Rule 803(10).

III. Reporter's Review of Case Law and Evidence Rules

This section sets forth those Evidence Rules that have been highlighted either by case law or scholarship as possible candidates for an amendment.

This memorandum carries several provisos:

1. Nothing here should be taken as a recommendation that any Rule should actually be amended. It is for the Committee to determine whether the substantial costs of amending a Rule are outweighed by the benefits of clarification or reformulation.

2. This memo does not contain a full-scale discussion of each, or any, of the Rules cited. It provides a concise explanation of the possible problem in the text of the particular Rule. If the Committee decides that the problem is one for which an amendment might be useful, then an in-depth memo on the particular Rule will be prepared for the Committee's consideration at the next meeting. To the extent that language for a possible amendment is set forth, it is only to give the Committee some perspective on what a change might look like. The language is not intended to be definitive, and it could undoubtedly be substantially improved.

3. Possible amendments that have been recently rejected by the Committee are not included, specifically: a) an amendment to Rule 806; b) an amendment to Rule 801(d) and possibly other rules to get rid of the "not hearsay" category; c) an amendment to Rule 804(b)(1) regarding grand jury testimony; and d) an amendment to Rules 803(8) and 803(6) to clarify who has the burden of showing trustworthiness.

4. Possible amendments to Rules 501 and 502 have not been included. There is an ambiguity in Rule 501 on whether state privilege rules apply when a state claim is joined with a federal claim. And there are some case law conflicts about the meaning of certain provisions of Rule 502. But any changes to either rule would have to be directly enacted by Congress and enough said about that.

Possible Amendments for the Committee to Consider

Rule 104(b)

Professor Allen, in *The Myth of Conditional Relevancy*, 25 Loy. L.A. L.Rev. 871 (1992), argues that Rule 104(b) is misguided because there is no such thing as conditional relevancy. Put another way, he contends that there is no distinction between relevance and conditional relevance. He explains as follows:

> No evidence is simply relevant in its own right. Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy.

Professor Allen also argues that there is no standard of proof for relevance that is clearly stated in the Rules–i.e., how much must the proponent show to prove that the evidence is relevant under Rule 401? If relevance (as opposed to conditional relevance) is governed by Rule 104(a), then there is the anomaly of applying a preponderance of the evidence standard to "pure" relevance questions, while using a prima facie standard for the more tenuous "conditional" relevance under Rule 104(b).

Because of all these conundrums, Professor Allen suggests that Rule 104(b) should be replaced with the following provision.

> *(b) Relevancy. – The court may admit evidence over a relevancy objection upon, or subject to, a finding that the evidence could rationally influence a reasonable person's assessment of any fact that is of consequence to determining the action.*

Rule 106

Rule 106 sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part * * * that in fairness ought to be considered at the same time." Rule 106 by its terms permits the adversary to introduce completing statements only where the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as a criminal defendant's oral confession. Some

courts have found, however, that Rule 106, or at least the principle of completeness embodied therein, applies to require admission of omitted portions of an oral statement when necessary to correct a misimpression. See *United States v. Tarantino,* 846 F.2d 1384 (D.C. Cir. 1988) (prior oral statements of a government witness were properly offered on redirect examination since the defendant had used portions of the statements in cross-examination and the omitted portions placed the statements in context). See also the discussion in *United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (noting the case law permitting criminal defendants to offer omitted parts of statements they make to law enforcement officers that provide exculpatory information). Compare *United States v. Harvey,* 914 F.2d 966 (7th Cir. 1990) (Rule 106 does not apply to oral statements).

Moreover, some courts have held that Rule 106 can operate as a de facto hearsay exception when the opponent opens the door by creating a misimpression by offering only part of a statement. In other words, completing evidence is found admissible under Rule 106 even if it would otherwise be hearsay. See *United States v. Sutton,* 801 F.2d 1346, 1369 (D.C.Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously"). See also C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (supporting this approach). Such a reading is not apparent from the text or Committee Note. See *United States v. Wilkerson,* 84 F.3d 692 (4th Cir. 1996) (interpreting Rule 106 as purely a timing device, not as a rule permitting the admission of otherwise inadmissible evidence).

Assuming that the Rule should cover oral statements, and also should permit the use of hearsay for completeness purposes, the Rule could be amended as follows:

> 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 in fairness ought to be considered at the same time, <u>whether or not that statement is hearsay</u>.

Rule 403

Rule 403 provides that a trial judge may exclude proffered evidence if its probative value is substantially outweighed "by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Of the negative factors listed that would support exclusion, only one refers to the jury directly — the danger of "misleading the jury". This would seem to indicate that other negative factors mentioned in the Rule, specifically the danger of unfair prejudice and confusion of

the issues, must be taken into account in a bench trial. Yet courts have held to the contrary, reasoning that unfair prejudice and confusing evidence will not have the same negative impact on the judge as it would have on the jury. See, e.g., *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994) (trial court erred in excluding evidence in a bench trial on the ground of its prejudicial effect); *Gulf States Utils. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981) (the portion of Rule 403 referring to prejudicial effect "has no logical application in bench trials").

The Rule could be brought into line with the case law by the following change:

> The court may exclude relevant evidence if its probative value is substantially outweighed by danger of one or more of the following: ~~unfair prejudice, confusing the issues,~~ misleading, confusing, or unfairly prejudicing the jury against the opponent, undue delay, wasting time, or needlessly presenting cumulative evidence."

Rules 413-415

The major ambiguity in these Rules is whether evidence of a defendant's prior acts of sexual misconduct are subject to exclusion under Rule 403. Every case construing these Rules has held that Rule 403 is applicable, so arguably there is no need to amend the Rule in light of this judicial unanimity. On the other hand, at least with Rules 413-414 the Rule 403 balancing has been construed into the Rules as a savings clause–the courts reasoning that if Rule 403 were unavailable, the Rules would violate the right of the accused to due process. See *Federal Rules of Evidence Manual*, §413.02 ("Some courts have held that Rules 413 and 414 might be unconstitutional if the trial court had no power to exclude evidence of an accused's prior sexual misconduct. Thus, these Courts read Rule 403 into the Rules as a kind of saving clause."). See also *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998) (recognizing that "Rule 413 raises a serious constitutional due process issue" because it creates a danger that the defendant will be convicted because he is a bad person, not because he committed the crime charged: "without the safeguards embodied in Rule 403, we would hold [Rule 413] to be unconstitutional.").

If the Committee wishes to specify that Rule 403 still applies to a defendant's prior sexual misconduct, it might add the following to Rules 413-415 (using Rule 413 as an example):

> **Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**
>
> (a) 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. Subject

to Rule 403, ~~T~~the evidence may be considered on any matter to which it is relevant.

* * *

Rule 607

Rule 607 states categorically that a party can impeach any witness it calls. On its face, the Rule permits a party to call a witness solely for the purpose of "impeaching" them with evidence that would not otherwise be admissible, such as hearsay. Yet despite the affirmative and permissive language of the Rule, the courts have held that a party cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. *See, e.g., United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985) ("The prosecution, however, may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule. The danger in this procedure is obvious."); *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975) (conviction reversed on the ground that the government should not have been permitted to call a witness for no other purpose than to impeach him). *See generally* Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 Tex. L. Rev. 745 (1990) (noting this and other situations where courts have felt compelled to diverge from the text of an Evidence Rule in order to reach a just result).

If the Committee wishes to codify an exception to Rule 607 that the courts have developed to prevent abuse, it might look something like this:

Rule 607. Who May Impeach

Any party, including the party that called the witness, may attack the witness's credibility. But a party may not call a witness for the sole purpose of impeaching that witness with evidence that is otherwise inadmissible.

Rule 613(b)

The Rule provides that it is not necessary to give a witness an opportunity to examine a prior inconsistent statement before that statement is admissible to impeach the witness. All that is necessary is that the witness be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule from Queen Caroline's case, under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Note, however, some courts have reverted to the common-law rule. See, e.g., *United States v. Sutton*, 41 F.3d 1257 (8th Cir. 1994) (trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while cross-examined by defense counsel); *United States v. Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite the language of Rule 613(b) "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and juries").

Some courts have returned to the common-law rule on the ground that it is more efficient. Allowing the adversary to admit extrinsic evidence without confronting the witness leads to a waste of time in cases where the witness would have admitted that he made the statement. The Rule also burdens witnesses who wish to minimize the time they must take from work or other activities. Under the Federal Rule a witness who apparently has nothing more to add must remain available for recall until the other party's case-in-chief or case-in-rebuttal has concluded.

The change from the common-law rule was deemed necessary for a number of reasons. First, the common-law rule was sometimes a trap for the unwary; statements were sometimes excluded due to an inadvertent failure to lay a foundation. Second, problems were presented when inconsistent statements were discovered after the witness testified. Third and most importantly, there was the danger under the common-law rule of prematurely alerting collusive witnesses to the evidence available for impeachment.

Those who argue against the current Rule maintain that a reversion to the common-law rule could be coupled with language granting discretion to the trial judge to dispense with the traditional foundation requirement where the interests of justice require. Judge Selya, concurring in *United States v. Hudson*, 970 F.2d 948, 959 (1st Cir. 1992), has expressed this view:

> [The common law rule] works to avoid unfair surprise, gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency, facilitates judges' efforts to conduct trials in an orderly manner, and conserves scarce judicial resources. At the same time, insistence upon a prior foundational requirement, subject, of course, to relaxation in the presider's discretion if the interests of justice otherwise require, does not impose an undue burden on the proponent of the evidence.

If the Committee were to propose a return to the common-law foundation requirement, while providing judicial discretion to dispense with such a requirement in the interests of justice, the amendment might look like this:

> **(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is not admissible ~~only if~~ before the witness is given an opportunity to explain or deny the statement ~~and an adverse party is given an opportunity to examine the witness about it, or if~~ unless the interests of justice otherwise require. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Rule 704(b)

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

The Committee might consider whether the Rule should be amended to restore its original focus, which was to limit the conclusory testimony of psychological experts in criminal cases. If such an amendment were considered, it might look like this:

Rule 704. Opinion on Ultimate Issue

* * *

(b) In a criminal case, a <u>mental health</u> 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. Those matters are for the trier of fact alone.

Alternatively, the Committee could consider the possibility of deleting Rule 704(b) entirely. If the Rule is designed to exclude expert testimony that is conclusory and unhelpful, then it is superfluous. Rule 702 already excludes expert testimony that is not helpful. Indeed, if Rule 704(b) is to be used at all independently of Rule 702, it is by definition being used to exclude *helpful* evidence about the defendant's mental state. It makes little sense to continue with a Rule that is either superfluous or else designed to exclude evidence that would assist the jury.

Rule 706

Judge Gettleman has proposed an amendment to the appointment clause of Rule 706 that would read as follows:

Rule 706. Court Appointed Experts

(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 that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.~~.

(1) The court may, on its own motion or the motion of any party, enter an order appointing an expert to act as the court's witness. Prior to any such appointment, the court must notify and allow the parties a reasonable time to:

(A) object to the appointment;

(B) submit nominations by each party or by all parties jointly; and

(C) address the qualifications of any such expert.

(2) The court may appoint expert witnesses of its own choosing or may appoint an expert nominated by any party.

Judge Gettleman explains the proposed change as follows:

The proposal eliminates the "show cause" language that is rarely observed in practice. Especially where a court-appointed expert is suggested by a party, the notice of motion serves as a "show cause" order. Where the court suggests the appointment, subsection (a) requires adequate advance notice.

* * *

Various suggestions have been made in the literature for other possible amendments to Rule 706. These include:

1. Regulating ex parte communications between the court and the expert and between a party and the expert, for example by requiring that all such communications be recorded and made available to all parties.

2. Granting the trial court discretion to limit depositions or cross-examination of court-appointed experts where the circumstances warrant.

3. Regulating whether the jury should be told that the expert is court-appointed — either prohibiting such a practice or requiring cautionary instructions.

4. Clarifying that the Rule does not affect the court's inherent authority to appoint a technical adviser, when that appointee will not be a witness at trial.

Most of these issues are addressed in the ABA Civil Practice Standards, and these Standards might serve as a guideline to any amendment to the Rule.

The Advisory Committee previously considered whether an amendment to Rule 706 should be proposed to deal with some of the possible problems set forth above. The Committee decided to defer consideration of any amendment because the Civil Rules Committee was considering an amendment to Civil Rule 53, governing special masters. The Evidence Rules Committee recognized that there is an overlap between the roles of special master and court-appointed expert, and found it appropriate to wait until Civil Rules completed its project. Rule 53 has since been amended, and it makes no attempt to regulate the use of court-appointed experts. So if the Committee were to decide to proceed with an amendment to Rule 706, it would not conflict with anything in the Civil Rules.

Rule 801(c)/(a)

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

This highly constricted definition of hearsay has been rejected by most courts. The cases generally state that statements are hearsay if 1) they are offered for the truth of a matter *implied* in the statement and 2) the speaker *intended* to communicate that implication. *See, e.g., United States v. Reynolds,* 715 F.2d 99 (3rd Cir. 1983) (rejecting the government's suggestion that only a statement's express assertion should be considered in deciding whether it constitutes hearsay); *Lyle v. Koehler,* 720 F.2d 426, 433 (6th Cir. 1983) (concluding that letters were hearsay because "the inferences they necessarily invite form an integral part of the letters"; the reference to "matters asserted" in Rule 801(c) covers both express and implied assertions); *United States v. Jackson,* 88 F.3d 845, 848 (10th Cir. 1996) (stating that the important question under Rule 801(c) is whether the assertion, express or implied, "is intended"). *See also* Milich, *Re-examining Hearsay Under the Federal Rules: Some Method for the Madness,* 39 Kan. L.Rev. 893 (1991) (arguing for an intent-based test in determining whether implied assertions are hearsay). There are cases, however, that appear to hold that implied assertions can never be hearsay. *See e.g., United States v. Perez,* 658 F.2d 654, 659 (9th Cir. 1981) ("Perez' verbal conduct acknowledging that the caller was Ruvalcaba, whether express or implied, was an implied assertion and admissible as nonassertive conduct under Federal Rule of Evidence 801(a), (c).").

An intent-based test for implied assertions, in accordance with the case law, could be added to Rule 801(c) as follows:

(c) Hearsay.—''Hearsay'' means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter <u>that the declarant intended to expressly or impliedly assert</u> ~~asserted~~ in the statement.

Another way to implement the intent-based test for implied assertions is to clarify the definition of "statement" in Rule 801(a). As the Committee discovered during the restyling, Rule 801(a) is ambiguous on whether verbal and written statements must be intentional to be admissible. The restyled rule reads as follows:

> **(a) Statement.** "Statement means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

The placement of "if the person intended it" is vague because it could refer only to nonverbal conduct. That ambiguity is in the original rule and courts and commentators have struggled with the meaning of the rule. Most courts have read the "it" to refer to all assertions listed — that is, an oral or written assertion is not a statement (and so cannot be hearsay) unless it was intended as an assertion. *See, e.g., United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005) (central question for hearsay application is whether an assertion is intended). But that is not a universal holding; a few courts have held that an implied assertion cannot be hearsay even if the declarant intended to communicate what was implied in the statement. *See, e.g., United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990) ("Rule 801, through its definition of "statement" forecloses appellants' argument by removing implied assertions from the coverage of the hearsay rule.").

If the Committee wishes to implement an intent-based test for all implied assertions, the possible fix to Rule 801(a) could look something like this: (a) Statement. "Statement means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

> (a) Statement. "Statement means a person's <u>intentional</u> oral assertion, written assertion, or nonverbal conduct~~, if the person intended it as an assertion~~.

It would probably be a good idea, for clarity purposes, to make changes to both Rules 801(a) and (c).

Rule 803(3)

Rule 803(3) incorporates the famous *Hillmon* doctrine, providing that a statement reflecting the declarant's state of mind can be offered as probative of the declarant's subsequent conduct in accordance with that state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. When the victim says, "I am going to meet Frank tonight", is the statement admissible to prove that Frank and the victim actually met? Or is the statement admissible only to prove the future conduct of the declarant? The Advisory Committee Note refers to the Rule as allowing only "evidence of intention as tending to prove the act intended" — implying that the statement can be offered to prove how the declarant acted, but cannot be offered to prove the conduct of a third party. The legislative history is ambiguous. The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. See, e.g., *Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978); *United States v. Jenkins*, 579 F.2d 840 (4th Cir. 1978) (statements of intent can prove only the declarant's subsequent conduct). Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place. See, e.g., *United States v. Delvecchio*, 816 F.2d 59 (2nd Cir. 1987). See C. Mueller and L. Kirkpatrick, *Evidence* at 938 ("Some modern cases take the clearly correct position that the exception in its present form cannot justify use of statements of intent by themselves as proof of what others did. And yet a growing number of cases approve use of a statement to prove what the speaker and another did together if other evidence confirms what the statement suggests the other did."). See also McLain, *"I'm Going to Dinner With Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker — and the Role of the Due Process Clause*, 32 Cardozo L.Rev. 373 (2010) (reviewing the case law and raising the possibility that a corroboration requirement could be codified in Rule 803(3).

Notably, the proposed codification of New York Evidence contains a provision specifically prohibiting use of the state of mind exception when offered to prove the subsequent conduct of a non-declarant.

If the Committee decides that Rule 803(3) should not permit admissibility of state of mind statements when offered to prove the conduct of someone other than the declarant, then the Rule could be amended as follows (with the bracketed language to be added if the Committee agrees with the courts that hold such statements admissible if corroborating evidence is provided):

> **(3) Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including:
>
> (A) a statement of memory or belief to prove the fact remembered or believed unless

it relates to the validity or terms of the declarant's will; and

(B) a statement offered to prove the conduct of someone other than the declarant [unless it is supported by corroborating evidence indicating that the statement is true].

Rule 803(5)

The Rule provides a hearsay exception for past recollection recorded. The text works well when the party who made the statements in the record offered for truth is also the party who prepared the record and who is testifying at trial. What happens, however, when a person makes a statement to another person, and that other person is the one who writes it down? The exception by its terms does not seem to permit a "two-party voucher" system of proving past recollection recorded, because it states that the record must be shown to have been "made or adopted by the witness." Thus, the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under Rule 803(5). *See, e.g.*, *United States v. Williams,* 951 F.2d 853 (7th Cir. 1993).

If the Rule were amended to provide for two-party vouching, it might read as follows:

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness — or made to another who testifies that the witness's statement was accurately recorded — when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Rule 803(6)

The Rule defines a business record as one "made at or near the time by — or from information transmitted by — someone with knowledge." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge," not that the person must be reporting within the business structure. Yet despite the text, the courts have held that all those who report information included in a business record must be under a business duty to do so — or else the hearsay problem created from the report by an outsider must be satisfied in some other way, under the strictures of Rule 805, the rule on multiple hearsay. See *United States v. Turner*, 189 F.3d 712, 719-20 (8th Cir. 1999) ("[W]hen the source of information and the recorder of that information are not the same person, the business record contains hearsay upon hearsay. If both the source and recorder of the information were acting in the regular course of the organization's business, however, the hearsay upon hearsay problem may be excused by the business records exception to the rule against hearsay."); *Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995) (911 call was not admissible as a business record because the caller was not under any business duty to report, and the report did not independently satisfy any hearsay exception); *Cameron v. Otto Bock Orthopedic Indus. Inc.*, 43 F.3d 14 (1st Cir. 1994) (product failure reports submitted to the manufacturer after the plaintiff's accident were inadmissible; the reports were submitted by parties who had no business duty to report accurately to the manufacturer).

If the Committee thinks it appropriate to codify the business duty requirement, the amendment might look like this:

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge <u>and a duty to record or transmit the information</u>;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

The above is the equivalent of the unrestyled Tennessee Rule of Evidence 803(6).

Another possibility is to add an exclusionary clause as a hanging paragraph, along the lines of Louisiana Rule 803(6):

> This exception is inapplicable unless the recorded information was furnished to the business by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule.

Reporter's Note: The Louisiana version is more comprehensive and descriptive. It properly notes that a statement from an outsider to the business can be admitted even if not made pursuant to a business duty, so long as it complies with some other hearsay exception (e.g., a party-opponent statement or an excited utterance in a business record). But it creates the dreaded hanging paragraph. If the Committee decides to proceed with considering a possible amendment, Professor Kimble will probably be able to incorporate the above language in some way without using a hanging paragraph.

Rule 803(8)

Rule 803(8) contains two textual anomalies. It currently reads as follows:

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

The anomalies are as follows:

1. *Rule 803(8)(A)(ii) and exculpatory reports:* Subdivision (A)(ii) excludes from its coverage public reports setting forth a "matter observed by law-enforcement personnel" if such reports are offered "in a criminal case." Read literally, the Rule would not provide a hearsay exception for a forensic report prepared by the police that concluded that the defendant was innocent. Such a report would be offered by the defendant, but the exclusionary language covers *all* police reports offered in criminal cases. Yet some lower courts have refused to be bound by the plain meaning of the rule, reasoning that Congress intended to regulate only police reports that unfairly *inculpate* a criminal defendant, and that the exception should therefore apply to public reports offered by the accused. See, e.g., *United States v. Smith*, 521 F.2d 957 (D.C.Cir. 1975) (despite its exclusionary language, the subdivision should be read in light of Congress's intent to exclude police reports only when offered *against* a criminal defendant). Other courts have read the Rule literally. *United States v. Sharpe*, 193 F.3d 852, 868 (5th Cir. 1999) (the defendant's reliance on Rule 803(A)(ii) to admit an exculpatory police report was "misplaced" because the Rule does not grant admissibility for any such reports offered in criminal cases).

2. *Rule 803(8)(A)(ii) and (iii) and law enforcement reports:* These subdivisions both contain language appearing to exclude from the hearsay exception all records prepared by law enforcement personnel, when such records are offered against a criminal defendant. Read literally, these provisions would prevent the government from introducing simple tabulations of non-adversarial information. For example, these subdivisions appear not to grant a hearsay exception for a routine

printout from the Customs Service recording license plates of cars that crossed the border on a certain day, when offered in a criminal case. Courts have refused to apply the plain exclusionary language of these subdivisions literally, however. They reason that the language could not have been intended to cover reports that are ministerial in nature and prepared under non-adversarial circumstances; it is only adversarial, evaluative reports (such as crime scene reports) that carry the risk of fabrication that the exclusionary language was designed to regulate. See, e.g., *United States v. Orozco*, 590 F.2d 789 (9th Cir. 1979) (customs records of border crossings are admissible under Rule 803(8) because they are ministerial and not prepared under adversarial circumstances); *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976) (reports concerning firearms' serial numbers were admissible because they were records of routine factual matters prepared in non-adversarial circumstances).

If these two textual anomalies were addressed in an amendment to Rule 803(8), the amendment might look like this:

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including~~,~~ ~~in a criminal case,~~ a matter observed by law-enforcement personnel, if the record or statement is made under adversarial circumstances and offered against a criminal defendant; or

(iii) in a civil case — or against the government in a criminal case if the record or statement is made under adversarial circumstances — ~~;~~ factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

There is another drafting alternative that captures the case law and would make Rule (803)(8) less elaborate and substantially easier to apply:

(8) Public Records. A record or statement of a public office~~:~~ ~~if:~~

~~(A) it sets out:~~

~~(i) the office's activities;~~

~~(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or~~

~~(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and~~

~~(B) neither~~ unless the opponent shows that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

This is the Nebraska version. It makes a good deal of sense, because all of the exclusionary language in the existing Rule is designed to exclude untrustworthy reports, such as police reports of a crime scene that might be written to frame the accused. It would seem that a simple inclusion of the trustworthiness clause would be sufficient to regulate untrustworthy public reports — and the change would bring the Rule in line with the case law in both civil and criminal cases. There is no reason to pigeonhole reports in various subdivisions as they are all designed to admit public reports unless they are shown to be untrustworthy.

Rule 804(b)(1)

The Rule provides a hearsay exception for prior testimony when offered against a party who either 1) had a similar motive and opportunity to develop the testimony at the time it was given, or 2) in civil cases, had a predecessor in interest with such a similar motive and opportunity at the time the testimony was given. Some courts have defined a "predecessor in interest" as *anyone* who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the instant trial; these courts do not require some legal relationship between the prior party and the party against whom the evidence is now offered. This construction collapses the term "predecessor in interest" with the term "similar motive." *See e.g., Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978) (prior testimony properly admitted against plaintiff, where prior party had a similar motive to develop the testimony as the plaintiff in the instant case would have were the declarant to testify at trial; Judge Stern, concurring, states that such an expansive definition of "predecessor in interest" effectively reads that term out of the Rule); *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276 (4th Cir. 1993) (prior testimony from a different case properly admitted against the plaintiff, where the previous plaintiff, though not affiliated in any way with the plaintiff, had a similar motive to develop the testimony). Other courts have admitted such evidence not as prior testimony (for want of a predecessor in interest) but as residual hearsay. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985).

If the Committee were to decide to codify the cases that read the predecessor in interest requirement out of the Rule — and thus provide for uniform case law — the amendment might look like this:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, ~~whose predecessor in interest~~ another party who had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Rule 804(b)(6)

Professor Tom Lininger, in his article *The Sounds of Silence: Holding Batterers Accountable for Silencing Their Victims,* 87 Tex. L.Rev. 857 (2009), argues for an amendment to Rule 804(b)(6) that will make it easier for a court to find that a defendant charged with abusing a victim had forfeited his hearsay objection. Professor Lininger contends that the existing Rule 804(b)(6) makes if difficult to find that an abuser forfeited his hearsay objection if he does anything less than specifically threaten the victim with harm for testifying. His proposal for a new Rule 804(b)(6) provides as follows:

> (6) **Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that engaged in wrongdoing that foreseeably could cause, and did in fact proximately cause, ~~wrongfully caused - or acquiesced in wrongfully causing -~~ the declarant's unavailability as a witness~~, and did so intending that result~~. Proof of forfeiture may consist, in whole or part, of the same proof that the proponent offers to establish any element of a criminal offense or civil claim at issue in the trial. Except with evidence that is separately admissible, evidence offered to establish wrongdoing must be heard outside the presence of the jury. The court may consider all available evidence other than privileged information, and the court must employ the same standard of proof as set forth in Rule 104(a).

Reporter's Note: Professor Lininger of course recognizes that the Supreme Court, in *Giles v. California,* 554 U.S. 353 (2008), 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.* But he argues, in a detailed reading of *Giles,* that his proposed amendment is consistent with the Court's language and holding. If the Committee wishes to proceed with considering an amendment like that above, the Reporter will provide a further analysis of whether the proposed amendment would be found consistent with *Giles.* For now it is enough to say that Professor Lininger's argument is at the very least colorable.

Rule 807

Rule 807 permits the admission of residual hearsay only if that hearsay is "not specifically covered" by another exception. This might seem to indicate that hearsay that "nearly misses" one of the established exceptions should not be admissible as residual hearsay — because it is specifically covered by, and yet not admissible under, another exception. In fact, however, most courts have construed the term "not specifically covered" by another hearsay exception to mean "not admissible under" another hearsay exception. *See, e.g., United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1989) (grand jury statement is "not specifically covered" by another hearsay exception because it is not admissible under any such exception). *Compare United States v. Dent*, 984 F.2d 1453 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that grand jury testimony can never be admissible as residual hearsay, since such testimony is specifically covered by, though not admissible under, the hearsay exception for prior testimony).

The predominant construction of the term "not specifically covered" indicates a much more liberal use of the residual exception than was contemplated by Congress. It is fair to state that Congress intended the residual exception to be used in only exceptional circumstances. But the courts have used the residual exception more broadly than that. It is notable that the Uniform Rules Committee has added language to its version of Rule 807 to limit its scope to "exceptional circumstances".

Another possible problem with the residual exception involves the notice requirement. The Rule states that a statement "is admissible only if" the proponent gives notice before the trial or hearing, sufficiently in advance so that "the party has a fair opportunity to meet it." Most courts have read the notice requirement far more flexibly than its language would seem to indicate. For example, most courts have held that the notice requirement can be satisfied by providing notice at trial, so long as the adversary is given sufficient time to prepare. *See, e.g., United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993). Other courts have read a good cause exception into the notice requirement. *See, e.g., United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977). *But see United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978) (rejecting a good cause exception as not permitted by the text of the Rule).

If the Committee wishes to retain the rigid notice requirement in Rule 807, there is not much it can do to amend the Rule that could make the courts comply. The Rule already says that a statement may not be admitted if the notice provision is not met. An amendment such as "and we really mean it" would not seem workable. On the other hand, the Committee might wish to amend the notice requirement to codify the predominant case law, which essentially reads a "good cause" requirement into the Rule.

Assuming that the Committee wishes to amend Rule 807 to limit its scope to its original intent, and also wishes to codify the case law on notice, the Rule might look like this:

Rule 807. Residual Exception

(a) In General. ~~Under the following~~ In exceptional circumstances, the court may admit a hearsay statement ~~is not excluded by the rule against hearsay even if the statement is~~ not specifically covered by a hearsay exception in Rule 803 or 804, if the court determines that:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it, unless the court for good cause excuses advance notice.

Tender Years Exception

The Uniform Rules contain a special hearsay exception for children who are victims of physical or sexual abuse. It is similar to exceptions that are found in most states. Under Federal Practice, such statements are usually offered under Rules 803(2), 803(4) or 807. An argument can be made that each of these exceptions is an inadequate tool for regulating and admitting child hearsay in abuse cases. If the Committee believes that a special exception should be added to the Federal Rules to cover child-victim hearsay in abuse cases, an exception like that in the Uniform Rules could be added as a new Rule 808. The Uniform Rules Tender Years exception provides as follows:

Statement of Child Victim

(a) Statement of child not excluded. – A statement made by a child under [seven] years of age describing an alleged act of neglect, physical or sexual abuse, or sexual contact performed against, with, or on the child by another individual is not excluded by the rule against hearsay if:

(1) subject to subdivision (b), the court conducts a hearing outside the presence of the jury and finds that the statement concerns an event within the child's personal knowledge and is inherently trustworthy; and

(2) the child testifies at the proceeding, or the child is unavailable to testify at the proceeding, as defined in Rule 804(a), and, in the latter case, there is evidence corroborative of the alleged act of neglect, physical or sexual abuse, or sexual contact.

(b) Determining trustworthiness. – In determining the trustworthiness of a child's statement, the court must consider the circumstances surrounding the making of the statement, including:

(1) the child's ability to observe, remember and relate the details of the event;

(2) the child's age and mental and physical maturity;

(3) whether the child used terminology not reasonably expected of a child of similar age, mental and physical maturity, and socioeconomic circumstances;

(4) the child's relationship to the alleged offender;

(5) the nature and duration of the alleged neglect, physical or sexual abuse, or sexual contact;

(6) whether any other descriptions of the event by the child have been consistent with the statement;

(7) whether the child had a motive to fabricate the statement;

(8) the identity, knowledge and experience of the person taking the statement;

(9) whether there is a video or audio recording of the statement and, if so, the circumstances surrounding the taking of the statement; and

(10) whether the child made the statement spontaneously or in response to suggestive or leading questions.

(c) Making a record. – The court must state on the record the circumstances that support its determination of the admissibility of the statement.

(d) Notice. – The statement is admissible only if the proponent gives to all adverse parties reasonable notice in advance of trial — or during trial if the court excuses pretrial notice for good cause — of the nature of any statement the proponent intends to introduce at trial.

Rule 901(b)

Judge Victor E. Bianchini & Harvey Bass, in *A Paradigm for the Authentication of Photographic Evidence in the Digital Age*, 20 T. Jefferson L. Rev. 303 (1998), argue that the traditional authentication methods under the Evidence Rules may be inadequate to deal with the special risks of alteration and forgery presented by digitally produced photographic evidence. The authors contend, with some justification, that the chances of detecting a digital manipulation of a photograph are substantially less than the chances of detecting manipulation of a traditional photo. The authors propose an amendment that would add a new subdivision to Rule 901(b), to create a special category for digitally created evidence. The amendment to Rule 901(b) would read as follows:

> (b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:
>
> * * *
>
> (11) In the case of photographic evidence generated digitally from computer sources, the proponent of such evidence must make the original computer data files available for examination upon request. Computer generated negatives, prints or other images created by emulsion-based "film recorders" or other such devices capable of masking the digital nature of the source, shall not be admissible unless such prints are digitally imprinted with a "fingerprint" identifying such print as having been so generated.

Reporter's Note: This proposal might have some merit, but it probably should not be placed in Rule 901(b). That Rule simply provides illustrations of ways to authenticate evidence. It does not impose limitations. Perhaps this proposal is better placed at the end of Rule 901(a), which sets forth the standard for authenticity, or as a separate rule at the end of Article IX.

Rule 1006

Rule 1006 allows admission of summaries in lieu of having the voluminous originals presented at trial. The use of summaries in this manner should be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted. *See, e.g., Air Disaster at Lockerbie Scot. on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994) (finding no error where experts gave their opinions on the adequacy of PanAm security measures, relying from time to time on trial transcripts displayed on a projection screen; Rule 1006 objection was misplaced because the trial transcripts were records of testimony at the trial itself). Some courts have considered the "admissibility" of charts and summaries of trial evidence under Rule 1006, but this is a mistake; the Rule is really not applicable because pedagogical summaries are not evidence. See, e.g., *United States v. Sawyer,* 85 F.3d 713 (1st Cir. 1996) (applying Rule 1006 to approve the use of summaries based on evidence that had already been admitted at trial); *United States v. Stephens,* 779 F.2d 232 (5th Cir. 1985) (same).

It might be possible to alleviate some confusion by clarifying that Rule 1006 does not regulate the presentation of summaries of trial evidence. An amendment might look like this:

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court. <u>This rule does not govern the use of summaries of evidence that has been admitted at trial.</u>

The Committee Note could instruct that the use of summaries of admitted evidence is to be treated under Rules 611 and 403. *See* Federal Rules of Evidence Manual, ¶ 1006.02 [5] ("Rule 1006 allows admission of summaries in lieu of having the voluminous originals presented at trial. This use of summaries must be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted. * * * Although some courts have considered charts and summaries of admitted evidence under Rule 1006, the Rule is really not applicable, because pedagogical summaries are not evidence. Rather, they are demonstrative aids governed by Rules 403 and 611.").

"Global" Amendment

There are a number of Evidence Rules that impose a notice requirement–Rules 404(b), 412, 413-415, 609(b), 807 and 902(11)and (12). The notice requirements are not consistently written. Some have imposed specific time limits (e.g., 15 days before trial for 413-415, 14 days for 412), some employ "reasonableness." Some allow good cause excuse, some do not. It is for the Committee to decide whether it would be useful to craft a standard notice provision that would be used for all of the Evidence Rules that require notice.

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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: March 1, 2012

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 Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases are grouped by subject matter, and sequentially by circuit within a particular topic.

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 any emergency or public risk 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.

11. Certificates of nonexistence of a record, prepared solely for litigation (after *Melendez-Diaz v. Massachusetts*).

12. Autopsy reports prepared at the behest of or with the participation of law enforcement.

Hearsay Found Not Testimonial:

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

2. Autopsy reports (at least if prepared independently of law enforcement).

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. Warrants of deportation and other immigration documents.

7. Entries into a regulatory database.

8. Statements made for purpose of medical treatment.

9. 911 calls reporting crimes or emergencies.

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

11. Accusatory statements in a private diary.

12. Odometer statements prepared before any crime of odometer-tampering occurred.

13. A present sense impression describing an event that took place months before a crime occurred.

14. Business records — including certificates of authenticity of business records prepared for trial, even after *Melendez-Diaz*.

15. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

16. Judicial findings and orders entered in one case and offered in a different case.

17. Informal statements made with no law enforcement officers present.

Suggestions for 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 *Michigan v. Bryant* 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 much of that uncertainty. Questions remain about whether statements to a person who is not a law enforcement official can ever be testimonial (probably note); whether and when statements made to law enforcement officials responding to an emergency become testimonial (because the Court's test for such statements is multi-factor and fuzzy); and whether testimonial statements violate the Confrontation Clause when they are offered only as part of the basis of an expert opinion (the Supreme Court is considering that question this term in *Williams v. Illinois*).

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 amendment to Rule 804(b)(3), which went into effect on December 1, 2010, has 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 many of the hearsay exceptions seem sound given the case law after *Davis* and now *Michigan v. Bryant*. For example, the cases have essentially held that if a statement fits the declaration against interest exception, it is for that reason non-testimonial after *Davis* — because to be admissible it will have to be made in informal circumstances with no law enforcement involvement. Courts have reached similar conclusions with respect to business records, public records, co-conspirator statements, state of mind statements, and others: the factors that make hearsay statements admissible under these exceptions by definition mean that the statements cannot be testimonial. The only glaring exception is Rule 803(10), which allows admission of certain certificates that are clearly testimonial under the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*. As you know, the Committee has proposed an amendment to Rule 803(10) that would provide a notice-and-demand procedure approved by the Court in *Melendez-Diaz.* That amendment is currently out for public comment.

A sweeping integration of *Crawford* standards into the Federal Rules is therefore probably unwarranted. Moreover, the Supreme Court does not appear finished in developing its *Crawford* jurisprudence. *Bryant* represents a shift to a more reasoned, less radical application of the Confrontation Clause, indicative of the change in personnel since the Court's last visit to the Confrontation Clause in *Melendez-Diaz*. Justices Stevens and Souter were two of the strongest supporters of *Crawford*. One of the replacements, Justice Sotomayor, wrote an opinion on the Second Circuit that called for a limited application of *Crawford* — specifically a limited definition of testimoniality. And she wrote the very pragmatic majority opinion in *Bryant.* And her concurring opinion in *Bullcoming* also shows a practical, rational approach. Moreover, the Supreme Court has taken a case for the next term that will consider whether the Confrontation Clause bars expert testimony that is based on testimonial hearsay. This activity in the Supreme Court cautions against any retooling of the hearsay rules at this time.

Cases Defining "Testimonial" Hearsay After Crawford, Arranged By Subject Matter

"Admissions" — Hearsay Statements by the Defendant

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.

Note: The *Lopez* court 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 a statement 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 applicable unless accomplice's hearsay statement is testimonial: *United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the

"*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

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. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause.

The defendant's own statements are 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* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. 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. Thus, the *Bruton* problem was resolved by a limiting instruction.

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* because 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); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements

at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that argument would mean that all hearsay is testimonial. The court observed that "*Crawford's* emphasis clearly is on whether the statement was 'testimonial' at the time it was made."

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)); ***United States v. Damra,*** 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator "by their nature are not testimonial").

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 noted that the statements "clearly were not made under circumstances which would have led [Daryl] 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." The court concluded as follows:

> 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.

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely "bragging to a friend" and not a formal statement intended for trial.

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 223 (2d Cir. 2004) (Sotomayor, J.): 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. After *Williamson v. United States,* hearsay 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 not 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. The court did not consider whether the confessions were admissible under a hearsay exception — but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

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 accomplice statements knowingly made 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.").

Statement admissible as a declaration against penal interest is not testimonial: ***United States v. Johnson,*** 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession

of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant. The defendant argued that the inquiry into testimoniality should focus on the questioner — in this case an informant encouraged by the government to obtain a statement from the declarant. But the court stated that "our precedent makes clear that the intent of O'Reilly, the declarant, determines whether the statements on the tape-recording are testimonial."

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, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because 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."

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 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.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls,* 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The statements were not testimonial because they were not made with "the primary purpose * * * of establishing or proving some fact potentially relevant to a criminal prosecution." The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. Finally, the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

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 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**.**

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal investigation or prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 131 S.Ct. 1143 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter — and admitted as an excited utterance under a state rule of evidence — was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis*— whether the primary motive for making the statement was to have it used in a criminal prosecution — and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.

2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's "primary purpose." An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency — unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, this dispute's potential scope and thus the emergency indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When

the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a "primary purpose" "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" — essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggests that their primary purpose was to address what they considered to be an ongoing emergency — apprehending a suspect with a gun — and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

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." 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. It is especially consistent with the pragmatic approach to finding an emergency that the Court found in *Michigan v. Bryant.***

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 * * *. 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.

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.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

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. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency that the Court found in *Michigan v. Bryant.*

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 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. * * * 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. It is especially consistent with the pragmatic approach to finding an emergency that the Court found in *Michigan v. Bryant.*

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, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

Note: Justice Sotomayor's opinion concurring in the judgment in *Bullcoming v. New Mexico, infra,* lends support to the D.C. Circuit's holdings as well as those of other courts in this headnote. That is especially so given the likelihood that her opinion on the matter would be joined by the four dissenters in *Melendez-Diaz.*

***See State v. Roach*, 2011 WL 3241467 (N.J.Super.A.D. 2011), in which the court relied on Justice Sotomayor's *Bullcoming* concurrence to hold that an expert's reliance on testimonial evidence does not violate the Confrontation Clause where the testimonial evidence is not admitted for its truth:**

> [M]ost importantly for the present case, Justice Sotomayor made clear that the Court's holding in *Bullcoming* did not necessarily extend to a situation "in which an expert witness was asked for his [or her] independent opinion about underlying testimonial reports that were not themselves admitted into evidence."...In this regard, Justice Sotomayor's concurrence alluded to Federal Rule of Evidence 703, which permits the discussion of "facts or data" that are not admitted into evidence, on certain conditions, by a testifying expert witness.

Confrontation Clause violated where expert does no more that restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez,* 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant's vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz,* and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant's right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

> The government argues primarily that, unlike in *Melendez–Diaz,* Morales's testimony constituted permissible expert review of Borrero's report, which was itself never actually offered as evidence. See Fed.R.Evid. 703. Absent further clarification from the Court, the reconciliation of *Crawford, Melendez–Diaz,* and *Bullcoming*—which forbid the introduction of testimonial hearsay as evidence in itself—with Rule 703, which permits expert reliance on otherwise inadmissible testimonial hearsay, will necessarily involve a case-by-case assessment as to the quality and quantity of the expert's reliance.
>
> More specifically, the assessment is one of degree. Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. *See*

United States v. De La Cruz, 514 F.3d 121, 134 (1st Cir.2008) (holding that the Confrontation Clause does not limit experts offering their own opinion regardless of the independent admissibility of the material relied upon); see also *Bullcoming*, 131 S.Ct. at 2722 (Sotomayor, J., concurring) ("[T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."). Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) ("[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay," there is likely a Crawford violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) ("[T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion."). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to "say what are the results of the test," and he did exactly that, responding "[b]oth bricks were positive for cocaine." This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

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 (2nd Cir. 2007): In an extortion case, the government called a criminal investigator who testified as an expert about the structure of La Cosa Nostra and 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. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson,* 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The Court noted that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts — as it was in this case. It stated that "[w]ere we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases." The Court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010): *Crawford* "does not prevent expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence." In this case, the court found that the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."

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.

Note: The court's holding in *Moon* — and the cases immediately below — is not impacted by the Supreme Court's decision in *Bullcoming v. New Mexico,* discussed *infra*. In *Bullcoming* the certificate — which was testimonial hearsay — was admitted for its truth and the government did not offer expert testimony. The question of whether an expert may testify

on the basis of testimonial hearsay is being taken up by the Supreme Court in the 2011-2012 term.

Expert reliance on drug test conducted by another does not violate *Melendez-Diaz: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010): At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant — the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, holding that "the government's expert witness was properly allowed to rely on the information gathered and produced by a lab employee who did not testify at trial." The court emphasized that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own. It concluded that "the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." The defendant argued that the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009), requires that any official involved in forensic testimony must be produced for cross-examination. But the court rejected that broad reading of *Melendez-Diaz*, reading the case as only prohibiting the introduction of *certificates* of forensic testimony, without any supporting testimony. The court observed that "*Melendez-Diaz* did not do away with Federal Rule of Evidence 703." ***See also United States v. Thornton,*** 642 F.3d 599 (7th Cir. 2011) (no error in allowing expert to testify to the place of manufacture of ammunition as he was relying on records prepared by manufacturers in the course of business).

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo,* 625 F.3d 1285 (10th Cir. 2010): The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. But the court found no plain error and affirmed the convictions. The court reasoned that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion — which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

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,* 554 U.S. 353 (2008): The Court 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. The Court 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 — presumably because the primary motivation for making such statements is for something other than use at trial.

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 more than one motivation for disposing of a witness. 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.

Retaliatory Murder of Witnesses Who Testified Against the Accused in a Prior Case Is Not a Forfeiture in the Trial for Murdering the Witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two

witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

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.

Implied Testimonial Statements

Testimony that a police officer's focus changed after hearing a statement impliedly

included accusatorial statements from an accomplice and so violated the defendant's right to confrontation: ***United States v. Meises,*** 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it made no difference that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court noted that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form."

Statements to Law Enforcement Were Testimonial, and Right to Confrontation Was Violated Even Though They Were Not Stated in Detail at Trial: ***Ocampo v. Vail,*** 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the Court found that the state court unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the Court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language — contradictions, hesitations, and other clues often used to test credibility — are lost, and instead a veneer of objectivity conveyed.
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> * * *
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> Whatever locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

Informal Circumstances, Private Statements, etc.

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 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."

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.

Informal conversation between defendant and undercover informant was not testimonial under *Davis: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The court noted that under *Davis,* a statement is not testimonial unless it was made with the awareness of its possible use at trial. Therefore, the defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, the court reasoned that under *Davis* it is not enough that the declarant might anticipate that his statement could be used at trial — that is only one component of the definition of "testimonial." The court declared that a statement to be testimonial must also be "formalized" in the nature of the "core class" of statements identified by the court in *Crawford* and *Davis.* In this case, the informant's statements were not made under formal circumstances, and "anything he said was meant not as an accusation in its own right but as bait."

Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the

defendant's statement does not violate the confrontation clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context — therefore it does not violate the right to confrontation because it is not offered as an accusation

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: *Miller v. Stovall,* 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement — especially because the declarant was a former police officer.

> **Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis*. The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.**

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken,* 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime — but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson

to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

> McNeese was acting as a government agent when he received the maps from Johnson. McNeese most likely anticipated Johnson's maps would be used at a later trial. However, we conclude that the proper focus is on Johnson's expectations as the declarant, not on McNeese's expectations as the recipient of the information. Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

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 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 court held that 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): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he 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 intent 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.

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

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 admission 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.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The Court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court found that the only difference between the questioning in this case and that in *Crawford* was that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same." But the court found that this was "a distinction without a difference" because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

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.

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.

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). ***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.").

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.

> **Note: In her critical concurring opinion in *Bullcoming v. New Mexico,* Justice Sotomayor emphasized that the Court had not ruled on whether a simple printout from a machine was testimonial. A fair inference from the opinion is that Justice Sotomayor and the four dissenters in *Bullcoming* would hold that a machine printout is not**

testimonial even if prepared for purposes of litigation.

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."

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

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 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 statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *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 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."

Accomplice statements purportedly offered for "context" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted to provide context. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements."

Accomplice's confession, when offered to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United*

States v. Cruz-Diaz, 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay — as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" — for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Confrontation Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case."

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 (2nd 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."

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.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2nd 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 (2nd 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, 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 admitting 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 statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *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.").

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give limiting instruction was error: *Adamson v. Cathel,* 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplice confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.

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 accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz,* 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial — because it was an accusation made to a police officer — but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay — and so even though testimonial did not violate the defendant's right to confrontation — because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him.

Statement offered to prove the defendant's knowledge of a crime was non-hearsay and

so did not violate the accused's confrontation rights: ***United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had confessed to police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

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." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

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. Those 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, stating "[w]e 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." ***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."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth"); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation); ***United States v. Gaytan,*** 649 F.3d 573 (7th Cir. 2011) (undercover informant's statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: "Gaytan's responses ['what you need?' and 'where the loot at?'] would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock'"; the court noted that there was no indication that the informant was "putting words in Gaytan's mouth").

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."

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth — that the witness saw the man he described pointing a gun at people — but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers' actions in the course of their investigation — "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to by crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

> The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context — even if the CI's

statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

Statements by confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent — after defense counsel had questioned the connection of the defendant to the residence — the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and the propriety of the investigation was not disputed. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh." ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted — that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here.").

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain

why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement was not offered for its truth, "it does not implicate the confrontation clause."

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, made to police officers, 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."

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Fielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate 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).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,* 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."**

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.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* — beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation — are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of some lower

courts that have admitted autopsy reports and other certificates after *Crawford* — these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case." Again, some lower courts after *Crawford* had distinguished between ministerial affidavits on collateral matters from Raleigh-type ex parte affidavits; this reasoning is in conflict with *Melendez-Diaz*.

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all — because a machine can't make a "statement" — and have also held that a machine's output is not "testimony" within the meaning of the Confrontation Clause. This case law appears to survive the Court's analysis in *Melendez-Diaz.*

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

6. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that merely authenticate proffered documents are not testimonial.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record.

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a

"conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case is prohibited.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Judge Ginsburg, writing for the Court, declared as follows:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Probably the most important part of the case is Justice Sotomayor's concurrence in the judgment, which emphasized the limits of the Court's holding:

> Although this case is materially indistinguishable from the facts we considered in *Melendez–Diaz*, I highlight some of the factual circumstances that this case does not present.
>
> First, this is not a case in which the State suggested an alternate purpose, much less an alternate primary purpose, for the BAC report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment. See *Giles v. California*, 554 U.S. 353, 376 (2008) ("[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules").
>
> Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. Razatos conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. * * * It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree

of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.

*Third, this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. See Fed. Rule Evid. 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted). * * * [T]he State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration. * * * Here the State offered the BAC report, including Caylor's testimonial statements, into evidence. We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.*

Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph. The State here introduced Caylor's statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the procedures used in handling the blood sample. Thus, we do not decide whether, as the New Mexico Supreme Court suggests, 226 P.3d, at 10, a State could introduce (assuming an adequate chain of custody foundation) raw data generated by a machine in conjunction with the testimony of an expert witness. (Emphasis added).

Justice Kennedy, joined by the Chief Justice and Justices Breyer and Alito, dissented in *Bullcoming* for essentially the same reasons that they dissented in *Melendez-Diaz.* If Justice Sotomayor would, as seems likely, come out differently on any of the factual scenarios she presented, then she would surely be joined by the four dissenters. Thus it appears likely that if an expert testifies to his own independent conclusions about the substance, and the test is not itself admitted, the defendant's Confrontation rights would not be violated. Also if the evidence is simply machine-generated, it seems likely that the Court would find no Confrontation violation in admission of the machine output.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

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 reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate 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.

Note: While 902(11) may still be viable after *Melendez-Diaz*, some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court seems to reject the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority rejected the government's argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

The *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. But while Rule 902(11) does have a notice and procedure, there is no provision for a demand for production of government production of a witness.

It can be argued that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial. But the problem with that argument is that the certificate does more than establish the genuineness of the business record.

Despite all these concerns, the lower courts *after Melendez-Diaz* have rejected Confrontation Clause challenges to the use of Rule 902(11) to self-authenticate business records. See the cases discussed under the next heading — cases on records after *Melendez-Diaz*.

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."

Note: Other circuits before Melendez-Diaz have reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting 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."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is 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. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation s recorded routinely and not in preparation for a criminal trial").

Note: Warrants of deportation probably still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition the crime has not been committed at the time it's prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial.

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.

Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved.

Autopsy report found 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). 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" but rather defines testimonial as requiring a "primary motivation" for use in litigation. With respect to Rule 803(8), 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.

Note: The court's emphasis on a practical result is problematic under the majority's analysis in *Melendez-Diaz.* The dissenters in *Melendez-Diaz* argued vehemently that requiring live testimony of the analyst would be impractical and would impose substantial and sometimes insurmountable obligations on the government. The majority's response was that it had no authority to consider burdens, because the certificate was testimonial and admission of testimonial hearsay in the absence of cross-examination violates the Confrontation Clause.

This does not mean, however, that autopsy reports are automatically testimonial after *Melendez-Diaz.* The forensic report in *Melendez-Diaz* was prepared *solely* for litigation and so fit squarely within the Court's definition of "testimonial." Under

> ***Davis*, it is not enough that a report might foreseeably be used in a litigation — use in litigation has to be the *primary purpose* of the report. Under that test, a good argument can still be made that many autopsy reports are not testimonial. The question is likely to turn upon the degree of law enforcement involvement in the preparation of the autopsy report — that appears to be the focus of the autopsy report cases issued after *Melendez-Diaz* (those cases are discussed below).**

See also Vega v. Walsh, 2012 WL 516203 (2nd Cir.) (in a habeas case, state court's determination that autopsy report was not testimonial was not an unreasonable application of federal law: "although autopsies are often used in criminal prosecutions, they are also prepared for numerous other reasons-including the determination of cause of death when there is no anticipation of use of the autopsy in any kind of court proceeding").

Certificate of the non-existence of a public record found 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.

Note: Other courts have found that certificates proving the absence of public records are not testimonial. See, e.g.: United States v. Urqhart, 469 F.3d 745 (8th Cir. 2006) (arguing that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford*."); ***United States v. Cervantes-Flores,*** 421 F.3d 825 (9th Cir. 2005) (noting 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 would still be so because the certificate is prepared solely for purposes of litigation).

> **Note: For reasons discussed in the analysis of *Melendez-Diaz, supra,* it is pretty certain that CNR's are testimonial, and that the above cases are no longer good law. Certificates offered to prove the absence of a public record are prepared solely for purposes of litigation. Nor is it relevant under *Melendez-Diaz* that the records are not about contested historical facts like the *ex parte* testimony in the Raleigh case. *See United States v. Norwood,* 595 F.3d 1025 (9th Cir. 2010) (after *Melendez-Diaz,* government concedes that certificate of the absence of a public record, prepared for trial, was testimonial).**

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*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared for litigation and no certificate or affidavit was prepared for use in the litigation.

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."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz.*

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 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. * * * 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.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are certainly similar to those in *Melendez-Diaz*. That said, toxicology tests conducted by *private* organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz*, the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility.

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 it was 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.

Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. On the other hand, as discussed above, Rule 902(11) might well be upheld as a rule simply permitting the authentication of a record.

Note: The Tenth Circuit has held that the reasoning of *Ellis* remains sound after *Melendez-Diaz. See United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011), infra.

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.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation.

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that the her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared 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."

> ***Note:*** **The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

Absence of records in database 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."

> **Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is only about the absence of public records — records that were not prepared in testimonial circumstances. If that absence had been proved by a *certificate,* then the Confrontation Clause, after *Melendez-Diaz,* would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial.**

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "it appears from an examination of the files in this office" that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation — they "respond[ed] to a prosecutor's question with an answer."

> **Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk's letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**
>
> **Note: The case also highlights the question of whether a certificate qualifying a business record under Rule 902(11) is testimonial under *Melendez-Diaz.* The letters did not come within the narrow "authentication" exception recognized by the *Melendez-Diaz* Court because they provided "an interpretation of what the record contains or shows." Arguably 902(11) certificates do just that. But because the only Circuit Court case on the specific subject of Rule 902(11) certificates finds that they are *not* testimonial, there is certainly no call at this point to propose an amendment to Rule 902(11).**

Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz: United States v. Moore,* 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

> The Office of the Medical Examiner is required by D.C.Code § 5–1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner]—use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports."

> These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez–Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent. See *Melendez–Diaz*, 129 S.Ct. at 2532; cf. *Michigan v. Bryant*, —— U.S. ——, 131 S.Ct. 1143, 1155–56, 179 L.Ed.2d 93 (2011).

Finally, the court rejected the government's argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence.

State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: *Nardi v. Pepe,* 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. It also noted that even if an autopsy report is testimonial, it would not necessarily violate the Confrontation Clause to have an expert rely on it. The court reasoned as follows:

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez–Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133–34 (1st Cir.2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with "clearly established" law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.
>
> It is also unclear whether, even if the Court were to so classify them, the admissibility of in-court expert testimony that relied in some measure on such a report would be affected. In such a case, a witness exists who can be cross-examined; and a long tradition exists of allowing experts to rely on hearsay where it is common practice in the profession to rely upon such evidence. E.g., Fed.R.Evid. 703. One of the common examples is a testifying

doctor who relies in part on medical tests or specialist reports.

> Many experts in trials, in one degree or another, rely on information supplied by others who are not present to testify. Several circuits, in addition to our own in De La Cruz, 514 F.3d at 134, have said that the Confrontation Clause does not limit experts offering their own opinion regardless of the independent admissibility of the material relied upon. The Supreme Court is now considering whether the expert may disclose that material to explain the opinion's foundation. *People v. Williams*, 238 Ill.2d 125, 345 Ill.Dec. 425, 939 N.E.2d 268 (2010), cert. granted, —— U.S. ——, 131 S.Ct. 3090, 180 L.Ed.2d 911 (2011).
>
> In all events, we stress the present uncertainty of the law only to emphasize that it was even more unsettled at the time of *Crawford* just how far that decision would be extended beyond statements taken by the police for specific use at trial. Certainly it was not clearly established law at the time of the SJC decision that any part of Dr. McDonough's testimony violated clearly established Supreme Court precedent. That is enough to resolve this case.

Business records are not testimonial: *United States v. Bansal,* 663 F.3d 634 (3rd Cir. 2011): In a money laundering prosecution the trial court admitted records kept by domestic and foreign businesses of various transactions. The Court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement — and because the accomplice was not produced to testify — admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

> ***Note:*** **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record — the cohort's production of the records at a proffer session — was testimonial.**

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Masher,* 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, "*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see Melendez-Diaz,* 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial))." ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.").

Prior conviction in which the defendant did not cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic,* 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter — specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by

introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* the record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal — or, for that matter, any business or public record — could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction.

Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez,* 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents — a Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge — were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records are not testimonial: *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz,* but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of

authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

See also United States v. Keck, 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records — the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in Melendez-Diaz), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *
>
> The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. See *Davis*, 547 U.S. at 828, 830 (focusing on the primary purpose of the 911 operator's interrogation in determining whether the answers elicited were testimonial). The district court properly ruled that the primary purpose

of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

Summary charts of admitted business records is not testimonial: *United States v. Naranjo,* 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[b]usiness records are not testimonial." And "[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial."

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,* 2012 WL 149314 (11th Cir.): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that the admission of autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were filed from an arm of law enforcement. The court reasoned as follows:

> We think the autopsy records presented in this case were prepared "for use at trial." Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. § 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. Id. The medical examiner for each district "shall determine the cause of death" in a variety of circumstances and "shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney." Fla. Stat. § 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section § 406.11 has a duty to report the death to the medical examiner. Id. at § 406.12. Failure to do so is a first degree misdemeanor. Id.
>
> * * *
>
> In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

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 at trial 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."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial — even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements."

Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person."

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. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) ("Although Gibson's statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey's counsel.").

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial — even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation."

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial and was subject to unrestricted cross-examination.

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,* 549 U.S. 406 (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.* (Emphasis added).

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.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

See also United States v. Barraza, 576 F.3d 798 (8th Cir. 2009) (defendant could not rely on

Roberts test to exclude non-testimonial hearsay admissible under Rule 803(3) as a statement of the victim's state of mind).

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TAB 7

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FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Symposium on Rule 502
Date: March 1, 2012

For the last year or so the Chairs of the Standing Committee (Judge Rosenthal and Judge Kravitz) have been thinking about ways that the Rules Committee can work to increase the visibility — and use by lawyers — of Evidence Rule 502. Rule 502 was enacted in 2008 and even though it can be used to reduce discovery costs there is at least anecdotal evidence that lawyers have not used it as frequently as might be anticipated. There is also anecdotal evidence that clients are not aware that the Rule exists, must less that it can reduce the costs of discovery.

At the last Standing Committee meeting, Judge Fitzwater and the Reporter proposed to Judge Kravitz that the Evidence Rules Committee, as part of its Fall 2012 meeting in Charleston, put together a symposium on the Rule 502. The goals of the symposium will be to analyze some of the 502 case law; get views of judges and lawyers on how the Rule does and should work; and explore ways to increase the visibility and use of Rule 502. The University of Charleston School of Law has enthusiastically agreed to assist the Committee in putting on the symposium.

Judge Fitzwater and the Reporter have begun the effort to put the symposium together. We have commitments from the following people, all of whom have substantial experience with Rule 502.

Judges

- Hon. Lee Rosenthal, who single-handedly pushed Rule 502 through Congress.
- Hon. Mark Kravitz, Chair of the Standing Committee.
- Hon. Paul Grimm, Chief Magistrate Judge, D.Md., who has written the definitive article on Rule 502.
- Hon. John Facciola, Magistrate Judge, D.D.C., author of two leading cases on Rule 502.
- Hon. Geraldine Soat Brown, Magistrate Judge, N.D. Ill., author of a leading case on Rule 502.

Practitioners — All Leading Authorities on Complex Litigation and Electronic Discovery

- Gregory Joseph, Esq., Law Offices of Gregory Joseph, New York City — an original member of the reconstituted Evidence Rules Committee.
- John Barkett, Esq., Shook, Hardy & Waite, Miami.
- Ariana Tadler, Esq., Milberg LLP, New York City.
- Maura Grossman, Esq., Weil Gotshal, New York City.
- Steven Morrison, Esq., Nelson Mullins, Columbia, S.C.
- Gedney Howe, Law Offices of Gedney Howe, Charleston, S.C.
- Daniel Smith, Esq., Trial Attorney, Environmental Enforcement Division, Department of Justice — author of a good article on Rule 502 in the U.S. Attorney's Bulletin.

Professors

- Ann Murphy, Gonzaga Law School, author of articles on Rule 502.
- Allison Haynes, University of Charleston School of Law, and expert on electronic discovery.

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The symposium will be held on the morning of Friday, October 5, at the University of Charleston School of Law. The Fall meeting of the Committee will be held thereafter, on Friday afternoon. The symposium proceedings will be published in the Fordham Law Review.

Members of the Standing Committee will be invited to attend, as well as members of the University of Charleston community. The Symposium will be open to the public.

_____

We will discuss plans for the symposium at the Spring meeting, and we invite and encourage any suggestions that Committee members may have. For example, we have intentionally avoided filling up the panels for the symposium. If anyone has a suggestion for topics, symposium participants, or anything else please let us know.

TAB 8

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MEMORANDUM

To: Advisory Committee on Evidence Rules

From: Ken Broun, Consultant

Re: Survey Rule on Spousal Testimony Privilege

Date: Feb. 28, 2012

Following is a draft of a survey rule and commentary dealing with the spousal testimony privilege. This work is part of my ongoing project to provide updates to the Committee with regard to the federal law of privilege. My goal is to publish all of the work I have done on the testimonial privileges in the federal courts, possibly as a monograph to be published by the Federal Judicial Center. If and when published, the monograph will indicate that the work was done with the support of the Committee, but that it is NOT a Committee-approved rule in any sense. The work is intended as informational only. That being said, I would very much welcome your comments and suggestions with regard to this and any of the other work I have done with regard to this project.

SPOUSAL TESTIMONY PRIVILEGE

(a) Definition. As used in this rule a "spouse" is either partner to a marriage recognized as such under the law of the state in which the partners reside.

(b) General Rule of Privilege. The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

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

(1) [As to matters occurring prior to the marriage;]

(2) [Where the spouses acted jointly in the commission of the crime charged;]

(3) In any proceeding in which one spouse is charged with a crime against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime is committed in the course of committing a crime against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse.

COMMENTARY ON THE SPOUSAL TESTIMONY PRIVILEGE

In General

The spousal testimony privilege must be distinguished from the marital communications privilege, which is a separate rule of law that protects confidential communications between spouses during their marriage. There is another Survey Rule governing that privilege.

The spousal testimony privilege was severely limited by the United States Supreme Court in *Trammel v. United States,* 445 U.S. 40 (1980). Prior to *Trammel*, a defendant in a criminal case could invoke the privilege to prevent a spouse from testifying against him or her. After *Trammel,* the privilege is vested only in the testifying spouse who is competent but not compellable to testify.

The draft Federal Rules of Evidence, submitted to Congress but not enacted, contained Rule 505. Proposed Rule 505 set out a husband-wife privilege like the one that existed before the *Trammel* case – a privilege that permitted a defendant in a criminal case to prevent a spouse from testifying against him. Because of the dramatic change in the law as a result of *Trammel*, Proposed Rule 505 gives little guidance as to the state of the law with regard to the present dimensions of the privilege. Not surprisingly, the fact that the privilege is vested only in the testifying spouse makes its invocation significantly less frequent.

As a result of the infrequency of the invocation of the privilege, the case law dealing with it since *Trammel* is very thin. Furthermore, the federal case law that does exist is often conflicting and it is difficult precisely to set forth the dimensions of the privilege. Much is yet to be resolved.

Perhaps the best background for analysis of the privilege as it presently stands is contained in the language in *Trammel* in which the Court rejected the contemporary justification for a privilege that could be invoked by the accused spouse – the preservation of marital harmony. The Court said: (445 U.S. at 52-53):

> When one spouse is willing to testify against the other in a criminal proceeding – whatever the motivation – their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace. Indeed, there is reason to believe that vesting the privilege in the accused could actually undermine the marital relationship. For example, in a case such as this the Government is unlikely to offer a wife immunity and lenient treatment if it knows her husband can prevent her from giving adverse testimony. If the Government is dissuaded from making such an offer, the privilege can have the untoward effect of permitting one spouse to escape justice at the expense of the other. It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband's control over her testimony.

Courts dealing with the spousal testimony privilege after *Trammel,* have tended to view the application of the privilege or the existence of an exception in light of likely impact of the decision on marital harmony as described by the Supreme Court.

(a) Definition. As used in this rule a "spouse" is either partner to a marriage recognized as such under the law of the state in which the partners reside.

The few federal cases dealing with the issue have looked to the state in which the partners resided to determine the validity of the marriage. *United States v. Acker,* 52 F.3d 509 (4th Cir. 1995) (no valid marriage in either of the states in which the individual co-habited); *United*

States v. White, 545 F.2d 1129 (8th Cir. 1976) (couple cohabited in Arkansas, a state that does not recognize common law marriage).

Using the state of residence at the time of the invocation of the privilege is consistent with the law dealing with the marital communications privilege, which looks to the state in which the partners resided at the time of the communications. *See People v. Schmidt,* 579 N.W. 2d 431 (Mich. App. 1998); 1 McCormick on Evidence, § 81 (6th ed. 2006).

The definition does not attempt to deal with the situation in which the partners are not currently living together. They may have resided in more than one state and the states in which they had resided had divergent rules on the validity of the marriage. The situation could arise with regard to divergent state laws with regard to the status of same-sex marriages. In this rare situation, despite the absence of authority, the court logically would seem likely to base its decision on the validity of the marriage in the last state in which the parties had cohabited.

The definition also does not attempt to deal with the issue of the application of the privilege where the marriage is deemed to be a fraud. *See Lutwak v. U.S.,* 344 U.S. 604, 73 S. Ct. 481 (1953) (no privilege to refuse to testify where the "relationship was entered into with no intention of the parties to live together as husband and wife but only for the purpose of using the marriage ceremony in a scheme to defraud); *U.S. v. Apodaca*, 522 F.2d 568 (10th Cir. 1975) (spousal testimony privilege does not apply where marriage is a fraud); *In re Grand Jury Proceedings,* 777 F.2d 508 (9th Cir. 1985) (recognizing the rule but finding that the marriage was not a sham). Only one of these cases, *In re Grand Jury Proceedings,* was decided after *Trammel.* Although the issue could arise even after *Trammel,* it would seem less likely to be a problem where the privilege is vested only in the testifying spouse. *See also* discussion of exception (c) (1), matters occurring prior to the marriage.

(b) General Rule of Privilege. The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

The statement of the privilege is based on the *Trammel* case. The language is identical to Uniform Rule of Evidence 504 (c).

There is some authority for the expansion of the privilege beyond criminal prosecutions to proceedings that could result in a criminal prosecution of a spouse. In *United States v. Yerardi,* 192 F.3d 14 (1st Cir. 1999) the court held that the spousal testimony privilege could apply in a criminal forfeiture case. However, the court noted that the government could overcome the

privilege by filing an affidavit promising that it would not use, either directly or indirectly, the compelled testimony of the wife in subsequent criminal proceedings against her husband. The privilege may also be invoked in grand jury proceedings, at least where the testimony might indirectly implicate a spouse. *See In re Grand Jury Matter,* 673 F.2d 688 (3d Cir. 1982) (wife's testimony was sufficient adverse to husband's interests to enable her to invoke the privilege in testimony before grand jury); *See also In re Grand Jury Subpoena of Ford,* 756 F.2d 249 (2d Cir. 1985) (government's promise not to use the grand jury testimony of the witness-spouse against the non-witness spouse sufficient to avoid privilege).

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

(1) [As to matters occurring prior to the marriage;]

Some, but not all, of the federal courts dealing with the issue, have required a spouse to testify to matters occurring prior to the marriage. Proposed Federal Rule 505 (c) (2) contained such an exception. Because of the split of authority on the issue, this exception appears in the Survey Rule in brackets.

The leading case since *Trammel* reaffirming the exception is *United States v. Clark,* 712 F.2d 299 (7th Cir. 1983). In *Clark,* the court relied on an earlier Seventh Circuit decision, decided before *Trammell, United States v. Van Drunen,* 501 F.2d 1393 (7th Cir. 1974). The court in *Van Drunen* had refused to refused to exempt the spouse from testifying based upon the exception contained in Proposed Rule 505 (c)(2) and because of the possibility that marriages would be entered into for the purpose of suppressing testimony. The defendant in *Clark* argued that the exception should not be applied because there was no evidence that the marriage was a sham. The court stated (712 F.2d at 302):

> Although it is true that *Van Drunen* created the premarriage acts exception because of a concern with collusive marriages, there is nothing in the opinion to suggest that the exception applies only when there is evidence presented of a collusive marriage. By imposing a general rule that the privilege does not cover premarriage acts, courts can avoids mini-trials on the issue of the sincerity of the parties in getting married. The limitation on the scope of the privilege of a spouse not to testify is consistent with the general policy of limiting the privilege because it interferes with fact-finding. . .

> Also, the failure of Congress to adopt proposed Fed.R.Evid 505(c) did not signal the rejection of the premarriage acts exception. Fed. R.Evid. 501 allows the scope of privileges to 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." In rejecting the specific rule relating to a husband-wife privilege, Congress manifested an intention to provide courts with the flexibility to develop rules of privilege on a case-by-case basis. *[*citing *Trammel].*

In further support, the court cited two pre-*Trammel* decisions from other circuits, *United States v. Pensinger,* 549 F.2d 1150, 1151 (8th Cir. 1977) and *Volianitis v. Immigration and Naturalization Service,* 352 F.2d 766, 768 (9th Cir. 1965). It distinguished a Sixth Circuit case, *United States v. Barlow,* 693 F.2d 954, 961-62 (6th Cir. 1982) as involving the application of the unavailability requirement under Federal Rule 804(a) rather than making a determination of the applicability of the spousal testimony privilege. Although the court was correct in its analysis of the *Barlow* case, neither the *Pensinger* nor the *Volianitis* cases involved the spousal testimony privilege. Both were cases in which the court held that the *marital communications* privilege did not apply to communications prior to marriage – holdings clearly consistent with the law governing that distinct privilege.

The exception was also recognized in *In re Grand Jury Subpoena of [Witness],* 884 F. Supp. 188 (D. Md. 1995). In that case, the court struggled with the issue of whether the marriage was a sham. It finally decided that it was not. However, the court was still troubled by the invocation of the privilege in circumstances in which the validity of the marriage was in doubt. Following *Clark,* it held that "Particularly in light of the facts in the instant case, the spousal privilege should not be available to block testimony as to events and communications occurring prior to marriage." (884 F. Supp. at 191-92).

Other courts have unequivocally rejected the exception for matters occurring prior to the marriage. A few years after the *In re Grand Jury Subpoena of [Witness]* case, the same district court distinguished that case on its facts and held that there was no such exception. In *A.B. v. United States,* 24 F. Supp. 2d 488, 492 (D. Md. 1998), the court stated:

> . . . once a court determines that a valid marriage exists, the privilege against adverse spousal testimony should apply to all matters, whether they occurred before or after the marriage. Only where there is evidence that a marriage is simply a fraud or a sham (not claimed to be the case here) should a court forbid the invocation of the marital privilege. Although it may be necessary for court to delve occasionally into peripheral issues in

determining the legitimacy of a marriage, this is a far more satisfactory outcome than simply eliminating all premarriage matters from the scope of the privilege.

The exception was also rejected in *in re Grand Jury Proceedings (86-2),* 640 F. Supp. 988, 992 (E.D. Mich. 1986) whether the court stated that such a broad based exception would "threaten to render the entire privilege and its purpose meaningless."

Even in the Seventh Circuit in which the *Van Drunen* and Clark cases were decided, later cases include dicta stating that the marital communications privileges includes matters which occurred prior to the marriage. *United States v. Lofton,* 957 F.2d 476 (7th Cir. 1992); *United States v. Byrd,* 750 F.2d 585 (7th Cir. 1984).

Based on this limited authority, it is difficult to predict whether the exception for matters occurring prior to the marriage will be adopted in the future or, if adopted, will be limited to cases in which the validity of the marriage is in question.

(2) [Where the spouses acted jointly in the commission of the crime charged;]

The federal courts are split on the issue of whether there is a joint participant exception to the spousal testimony privilege. Proposed Federal rule 505 contained no such exception. Uniform Rule 504, which combines the spousal testimony and marital communications privilege, contains an exception to both providing that there is no privilege "in any criminal proceeding in which an unrefuted showing is made the spouses acted jointly in the commission of the crime charged."

The federal courts have consistently applied a joint participant privilege to the marital communications privilege, although the test for its application has varied. See commentary to the Survey Rule on the Marital Communications privilege and *e.g., United States v. Hill,* 967 F.2d 902 (3d Cir. 1992) (communications "have to do" with commission of a crime in which both spouses are participants); *United States v. Savage,* 390 F.3d 823 (4th Cir. 2004) ("relate to" a crime in the course of the spouses' joint planning or participation).

The leading cases applying a joint participant exception to the spousal testimony privilege are the same two Seventh Circuit cases that applied an exception for acts occurring prior to marriage, *United States v. Van Drunen,* 501 F.2d 1393 (7th Cir. 1974) and *United States v. Clark,* 712 F.2d 299 (7th Cir. 1983) the court in *Van Drunen* stated (501 F.2d at 1397):

> Today's holding . . . limits the privilege to those cases where it makes most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime. In that circumstance, the privilege encourages the preservation of a marriage which may conceivably be an important institution contributing to the rehabilitation of the defendant spouse.

The Court in *Clark* relied on *Van Drunen,* holding that there was a joint participant exception to the privilege even where, unlike *Van Drunen,* there was no issue as to whether the marriage was a sham. The Court added (712 F.2d at 301):

> Furthermore, a joint participants exception is consistent with the general policy of narrowly construing the privilege. The privilege has received much criticism from commentators because it generally retards truth seeking.

The court did not agree with the argument that the Supreme Court in *Trammel* had implicitly rejected the joint participants exception because the husband and wife in that case were joint participants. The court in *Clark* noted that the Court in *Trammel* was addressing the limited question of whether the accused spouse could invoke the privilege and gave no consideration to a joint participants exception.

The *Clark* case relied on two decisions from other circuits applying the exception to the marital communications privilege, *United States v. Mendoza,* 574 F.2d 1373 (5th Cir. 1978) and *United States v. Cotroni,* 527 F.2d 708 (2d Cir. 1975). Neither of these cases applied the exception to the spousal testimony privilege.

See also *United States v. Dowdy,* 738 F.Supp. 1283 (W.D.Mo. 1990) (applying a joint participants privilege).

The failure of the Supreme Court to decide the *Trammel* case on the basis of a joint participants exception to the rule was more persuasive to courts that have rejected that exception. In *In re Grand Jury Subpoena (Koecher),* 755 F.2d 1022 (2d Cir. 1985) the court held that the spousal testimony privilege is not subject to the exception for joint participants. In rejecting the exception, the court noted (755 F.2d at 1026):

> If the Supreme Court [in *Trammel*] looked on the exception with favor, it is somewhat peculiar that it should not have decided the case on that ground

> rather than making the much broader assault upon the privilege involved in confining the privilege to the witness-spouse, thereby requiring a partial overruling of decision little more than twenty years old.

The exception was also rejected in *Appeal of Malfitano,* 633 F.2d 276, 278-79 (3d Cir. 1980), where the court stated:

> There is nothing in the record or otherwise to indicate that marriages with criminal overtones disintegrate and dissolve. The spouse in fact may be very happy. Moreover, the fact that under *Trammel* the witness spouse is the holder of the privilege completely satisfies any concern that the privilege not be extended to marriages that in fact need no protection.

The court also notes that it was aware of no public policy "requiring that a marriage be dissolved when the partners engage in crime." The court added:

> Ironically, the closer the marriage, the more likely it will appear that both spouses are involved. . . . [T]here will not be much difficulty in asserting that the appellant is involved even though she is not even a target of the grand jury. This recognition of an exception where it can be said that both spouses are involved will tend to undermine the marriage precisely in the manner that the privilege is designed to prevent.

See also *In re Grand Jury,* 111 F.3d 1083 (3d Cir. 1997) (no joint participant exception).

The Ninth Circuit has reached the same result, finding no joint participant exception to the spousal testimony privilege. *United States v. Ramos-Osequera,* 120 F.3d 1028 (9th Cir. 1997). For a district court case reaching the same result see In *A.B. v. United States,* 24 F. Supp. 2d 488, 492 (D. Md. 1998) (discussed above in connection with the exception for acts prior to marriage).

Based on these authorities, it is difficult to say with any certainty whether or not there is an exception to the spousal testimony with regard to joint participants, or if there is, what the dimensions of that exception are. The issue will have to be resolved on a case by case basis.

(3) In any proceeding in which one spouse is charged with a crime against the person or property of the other, a minor child of either, an individual residing in the

household of either, or a third person if the crime is committed in the course of committing a crime against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse.

This exception is taken almost verbatim from Uniform Rule of Evidence 504 (c) (3). The only change is the elimination of a reference to "tort against the person or property of the other." The exception in the Uniform Rule applies to both marital communications and spousal testimony. Proposed Federal Rule 505 (c) set forth a similar exception "in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other."

Although there is not much federal law on the subject, most of the case law supports an exception with these stated dimensions. There is one case that has rejected such an exception, *United States v. Jarvison,* 409 F.3d 1221 (10th Cir. 2005). The principal issue in the case was the validity of the defendant's marriage to a witness who had refused to testify based upon the privilege protecting against adverse spousal testimony. After holding that the marriage was valid, the court refused to apply a harm to child exception to the marital testimony privilege, and upheld witness's privilege claim. The entirety of the court's analysis of the harm to child exception is as follows (409 F.3d at 1231):

> The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe,* 128 F.3d 1440 (10th Cir.1997). In *Bahe,* we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. *See Trammel,* 445 U.S. at 44-46, 100 S.Ct. 906; *Bahe,* 128 F.3d at 1442; *see also Jaffee v. Redmond,* 518 U.S. 1, 11, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (recognizing justification of marital testimonial privilege as modified by *Trammel* because it "furthers the important public interest in marital harmony). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create

an exception--not currently recognized by any federal court--allowing a court to compel adverse spousal testimony."

The court in *Jarvison* made no attempt to explain why a harm to child exception should apply to the marital communications privilege, but not to the adverse testimonial privilege. In fact, the court in *Jarvison* relatively recent authority from its own circuit for the existence of a harm to child exception to the privilege to the spousal testimony privilege – the precise privilege involved in *Jarvison*. In *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), the court, without discussing its reasons, applied *Bahe* to uphold a conviction in which the defendant's wife had testified against him in a case involving abuse of the couples' daughters. For purposes of the harm to child exception, the *Castillo* court made no distinction between the spousal testimony privilege and the confidential communications privilege.

In addition to the *Castillo* case, one other federal case has applied the harm to the child exception to the spousal testimonial privilege. *United States v. Allery,* 526 F.2d 1362 (8th Cir. 1975), was a prosecution of the defendant for the attempted rape of his twelve-year-old daughter. In *Allery,* decided pre-*Trammel,* the defendant alleged error in allowing his wife to testify against him. The court found that the privilege protecting the defendant from testimony by his wife was inapplicable in a case in which he was charged with harm to his child. The court relied, in part, on the existence of such an exception to the privilege in Proposed Rule 505. In reaching its decision, the court stated (526 F.2d at 1366):

> A careful review or the legislative history behind the rejection of the changes proposed in Article V and the passage of Rule 501 does not indicate that Congress disapproved of the expansion of this exception but rather that any substantive changes should be done on a case-by-case basis.

The court went on to note:

> . . . We recognize that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that a serious crime against a child is an offense against that family harmony and to society as well.
>
> Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in

> the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. Evidentiary Problems in Criminal Child Abuse Prosecutions, 63 Geo. L. J. 257, 258 (1974).

Judge Henley, dissenting in *Allery*, would not have extended the exception to this case where the victim was "not a child of tender years" and was competent and did testify. He believed that there was no necessity for the wife's testimony under such circumstances and that any exception to the privilege should be confined to instances where "the alleged victim is an incompetent witness and no reliable witness other than a spouse of the accused is available." 526 F.2d at 1367.

The lack of much federal precedent with regard to this exception makes it worthwhile to consider both state cases and scholarly comment.

More than half the states have some form of an exception for crimes against children in their privilege rules or statutes. Wright & Graham, Federal Practice and Procedure, § 5593 (2006 Supp.). Some others have read such an exception into their privileges through judicial decision, see *e.g., State v. Kollenborn,* 304 S.W.2d 855 (Mo. 1957) (spousal testimony privilege; common law exception created in case involved injury to child of both spouses). *See also* 1 McCormick, Evidence § 66 (adverse spousal testimony) at 316, n. 13. The differences occur in the extent of the exception.

States dealing with the issue seem to have uniformly applied the exception to a stepchild of the witness or the spouse charged with the crime. See, *e.g., Wilson v. State,* 737 P.2d 1197 (Okla. Crim. App. 1987) (spousal testimony privilege; statutory exception for "child" of either interpreted to cover stepchild).

Most courts dealing with the issue apply the exception beyond the child or stepchild of the defendant or the witness spouse. See, *e.g., Daniels v. State,* 681 P.2d 341 (Alaska 1984) (spousal testimony privilege; extended to foster child); *Meador v. State,* 711 P.2d 852 (Nev. 1985) (statute providing exception to spousal testimony privilege for child in "custody or control" covered children spending the night with defendant's daughters); *State v. Waleczek,* 585 P.2d 797 (Wash. 1978) (both marital privileges; term "guardian" in statute included situation in which couple voluntarily assumed care of child even though no legal appointment as guardian); *State v. Michels*, 414 N.W. 2d 311 (Wis. App. 1987) (spousal testimony privilege; statutory exception for crime against a "child of either" encompasses foster children).

A few decisions have refused to extend the exception to children merely living in the household. See, *e.g., People v. Clarke*, 114 N.W. 2d 338 (Mich. 1962) (spousal testimony privilege; exception did not apply to a child living in the household who was not the child of either the husband or the wife; Michigan subsequently enacted a statute expressly providing for an exception to the marital privilege for offenses committed against any person who is younger than 18 years of age. Mich. Comp. Law. Ann. § 600.2162).

Although most courts dealing with the issue extend the exception to adult children, *e.g., People v. Simpson*, 347 N.W.2d 215 (Mich. App. 1984) (spousal testimony privilege; exception for children of either applied to 19-year-old daughter), at least one case has refused to apply its state exception to the spousal testimony privilege to a daughter over the age of 16, *Zamora v. State,* 692 S.W.2d 161 (Tex. App. 1985) (Texas statute specifically limited exception to children under 16).

Despite the lack of uniformity in state law and In light of the sparse federal authority, it seem reasonable to assume that the federal courts would adopt an exception similar to that set forth in Proposed Federal Rule 505 and Uniform Rule 504. The one true outlier is *Jarvison*, a case with clear analytical and precedential defects.

An exception for certain specific federal offenses?

Proposed Federal Rule 505(c)(3) contained an exception for "proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§2421-2424, or with violation of other similar statutes. There are no cases dealing with the possibility of such an exception since the adoption of the Federal Rules and the substitution of Rule 501 for the specific privilege rules, including 505. The *Trammel* case, confining the privilege to the testifying spouse, may well have removed the policy considerations behind such an exception. Such an exception is not included in this survey rule, based on the uncertainty of the continuing viability of the policy and the absence of authority dealing with the issue.

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