ADVISORY COMMITTEE
ON
EVIDENCE RULES

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New York, New York
April 6-7, 1998

ADVISORY COMMITTEE ON EVIDENCE RULES

Agenda for Committee Meeting
New York, New York
April 6th and 7th, 1998

I. Opening Remarks of the Chair.

Including approval of the minutes of the October meeting, and a report on the last meeting of the Standing Committee. The Draft Minutes of the October meeting and this Committee's report to the Standing Committee are included in the agenda book. The minutes of the Standing Committee meeting will be distributed separately.

II. Matters Under Review.

A. *Rule 702* (concerning expert testimony). The subcommittee report on this Rule, together with relevant background material, is included in the agenda book.

B. *Rule 701* (concerning limitations on lay witness testimony). The subcommittee report on this Rule, together with relevant background material, is included in the agenda book.

C. *Rule 703* (concerning the admission of inadmissible information used as the basis for an expert's testimony). The subcommittee report on this rule, together with relevant background material, is included in the agenda book.

D. *Attorney Conduct Rules* (concerning the proposal to adopt rules of attorney conduct for the federal courts). The Reporter's memorandum on this matter, together with material submitted by the Reporter of the Standing Committee, is included in the agenda book.

E. *Parent-child Privilege*--Legislation is proposed to require the Judicial Conference to report to Congress on whether the Federal Rules of Evidence should be amended to include a parent-child privilege. The Reporter's memorandum on this matter, together with relevant background material, is included in the agenda book.

F. *Rule 801(d)(1)(B)*--Judge Bullock has proposed consideration of an amendment to Rule 801(d)(1)(B) that would provide for admissibility of prior consistent statements as substantive evidence whenever they would be admissible to rehabilitate the credibility of the witness. The Reporter's memorandum on this proposal, together with relevant background material, is included in the agenda book.

G. *Computerized Evidence* (concerning whether the Evidence Rules should be amended to accommodate technological innovations in the presentation of evidence). The Reporter's memorandum on this matter is included in the agenda book.

H. *Civil Rule 44* (concerning whether Civil Rule 44 should be deleted in light of the existence of Evidence Rules that govern authentication of official records). The Reporter's memorandum on this matter is included in the agenda book.

III. Recent Developments.

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

B. *Shortening the Rules Process*. A memo from Judge Hodges to Judge Stotler on this matter is included in the agenda book.

IV. New Issues for the Committee to Pursue.

V. Next Meeting.

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March 6, 1998
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March 6, 1998
Doc. No. 3811

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Agenda Item I

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 20-21, 1997

Charleston, S.C.

The Advisory Committee on the Federal Rules of Evidence met on October 20th and 21st at the Charleston Place Hotel in Charleston, South Carolina.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. David C. Norton
Hon. Milton I. Shadur
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Mary F. Harkenrider, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
Dean James K. Robinson
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Alicemarie H. Stotler, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. David S. Doty, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Gene W. Lafitte, Esq., Chair of the Standing Committee's Subcommittee on Technology
Roger Pauley, Esq., Justice Department

Joe Cecil, Esq., Federal Judicial Center
John K. Rabiej, Esq., Chief, Rules Committee Support Office
David Pimentel, Esq., Administrative Office
Mark Syska, Esq., Administrative Office
Al Cortese, Esq., Lawyers for Civil Justice
Karen Molzen, Law Clerk, District Court for the District of New Mexico

Opening Business

The Chair opened the meeting by asking for approval of the minutes of the April, 1997 meeting. These minutes were unanimously approved. The Chair expressed the pleasure of the Committee in the reappointment of Judge Jerry Smith and John Kobayashi to new terms. The Chair also welcomed Judge Bullock as the new liaison from the Standing Committee.

The Chair then reported on actions taken by the Standing Committee at its June, 1997 meeting. The Standing Committee remanded the Evidence Rules Committee's proposed amendment to Rule 103 for reconsideration. The Standing Committee accepted the Evidence Rules Committee's proposed amendment to Rule 615 in principle, but changed the proposed language of the amendment to provide that a person whose "presence is authorized by statute" cannot be excluded from trial. The Standing Committee's amendatory language has been approved by the Judicial Conference and is currently before the Supreme Court.

Rule 103

The Committee began a discussion on how to revise the proposed amendment to Evidence Rule 103 in light of the Standing Committee's comments. The major question to be decided is whether the proposal should include treatment of the issues presented in *Luce v. United States*--should the rule provide that when the effect of a ruling is triggered by a trial event, a party cannot appeal unless that event actually occurs? Comment was made that the courts (both state and federal) are generally uniform as to the implications of *Luce,* with the exception of the situation in which a party introduces the offending evidence to remove the sting of anticipated prejudice. In that situation, some courts have found a waiver of a claim of error and others have not. Yet the Committee's proposal to deal with *Luce* does not deal with this problem. Thus, one point of view expressed was that it was not necessary to codify *Luce* and its progeny, as the proposal to the Standing Committee had attempted to do.

A countervailing concern was then expressed: that the failure to mention *Luce* might lead one reading the rule to assume that there was an intent to reject *Luce*. Several members

expressed the further view that *Luce* is an important decision, based on sound policy considerations, that had to be recognized in the rule.

Another question addressed was whether the proposed amendment should be placed in a new subdivision (e), or instead added as a freestanding paragraph to subdivision (a). It was noted that the amendment will deal with all advance rulings, both pre-trial and at-trial. From this it was concluded that the amendment would be most properly placed in subdivision (a), which deals specifically with all evidentiary rulings.

There was general agreement that the heart of the Advisory Committee proposal previously sent to the Standing Committee was correct, i.e., that if the advance ruling is "definitive" a party need not renew an objection or offer of proof in order to preserve a claim of error.

A vote was taken on a motion to include the amendatory language concerning renewal of objections and offers of proof in subdivision (a) of Rule 103. All were in favor. The Committee unanimously agreed that the language should be set forth as a freestanding paragraph at the end of Rule 103(a). Because of the way the rule is structured, the amendatory language could not be added as a new subdivision (a)(3); and restructuring the existing subparagraphs of the rule would lead to a renumbering that would be confusing, especially given the many cases that have already been decided under the subdivision structure that currently exists.

A motion was made to add language codifying *Luce* and its progeny to the new freestanding paragraph in Rule 103(a). This motion was unanimously approved.

The Committee unanimously agreed to submit the proposed amendment to Rule 103(a) to the Standing Committee, with the recommendation that the Rule be published for public comment. The Committee also approved a proposed Advisory Committee Note to accompany the proposed amendment. The approved draft and the Advisory Committee Note are attached to these minutes.

Rule 615

The Kennedy-Leahy bill on victim's rights, currently in the Senate, contains a provision that would directly amend Evidence Rule 615. The bill gives the Judicial Conference a time period after passage in which to provide comments and suggestions on the legislation. The Reporter prepared some suggested drafting changes to the Congressional proposal to amend Rule 615, so that the Committee can be prepared with comments should the legislation pass. After preliminary discussion, the Committee was informed by the Administrative Office that it was unlikely that the Bill would be passed in this Congressional session. Therefore, the Chair suggested that any discussion on this matter should be tabled until the next meeting. This

suggestion was unanimously approved. Members were asked to give the Reporter any comments that they might have on the suggested drafting changes.

Rule 404

The Omnibus Crime Bill, currently before Congress, proposes two changes to Evidence Rule 404. The first change would provide that if the defendant attacks the character of the victim, this would open the door to an attack on a pertinent character trait of the defendant. The second change would add "disposition toward a particular individual" as one of the proper purposes for evidence of uncharged misconduct under Rule 404(b). The Advisory Committee considered the merits of these proposals.

The Committee was in agreement that the proposed amendment to Rule 404(b) was unnecessary and unwise. It is unnecessary because the list of proper purposes in Rule 404(b) is illustrative only. It is not intended to be exclusive. The Reporter could find no case in which evidence of disposition toward a particular individual was excluded on the ground that such a purpose was not listed in Rule 404(b). The change is also unwise because it could lead courts to the erroneous conclusion that a purpose must be on the list of not-for-character purposes in Rule 404(b) in order for evidence offered pursuant to that purpose to be admissible under the Rule. The Committee concluded that Rule 404(b) should not be amended along the lines proposed in the Omnibus Crime Bill.

A majority of the Committee agreed in principle that if a defendant attacks the victim's character, this should allow the prosecution some opportunity to attack the defendant's character. There was concern, however, over the breadth of the language in the Omnibus Crime Bill proposal. After substantial discussion, the Committee agreed upon language that would limit proof of the defendant's character to evidence of a character trait that corresponds to the trait of the victim's that the defendant has attacked. This language would prevent the prosecution from attacking the defendant's credibility simply because the defendant had proven a pertinent character trait of the victim.

After agreeing in principle upon language revising the Congressional proposal, the Committee discussed whether it should simply refer this language to Congress in the form of a suggested drafting change, or whether it should propose an amendment to Rule 404(a) by way of the rules process. After extensive discussion, the Committee voted to submit a proposed amendment to Rule 404(a) to the Standing Committee, with the recommendation that the Rule be published for public comment. Two members dissented. The Committee also approved an Advisory Committee Note to accompany the proposed amendment. The approved draft and the Advisory Committee Note are attached to these minutes.

Rules 803(6), 902(11), and 902(12)

At its April, 1997 meeting, the Evidence Rules Committee approved in principle a proposal to amend Rule 803(6) to provide for a means of establishing the foundation requirements for business records other than through a live witness. This change would correct an anomaly created by 18 U.S.C. § 3505. Under that statute, foreign business records can be proved through certification in criminal cases. But under Evidence Rule 803(6), all other business records in all other cases must be proven through a foundation witness. The Committee agreed that if Rule 803(6) were amended to permit proof by certification, then conforming amendments to Rule 902 would be required to provide that such records can be self-authenticating.

At the April meeting, some concern was expressed about the difficulty that an opponent might have in attacking the trustworthiness of self-authenticating business records. A subcommittee was appointed to determine whether language could be added to the proposed amendments to Rule 902 that would require testimonial foundation if a genuine question were raised about the trustworthiness or authenticity of the proffered records. The subcommittee reported to the Committee that such additional language was not necessary, because the proposed amendments to Rule 902 already incorporated the trustworthiness proviso from Rule 803(6). Also, a studied effort had been made in the proposed amendments to track the provisions of 18 U.S.C. § 3505, in order to provide for consistent treatment of business records in all cases. Adding language to the proposed amendments to Rule 902, when such language is not included in the statute, would result in the disuniformity that the amendments are proposed to avoid.

After discussion, the Committee voted to submit proposed amendments to Rule 803(6) and 902 to the Standing Committee, with the recommendation that these Rules be published for public comment. The Committee also approved Advisory Committee Notes to accompany these proposed amendments. The approved draft and the Advisory Committee Notes are attached to these minutes.

At the end of the discussion on this matter, it was mentioned that Civil Rule 44 deals with the admissibility of public records, and might overlap with the Rules of Evidence, particularly Evidence Rules 803(8) and 902. It was suggested that the Advisory Committee on Civil Rules might consider whether Civil Rule 44 should be deleted.

Rules 702 and 703

At the April meeting, the Committee agreed to consider whether Rule 702 should be

amended to account for changes wrought by the Supreme Court's *Daubert* decision. In advance of the November meeting, the Reporter provided the Committee with background information as well as several possible working models that could be used for a possible amendment. The Chair, as well as several members, noted that there is a good deal of conflict in the cases over the meaning of the *Daubert* decision, and particularly over whether the *Daubert* standards are applicable to non-scientific expert testimony.

After a general discussion, the Committee agreed that some amendment to Rule 702 should be proposed, in light of the conflicts created by *Daubert*, and the importance of the issue to courts and litigants. An amendment through the rulemaking process was also considered important in light of the proposals in Congress to amend Evidence Rule 702. Members expressed the opinion that the Committee could perform a valuable service by setting forth some general standards that would guide a trial court in determining whether expert testimony is sufficiently reliable. Other members commented that an amendment to Rule 701 should be considered as well, to address the problem of lay witnesses who testify on technical subjects. The Committee also discussed the question of whether an amended Rule 702 should provide procedural standards to govern the timing of the hearing, notice requirements, etc. While no final decision was made on this point, several members expressed the concern that inclusion of procedural requirements in the rule might be unwise. For one thing, different procedures might have to apply to civil and criminal cases. For another, the addition of extensive and detailed procedural requirements might simply create another set of issues for appeal.

The Committee was in general agreement that any amendment to Rule 702 must cover all expert testimony, not just scientific testimony. Imposing more rigorous standards for scientific expert testimony only would create an incentive for litigants to argue that a proffered expert's methodology is completely unscientific, and therefore should be free from scrutiny. The Committee agreed that any amendment to Rule 702 must provide that all expert testimony is to be scrutinized for reliability. The Committee also agreed that any amendment to Rule 702 must concern itself not only with the theory employed by the expert, but also with the application of that theory to the specific facts of the case.

Consideration was given to the Seventh Circuit's conception of *Daubert*: that an expert should employ the same intellectual rigor in testifying that would be demanded from the expert in her professional life. Members expressed the view that language to this effect might have some utility in an amended Rule 702. It was observed, however, that the Seventh Circuit standard might be insufficient on its own to regulate expert testimony in a situation where there are no professional standards in the expert's particular field.

Finally, it was generally agreed that any amendment to Rule 702 should not be excessively long or detailed. No rule could attempt to include all the factors that should be considered in assessing the trustworthiness of all types of expert testimony. It was agreed that any details or elaborations on general principles should be left for the Advisory Committee

Note.

The Chair appointed a subcommittee to prepare a working draft of Rule 702 for the next meeting, taking into account the foregoing Committee discussion and the general points of agreement that had been reached. Judge Shadur, Ken Broun, Greg Joseph, John Kobayashi, and the Reporter were named to the subcommittee, with Judge Shadur serving as the Chair of the subcommittee. The Chair of the Evidence Rules Committee will serve ex officio.

The Chair noted that the Committee had already worked on a proposed change to Rule 703, to deal with the problem of an expert who uses otherwise inadmissible information as the basis of an opinion. It was agreed that consideration of an amendment to Rule 703 must be deferred in order to be considered in tandem with the Rule 702 proposal. The Subcommittee was therefore directed to review the proposed amendment to Rule 703, and to report to the Committee at the next meeting.

Uniform Rules

Professor Leo Whinery, Reporter to the Uniform Rules of Evidence Drafting Committee, reported on developments in the effort to amend those rules. The Drafting Committee has proposed the inclusion of extensive procedural requirements in Rule 404(b). It has also proposed an amendment to Rule 801(d)(1)(B) that would codify the Supreme Court's *Tome* decision. The Drafting Committee is working on an amendment to Rule 702 that would apply a presumption of admissibility to expert testimony based on a generally accepted methodology, and a contrary presumption of inadmissibility for testimony based on a methodology not generally accepted. The Uniform Rules Drafting Committee is also proposing a change to Rule 801(d)(2) that would track the recent amendment to the Federal Rule.

Electronic Filing

Karen Molzen, Law Clerk for Chief Judge Conway of the District Court of the District of New Mexico, gave a visual presentation of a pilot program providing for electronic filing of court papers. Under a system of electronic filing, parties can file pleadings, answers, and other motions (including motions to intervene) electronically. Filings can be retrieved through Netscape for litigants and members of the public to review. The documents cannot be altered electronically once filed. The docket sheet contains hyperlinks so that relevant documents can be called up by the user. The system provides for digital signatures that are equivalent to fingerprints. Sole practicioners seem to prefer the system of electronic filing, because it makes access to the courts easier. The system contains an electronic mailbox for lawyers and judges, allowing them to keep track of orders and opinions. A digital filing stamp is created when a document is filed with the court.

Automation

The Committee discussed whether the Evidence Rules must be amended to accommodate technological changes in the presentation of evidence. One possible solution discussed is to expand the applicability of the definition of "writings" and "recordings" in Rule 1001 to cover all of the Federal Rules. The Uniform Rules Drafting Committee is considering this solution. Research is required to determine whether any other particular rules must be amended, or whether extending the application of the Rule 1001 definition will adequately cover electronic evidence offered under other rules. The Reporter was directed to report at the next meeting on whether Rule 1001 could be amended to address computerized evidence, and whether conforming amendments to other rules might be necessary as well.

Misleading Advisory Committee Notes

At the April meeting, the Reporter was directed to prepare a list of Advisory Committee Notes that have become misleading because the Advisory Committee proposal on the particular Rule was either rejected or substantially changed by Congress. The Reporter prepared a list of such notes, together with suggested editorial comments that could be included in a published version of the Federal Rules, and that would alert the reader to the fact that the particular Advisory Committee comment is inconsistent or in conflict with the rule as promulgated.The Committee discussed how the Reporter's memorandum might be most usefully distributed. One possibility is to send a letter to all the publishers of the Federal Rules, suggesting that the editorial comments be incorporated. Another possibility is that the memorandum could be distributed in some form by the Federal Judicial Center. It was agreed that inquiries would be made to determine whether the FJC would be interested in distributing the memorandum. It was also agreed that the memorandum would not be distributed as the work product of the Advisory Committee. Rather, it would be distributed, if at all, as a memorandum prepared by the Reporter in his individual capacity.

New Business

The Chair received the text of an ABA resolution providing that the attorney-client

privilege should be applied to the same extent for in-house counsel as for outside counsel. The proposal was referred to the Chair for informational purposes. After discussion, the Advisory Committee decided that it would not propose any amendment concerning privileges at this time.

Next Meeting

The Chair announced that the next meeting of the Evidence Rules Committee would take place on April 6th and 7th, 1998, in New York City.

The meeting was adourned at 9:40 am., Tuesday, October 21st.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

TO: **Honorable Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Fern M. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 1997**

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

I. Introduction

The Advisory Committee on Evidence Rules met on October 20th and 21st in Charleston, S.C. At the meeting, the Committee approved three items for action by the Standing Committee--proposed amendments to Evidence Rules, with the recommendation that they be published for public comment. The Advisory Committee is submitting these proposed amendments to the Standing Committee at this time, but there is no intent to accelerate or otherwise change the regular schedule for public comment.

The Evidence Rules Committee also discussed several proposals for amending other Evidence Rules. Specifically, the Committee has begun to consider whether the rules on expert testimony should be amended in light of the Supreme Court's *Daubert* decision, and also whether the Evidence Rules should be revised to accommodate technological advancements in the presentation of evidence. The discussion of these and other matters is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the October meeting, which are attached to this Report.

II. Action Items

A. Rule 103(a).

The proposed amendment to Rule 103 would add a new paragraph to subdivision (a). The goals of the proposal are: 1) to specify when and whether a party must renew an objection or offer of proof after losing an initial ruling on admissibility; and 2) to codify the principles of *Luce v. United States,* concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial.

The Evidence Rules Committee previously proposed an amendment to Evidence Rule 103 that would have added a new subdivision (e) to the Rule. At its June, 1997 meeting, the Standing Committee sent this proposal back for reconsideration on a number of grounds. Among the suggestions were: 1) that the *Luce* principle set forth in the Evidence Rules Committee's proposal was inappropriately limited to civil cases; and 2) that it would make more sense to amend subdivision (a), which already deals with objections and offers of proof, than it would be to add a new subdivision to the Rule. After considering these suggestions, the Evidence Rules Committee unanimously agreed upon a new proposal. This new proposal incorporates all of the suggestions for improvement made at the Standing Committee meeting, and sets forth clear-cut standards for determining when an objection or offer of proof must be renewed after an initial determination by the trial court. Both the proposed amendment and Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 103 be published for public comment, at the regularly scheduled time for publication.

B. Rule 404(a)

Congress is currently considering a proposal to amend Evidence Rule 404(a) to provide that evidence of a criminal defendant's pertinent character trait is admissible if the defendant attacks the character of the victim. The Evidence Rules Committee reviewed this proposal and agreed, in principle, that an attack on the victim's character should open the door to permit a corresponding attack on the defendant's character. The Evidence Rules Committee was concerned, however, with the breadth of the language in the Congressional proposal, which might be read to permit an attack on the defendant's *credibility* whenever the defendant attacks the

character of the victim. The Evidence Rules Committee agreed upon more limited language, and proposes an amendment to Rule 404(a) that would address Congressional concerns, and provide a more balanced use of character evidence when the defendant chooses to prove a negative character trait of the victim. Both the proposed amendment and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 404(a) be published for public comment, at the regularly scheduled time for publication.

C. Rules 803(6) and 902.

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The Evidence Rules Committee unanimously agreed that an amendment to Evidence Rule 803(6) was necessary to provide for uniform treatment of business records. The Committee also recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package--the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The Evidence Rules Committee notes that the proposed modification of Rules 803(6) and 902 to permit certification of business records is in accord with a trend in the states. The Evidence Rules Committee's proposed amendments are adapted from state versions of the Federal Rules of Evidence in Indiana, Maryland and Texas. The proposed amendments to Rules 803(6) and 902, and the Advisory Committee Notes to these amendments, are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendments to vidence Rules 803(6) and 902 be published for public comment, at the regularly scheduled time for publication.

III. Information Items

A. Rules on Experts and *Daubert*.

The Supreme Court's *Daubert* decision has spawned a large body of case law, as well as initiatives in Congress to amend Evidence Rule 702. In 1995, the Advisory Committee decided to delay considering any amendment to the Evidence Rules on experts, until the courts had had enough time to digest and interpret the *Daubert* opinion. At its October, 1997 meeting, the Evidence Rules Committee agreed unanimously that there is now enough case law--and conflicts among the courts--to justify consideration of an amendment to Evidence Rule 702 to explicate the standards of reliability to be applied to expert testimony, in light of *Daubert*. Moreover, the Committee is aware of, and has commented upon, two pieces of proposed legislation in Congress that purport to codify *Daubert*, but that in fact create serious problems of interpretation, and impose evidentiary standards so rigorous as to render much traditionally accepted expert testimony inadmissible. In light of these Congressional proposals, the Evidence Rules Committee agreed that it was especially appropriate to consider whether Rule 702 should be amended through the rulemaking process.

The Evidence Rules Committee has agreed on the following general principles: 1) Any attempt to amend Evidence Rule 702 must encompass both scientific and non-scientific testimony; 2) The amendment should not attempt to delineate an all-encompassing set of specific standards that courts must employ in regulating expert testimony; 3) The amendment must cover not only the theories employed by the expert, but also the application of those theories to the specific facts of the case; 4) Any amendment to Evidence Rule 703, concerning the use of inadmissible information by an expert, would be related to and should be considered together with any amendment to Rule 702; and 5) Consideration should be given to the treatment of lay witnesses who are proffered to testify about technical subjects that require some expertise.

A subcommittee has been appointed to consider these points of agreement and to prepare a proposal to amend the Evidence Rules accordingly. The subcommittee's report will be considered at the April, 1998 meeting of the Evidence Rules Committee.

B. Technological Advances in Presenting Evidence

The Evidence Rules Committee discussed, and will consider at its next meeting, whether an amendment is necessary to accommodate technological innovations in the presentation of evidence. One possible solution that is being considered is to use the definition of "writings" and "recordings" that is currently found in Evidence Rule 1001, and to apply that definition more

broadly throughout the Rules. This presents a conceptual problem, because the Federal Rules of Evidence contain no all-encompassing definitions section. The alternative, assuming an amendment is necessary, would be to directly amend each rule in which the terms "writing" or "recording" are found. These matters will be considered by the Evidence Rules Committee at its next meeting in April, 1998.

C. Correcting Advisory Committee Notes.

The Advisory Committee Notes provide comment on the Advisory Committee draft of the Evidence Rules; however, several of the Rules ultimately adopted by Congress differ markedly from the Advisory Committee's version. For example, the Advisory Committee Note to Evidence Rule 804(b)(1) states that the Rule allows "substitution of one with the right and opportunity to develop the testimony with similar motive and interest." Yet Congress rejected the Advisory Committee's position, and added a "predecessor in interest" requirement to the Rule. Another example is the Advisory Committee's Note on Evidence Rule 301. Congress rejected the Advisory Committee's "burden-shifting" approach to presumptions in favor of the "bursting bubble" approach. The Committee Note, however, states that the Rule provides for burden-shifting, and is critical of the "bursting bubble" approach ultimately adopted by Congress.

The Reporter to the Evidence Rules Committee prepared a list of statements contained in the original Advisory Committee Notes that are either wrong as written, or that comment on a draft that was materially changed by Congress. A copy of this memorandum is attached to this Report. The Evidence Rules Committee reviewed the draft and agreed that the Federal Judicial Center should consider whether the memorandum might be distributed under FJC auspices to publishers and other interested persons. The memorandum would not be published as the work product of the Evidence Rules Committee, but rather as a work of the Reporter in his individual capacity.

D. Congressional Proposal to Amend Evidence Rule 615

The Kennedy-Leahy Bill on victims rights, currently in the Senate, would directly amend Evidence Rule 615 to expand the right of victim-witnesses to attend a criminal trial. The proposal gives the Judicial Conference a time period after the date of passage in which to provide comments on the legislation. The Reporter to the Evidence Rules Committee has drafted some suggestions for improvement in the proposed statutory language. It appears that there will be no action on the Kennedy-Leahy proposal during this term of Congress. The Evidence Rules Committee will take up the matter of possible suggestions for improvement in the statutory language at its April, 1998 meeting.

E. Issues the Committee Has Decided Not to Pursue

After discussion at the October meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

1. *Rule 404(b)*--The Committee considered whether Evidence Rule 404(b) should be amended along the lines of a proposal contained in the Omnibus Crime Bill. That proposal would add "disposition toward a particular individual" to the list of permissible purposes for evidence of uncharged misconduct. After consideration, the Evidence Rules Committee determined that such an amendment was unnecessary, because the list of purposes set forth in Rule 404(b) is illustrative only; it is not intended to be exclusive.

2. *Rule 501*--The Evidence Rules Committee considered a proposal to provide that the attorney-client privilege for in-house counsel should be contiguous with the attorney-client privilege for outside counsel. After discussion, the Committee decided not to propose any change to the rule on privilege at this time.

IV. Minutes of the October, 1997 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's October, 1997 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Rules and Committee Notes
Reporter's Memorandum concerning incorrect Advisory Committee Notes
Draft Minutes

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 103(a)

1 **Rule 103. Rulings on Evidence***

2 (a) Effect of erroneous ruling.—Error may not be
3 predicated upon a ruling which admits or excludes evidence
4 unless a substantial right of the party is affected, and

5 (1) Objection.—In case the ruling is one
6 admitting evidence, a timely objection or motion to
7 strike appears of record, stating the specific ground of
8 objection, if the specific ground was not apparent from
9 the context; or

10 (2) Offer of proof.— In case the ruling is one
11 excluding evidence, the substance of the evidence was
12 made known to the court by offer or was apparent
13 from the context within which questions were asked.

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* New matter is underlined and matter to be omitted is lined through.

14 Once the court, at or before trial, makes a definitive ruling on
15 the record admitting or excluding evidence, a party need not
16 renew an objection or offer of proof to preserve a claim of
17 error for appeal. But if under the court's ruling there is a
18 condition precedent to admission or exclusion, such as the
19 introduction of certain testimony or the pursuit of a certain
20 claim or defense, no claim of error may be predicated upon the
21 ruling unless the condition precedent is satisfied.

* * * * *

COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always

required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have held that an objection or offer of proof once made is sufficient to preserve a claim of error because the trial court's ruling thereon constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). Where the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *Favala v. Cumberland Engineering Co.*, 17 F.3d 987, 991 (7th Cir. 1994) ("once a motion *in limine* has been granted, there is no reason for the party losing the motion to try to present the evidence in order to preserve the issue for appeal"). On the other hand, where the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's

attention subsequently. *See, e.g., United States v. Vest,* 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial, meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti,* 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence). While formal exceptions are unnecessary, the amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point.

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.,* 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk,* 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

The amendment codifies the principles of *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. In *Luce*, the Supreme Court held that a criminal defendant must testify at trial in order to

preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations, and logically applies whenever the occurrence of a trial event is a condition precedent to the admission or exclusion of evidence. *See United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994), *cert.denied,* 514 U.S. 1007 (1995) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir.), *cert. denied,* 489 U.S. 1070 (1989) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error for appeal); *United States v. Bond,* 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher,* 106 F.3d 622 (5th Cir. 1997), *as corrected* 1997 U.S. App. LEXIS 12671 (1997)

(where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas*, 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); United States v. Williams, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

1 **Rule 404. Character Evidence Not Admissible to Prove**
2 **Conduct; Exceptions; Other Crimes***
3 (a) Character evidence generally. — Evidence of a
4 person's character or a trait of character is not admissible for
5 the purpose of proving action in conformity therewith on a
6 particular occasion, except:
7 (1) Character of accused. — Evidence of a
8 pertinent trait of character offered by an accused, or
9 by the prosecution to rebut the same~~;~~, or if evidence
10 of a trait of character of the victim of the crime is
11 offered by an accused and admitted under subdivision
12 (a)(2), evidence of a pertinent trait of character of
13 the accused offered by the prosecution;

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* New matter is underlined and matter to be omitted is lined through.

14 (2) Character of victim. — Evidence of a
15 pertinent trait of character of the victim of the crime
16 offered by an accused, or by the prosecution to rebut
17 the same, or evidence of a character trait of
18 peacefulness of the victim offered by the prosecution
19 in a homicide case to rebut evidence that the victim
20 was the first aggressor;
21 (3) Character of witness.— Evidence of the
22 character of a witness, as provided in rules 607, 608,
23 and 609.

* * * * *

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of a victim under subdivision (a)(2) of this Rule, the door is opened to an attack on a corresponding character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the defendant offers proof of self-defense, this permits proof of the victim's character trait for peacefulness, but it does not permit proof of the defendant's character trait for violence).

The amendment makes clear that the accused cannot attack the victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the accused's own corresponding character trait. For example, in a murder case where the defendant claims self-defense, the defendant, to bolster this defense, might offer evidence of the victim's allegedly violent disposition. If the government has evidence that the defendant has a violent character, but is not allowed to offer this evidence as part of its rebuttal, then the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the defendant's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the defendant's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when the accused chooses to attack the character of the victim.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion. Finally, the amendment does not permit proof of the defendant's character when the defendant attacks the victim's character as a witness under Rules 608 or 609.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(6)

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

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

5 * * * * *

6 (6) Records of regularly conducted activity.—A
7 memorandum, report, record, or data compilation, in any
8 form, of acts, events, conditions, opinions, or diagnoses, made
9 at or near the time by, or from information transmitted by, a
10 person with knowledge, if kept in the course of a regularly
11 conducted activity, and if it was the regular practice of that
12 business activity to make the memorandum, report, record or
13 data compilation, all as shown by the testimony of the
14 custodian or other qualified witness, <u>or by certification that</u>
15 <u>complies with Rule 902(11), Rule 902(12), or a statute</u>
16 <u>permitting certification,</u> unless the source of information or the
17 method or circumstances of preparation indicate lack of
18 trustworthiness. The term "business" as used in this paragraph

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* New matter is underlined and matter to be omitted is lined through.

19 includes business, institution, association, profession,
20 occupation, and calling of every kind, whether or not
21 conducted for profit.

* * * * *

COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. See, e.g., *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 902

1 **Rule 902. Self-authentication***

2

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

6 * * * * *

7 (11) *Certified domestic records of regularly*
8 *conducted activity.* The original or a duplicate of a domestic
9 record of regularly conducted activity, which would be
10 admissible under Rule 803(6), and which the custodian thereof
11 or another qualified person certifies under oath—

12 (A) was made at or near the time of the
13 occurrence of the matters set forth, by or from
14 information transmitted by, a person with knowledge
15 of those matters;

16 (B) was kept in the course of the regularly
17 conducted activity; and

18 (C) was made by the regularly conducted
19 activity as a regular practice.

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* New matter is underlined and matter to be omitted is lined through.

20 A party intending to offer a record in evidence under this
21 paragraph must provide written notice of that intention to all
22 adverse parties, and must make the record available for
23 inspection sufficiently in advance of its offer in evidence to
24 provide an adverse party with a fair opportunity to challenge
25 it.
26 (12) *Certified foreign records of regularly conducted*
27 *activity*. In a civil case, the original or a duplicate of a foreign
28 record of regularly conducted activity, which would be
29 admissible under Rule 803(6), and which is accompanied by a
30 written declaration by the custodian thereof or another
31 qualified person that the record—
32 (A) was made at or near the time of the
33 occurrence of the matters set forth, by or from
34 information transmitted by, a person with knowledge
35 of those matters;
36 (B) was kept in the course of the regularly
37 conducted activity; and
38 (C) was made by the regularly conducted
39 activity as a regular practice.

40 The declaration must be signed in a manner that, if falsely
41 made, would subject the maker to criminal penalty under the
42 laws of the country where the declaration is signed. A party
43 intending to offer a record in evidence under this paragraph
44 must provide written notice of that intention to all adverse
45 parties, and must make the record available for inspection
46 sufficiently in advance of its offer in evidence to provide an
47 adverse party with a fair opportunity to challenge it.

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases. The notice requirements in Rules 902(11) and (12) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the certification.

FORDHAM Agenda Item IIA
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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra
Re: Proposed Rule 702
Date: February 16, 1998

Attached is a proposal to amend Evidence Rule 702, and an accompanying Advisory Committee Note, all as drafted by the *Daubert* subcommittee. The goal of the amendment is to accommodate the changes wrought by *Daubert*.. Also attached, for background information is an updated outline on the major cases decided after *Daubert*.

The Subcommittee was in unanimous agreement on four basic propositions: 1. That the reliability requirements of the Rule must extend to both scientific and non-scientific expert testimony; 2. That as little damage as possible should be done to the current structure of the Rule; 3. That it was better to have a general rule, together with a copious Advisory Committee Note, than to have an extremely detailed and lengthy Rule; and 4. That the Rule must regulate the expert's methodology *as applied* to the facts of the case. All of these points of agreement are set forth in the proposal. I also note that the Committee as a whole has previously decided that Rule 702 should in fact be amended, in light of the changes wrought by *Daubert* and the activity concerning Rule 702 in Congress

Proposed Amendment to Rule 702

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise~~.~~, provided (1) the testimony is adequately based upon reliable underlying facts, data or opinions; (2) the testimony is based upon reliable principles and methodology; and (3) the principles and methodology employed by the witness have been applied reliably to the facts of the case.

Proposed Advisory Committee Note

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*. In *Daubert* the Court charged district judges with the responsibility of acting as gatekeepers to exclude expert testimony that is not reliable. The amendment affirms the trial judge's role as gatekeeper and provides some general standards that the trial judge must use to assess the reliability and helpfulness of proffered expert testimony. The Rule provides that the reliability and helpfulness of expert testimony of all types--not only the scientific testimony specifically addressed in *Daubert*-- present questions of admissibility for the trial court, and as such are governed by the provisions of Rule 104(a).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The factors explicated by the *Daubert* Court are: (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or

theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.

No attempt has been made to "codify" these specific factors set forth in *Daubert*. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other courts have recognized that not all of the explicated factors can apply to every type of expert testimony. See *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the factfinder. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally

and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir.), *cert. denied,* 116 S. Ct. 189 (1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner,* 118 S.Ct. 512, 519 (1997) (noting that in some cases a court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. See *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presented a question of weight, so long as the most obvious causes had been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). See also *Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (*Daubert* requires the trial court to assure itself that the expert "adheres to the same standards of intellectual rigor that are demanded in his professional work.").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the amendment.

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner,* 118 S.Ct. at 519. Under the amendment, as under *Daubert,* when an expert purports to apply a methodology

consistent with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the methodology has not been faithfully applied. See *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the methodology that was used by the expert, but also whether the methodology has been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995): "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

Daubert involved scientific experts, and the Court left open whether the *Daubert* standards apply to expert testimony that does not purport to be scientifically-based. The inadaptability of many of the specific *Daubert* factors outside the hard sciences (e.g., peer review and rate of error) has led some courts to find that *Daubert* is simply inapplicable to testimony by experts who do not purport to be scientists. *See Compton v. Subaru of Am., Inc.*, 82 F.3d 1513 (10th Cir.) (*Daubert* inapplicable to expert testimony of automotive engineer), *cert. denied*, 117 S. Ct. 611 (1996); *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (2d Cir. 1993)

(*Daubert* inapplicable to testimony based on a payroll review prepared by an accountant). Other courts have held that *Daubert* is applicable to all expert testimony, while noting that not all of the *Daubert* factors can be applied readily to the testimony of experts who are not scientists. See *Watkins v. Telsmith, Inc.*, 121 F.3d 985, 991 (5th Cir. 1997), where the court recognized that "[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience", but stressed that the trial court after *Daubert* is still obligated to determine whether expert testimony is reliable; therefore, "[w]hether the expert would opine on economic evaluation, advertising psychology, or engineering," the trial court must determine "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers."

The amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeper function applies to testimony by any expert. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissibly simply because it is outside the realm of science. Put in a positive sense, an opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to

be a scientist. See *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication. Other types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. If there is a well-accepted body of learning and experience in the field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how her conclusion is so grounded.

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached. The trial court's gatekeeper function requires more than simply "taking the expert's word for it." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir.), *cert. denied,* 116 S. Ct. 189 (1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*,

that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony is to be excluded as unreliable. See *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the adequacy of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the ``reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. By its terms, Rule 703 does not regulate the basis of the expert's opinion per se. Rather, it regulates whether the expert can rely on information that is otherwise inadmissible. If the expert purports to rely on inadmissible information, Rule 703 requires the court to determine whether that information is of a type reasonably relied upon by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question of whether the expert is relying on an *adequate* and reliable basis of information--whether admissible information or not--is governed by the reliability requirement of Rule 702.

The amendment makes no attempt to set forth procedural requirements for

exercising the trial court's gatekeeping function over expert testimony, such as are discussed in, e.g, Margaret Berger, *Procedural Paradigms for Applying the Daubert Test,* 78 Minn.L.Rev. 1345 (1994). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert.*, and it is contemplated that this will continue under the amended Rule. See, e.g., *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings), *cert. denied*, 115 S. Ct. 1253 (1995); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methodology underlying their conclusions).

The amendment continues the practice of the original rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the rule does not, however, mean that a jury should be informed that a qualified witness is testifying as an "expert". Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and

protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 599 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

CASES APPLYING *DAUBERT*

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I. THE GATEKEEPING ROLE

Factors for the Gatekeeper to Consider

Research In Anticipation of Litigation: ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 43 F.3d 1311 (9th Cir. 1995): On remand from the Supreme Court, the Court of Appeals held that summary judgment was properly granted against the plaintiffs. The Court noted that "Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before." It stated that the first prong of the two-prong *Daubert* analysis--whether the expert's testimony is derived from the scientific method--"puts federal judges in an uncomfortable position" because they must second-guess qualified experts. Nonetheless, a Court after *Daubert* cannot be content with an expert's self-serving conclusion that his testimony is derived from the scientific method. "Rather, the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology."

The *Daubert* Court stated that a "very significant fact" in determining reliability is whether the experts are testifying on the basis of research "conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying." Since the scientist's "normal workplace is the lab or the field, not the courtroom" it follows that expert testimony based on research prepared in anticipation of litigation is unlikely to be consistent with the scientific method, whereas research prepared independent of the litigation gives some objective proof of good science. However, one exception to the general exclusion of research prepared in anticipation of litigation is that scientific research "closely tied to law enforcement may indeed have the courtroom as a principal theatre of operations."

Applying these principles to the plaintiffs' experts, the *Daubert* Court found that none had conducted research that pre-existed or was independent from the litigation. Nor had the research and analysis been "subjected to normal scientific scrutiny through peer review and publication." The Court concluded that apparently no one in the scientific community "has deemed these studies worthy of verification, refutation or even comment."

In the absence of both independent research and peer review, the *Daubert* Court held that the experts "must explain precisely how they went about reaching their conclusions and point to some objective source--a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like--to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field." In this case, the experts had failed to explain with particularity the methodology they followed, and they could not point to any objective external source to validate their methodology. The Court concluded that it had been presented "with only the expert's qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."

The second prong of *Daubert* requires a showing of the "fit" between the expert's testimony and an issue in the case. The Court found that most of the plaintiffs' expert testimony failed the "fit" requirement. This was because state tort law required the plaintiffs to prove that Bendectin was more likely than not the cause of their injuries, and these experts did not did not make that conclusion. Rather, they simply testified that Bendectin increased the risk of limb reduction; this testimony in fact tended to disprove the plaintiffs' argument as to legal causation, because "it shows that Bendectin does not double the likelihood of birth defects."

Thorough Overview of the *Daubert* Mandate: *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994): Affirming in part and reversing in part a grant of summary judgment in a case alleging damages from exposure to PCB's, the Court engaged in an extensive and incisive analysis of *Daubert's* effect on scientific expert testimony. The Court made the following important points about Rules 702 and 403 after *Daubert*:

1. Because a judge at an *in limine* hearing must make findings of fact on complex scientific issues, and because the *in limine* ruling will often decide the case, "it is important that each side have an opportunity to depose the other side's experts in order to develop strong critiques and defenses of their expert's methodologies."

2. The factors to be deemed important for scientific validity are: a. whether the expert's hypothesis can be tested; b. peer review; c. known or potential rate of error; d. existence of protocols; e. general acceptance; f. the relationship of the method to other techniques which have been found reliable; g. the qualifications of the expert; and h. the non-judicial uses to which the method has been put.

3. Because the question of reliability is an admissibility requirement governed by Rule 104(a), a proponent must do more than simply make a *prima facie* case on reliability. While the proponent does not have to prove to the judge that the proffered expert testimony is *correct*, she must prove to the judge by a preponderance of the evidence that the testimony is *reliable*. The *Paoli* Court stated that the "evidentiary requirement of reliability is lower than the merits standard of correctness."

4. After *Daubert* any distinction between methodology and its application is no longer viable. *Daubert* provides that "*any* step that renders the analysis unreliable * * * *renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."*

5. *Daubert's* focus on methodology rather than conclusion has only a limited practical effect, because when a judge disagrees with the expert's conclusion, "it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert." The only situation in which the methodology/conclusion distinction might make a difference is the rare case in which expert testimony is challenged on the sole ground that the conclusion is different from that of other experts. In that case, the Trial Judge must inquire beyond the conclusion before excluding the testimony.

6. Because the *Daubert* Court held that Rule 702 was the "primary locus of a court's gatekeeping role," the use of Rule 403 to exclude expert testimony should be left for the rare case, especially at the pretrial stage. Thus, "there must be something *particularly* confusing about the scientific evidence at issue--something other than the general complexity of scientific evidence."

Applying the foregoing principles to the expert testimony proffered by plaintiffs, the *Paoli* Court held the following:

1. The testimony of one doctor was properly excluded because he relied on answers to a questionnaire to assume that the plaintiffs had certain symptoms. As a result, the doctor had no reliable foundation to assume that the plaintiffs even had any illness, much less that the illness was caused by exposure to PCB's. The testimony was also unreliable because the doctor failed to exclude other possible causes through a proper differential diagnosis.

2. The district court erred in excluding the testimony of one doctor insofar as that testimony was based on the doctor's personal examination and review of the medical history of certain plaintiffs, knowledge of PCB exposure in the area at issue, and some consideration of possible alternative causes.

3. The testimony of an expert who concluded that plaintiffs had been exposed to PCB's was properly excluded insofar as it relied on the expert's recalculation of data prepared by American Medical Laboratories, Inc. The Court found that recalculation based on the differences between three samples "is not a technique identified in the scientific literature; nor is it generally accepted." A recalculation based on such a small sample is "too rough to be reliable."

4. The district court abused its discretion when it excluded expert testimony that PCB's are harmful to humans. The testimony was based on animal studies, and such studies are sufficiently reliable when they are not contradicted by epidemiological studies.

5. Contrary to the district court's ruling, it was not necessary for a doctor to examine patients before he could reliably testify that they faced a future risk of illness from prior exposure to PCB's. The doctor's opinion was reliable because he based it on a residential history of each plaintiff, and on fat and blood tests performed on the plaintiffs.

Expert Must Employ the Same Methodology for an In-Court Conclusion as She Would Employ In Her Out-of-Court Work: *Braun v. Lorillard Inc.,* 84 F.3d 230 (7th Cir. 1996): The plaintiff sought to prove that the decedent's mesothelioma was caused by smoking cigarettes with a filter made with crocidolite asbestos. The decedent's lung tissue was tested for asbestos fibers, using the standard methodologies of "bleach digestion" and "low temperature plasma ashing." No crocidolite fibers were found. The plaintiffs then retained an expert who tested for asbestos in building materials to conduct tests on the decedent's lung tissue. This expert was unaware of the methodologies ordinarily employed in testing tissue. He used the same test that he used on building materials, known as high temperature ashing, and found crocidolite fibers in the tissue. The expert stated that high temperature ashing was as usable on tissue as on bricks, though he had never conducted such a test on tissue before this litigation. He also admitted that the high temperature could alter the chemistry of the sample, in which case it would be impossible to tell whether asbestos fibers were crocidolite or some other kind. But he asserted that his method was far more likely to produce a false negative than a false positive.

The Court held that the expert's testimony was properly excluded as unscientific under *Daubert.* It made the following points:

> Nowhere in *Daubert* did the Court suggest that failure to adhere to the customary methods for conducting a particular kind of scientific inquiry is irrelevant to the admissibility of a scientist's testimony. On the contrary, the Court made clear that it is relevant. A judge or jury is not equipped to evaluate scientific innovations. If, therefore, an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may appropriately insist that he ground his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry. To forsake the accepted methods without even inquiring why they are the accepted methods--in this case, why specialists in testing human tissues for asbestos fibers have never used the familiar high temperature ashing method--and without even knowing what the accepted methods are, strikes us * * * as irresponsible.

Modern science is highly specialized. An expert in the detection of asbestos in building materials cannot be assumed to be an expert in the detection of asbestos in human tissues even though, as the plaintiff reminds us, many building materials, most obviously wood, are, like human and animal tissues, organic rather than inorganic substances. The fact that the plaintiffs' lawyer turned to this nonexpert, having already consulted experts without obtaining any useful evidence, is suggestive of the abuse, or one of the abuses, at which *Daubert* and its sequelae are aimed. That abuse is the hiring of reputable scientists, impressively credentialed, to testify for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit.

Level of Scrutiny

Limited View of Gatekeeper Role: ***McCullock v. H.B. Fuller Co.,*** 61 F.3d 1038 (2d Cir. 1995): The plaintiff alleged that she contracted a respiratory ailment, including throat polyps, from exposure to an unventilated glue pot at the place of her employment. The defendant challenged two experts under *Daubert*--a consulting engineer, who testified that the plaintiff was in the "breathing zone" of the glue fumes, and an ear, nose and throat doctor, who testified that the glue fumes caused the plaintiff's ailments. The Court held that the testimony of both experts was sufficiently reliable under *Daubert.* The engineer based his opinion on his extensive practical experience, examination of safety literature and the warnings provided by the defendant, interviews with the plaintiff concerning her exposure, and background industrial experience with ventilation. The doctor based his testimony on his treatment of the plaintiff, her medical history, pathological studies, use of a scientific analysis known as differential etiology (which requires listing all possible causes, then eliminating all causes but one), and scientific and medical treatises. Under these circumstances, any dispute as to the experts' lack of specialization, flaws in methodology, or lack of textual authority, went to weight and not admissibility. The Court concluded that the defendant's point-by- point, scrict scrutiny attack on the experts' qualifications and methodology constituted an unwarranted extention of *Daubert:*

Trial judges must exercise sound discretion as gatekeepers of expert testimony under *Daubert*. Fuller, however, would elevate them to the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul -- separating the saved from the damned. Such an inquiry would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.

Trial Court's Gatekeeping Standards Too Strict: ***United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,*** 80 F.3d 1074 (5th Cir. 1996): In an eminent domain action, the landowner proffered an engineering expert and a real estate appraisal expert. The engineering expert stated that a new levee left the subject property unprotected from flooding, and in a worse position than before the levee was built. The real estate appraisal expert stated that any prospective buyer would determine that the property was subject to flooding, and that the fair market value of the property had been reduced. The trial court excluded the experts' testimony as speculative and without foundation, relying specifically on the experts' uncertainty about the extent of flooding on the property in the event of heavy rainfall. But the Court of Appeals found an abuse of discretion, because the trial court "applied too stringent a reliability test." The Court stated that *Daubert* had not worked a "seachange over federal evidence law" and that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." The engineer's opinion was properly based on his review of maps, photographs and other relevant data, as well as his experience as an engineer. The appraisal expert's opinion was based on his experience, his personal inspection of the property, comparable sales, and discussions with local brokers. Under these circumstances, any vagueness or tentativeness in the testimony were "matters properly to be tested in the crucible of adversary proceedings; they are not the basis for truncating that process."

Sufficiency of Expert Testimony

Gatekeeper Role Does Not Extend to Sufficiency Review: ***In re Joint E. and S. Dists. Asbestos Litigation (Maiorana),*** 52 F.3d 1124 (2d Cir. 1995): The trial court held that the plaintiff had presented insufficient evidence to establish that asbestos caused colon cancer, and granted the defendant's motion for judgment as a matter of law after a jury verdict in favor of the plaintiff. While the plaintiff's expert testimony was found on a previous appeal to be admissible, the trial court on remand relied on *Daubert* for the proposition that the trial judge has an obligation to strictly scrutinize expert testimony for its sufficiency as well as its admissibility. But the Court of Appeals reversed the trial court and reinstated the verdict. The Court held that *Daubert* did not change the standard for assessing the sufficiency of evidence or for granting judgment as a matter of law. While the trial judge has an expanded role in assessing the admissibility of scientific expert testimony, this does not allow the judge to usurp the jury's function by acting as a gatekeeper as to sufficiency. The Court explained as follows:

> The "admissibility" and "sufficiency" of scientific evidence necessitate different inquiries and involve different stakes. Admissibility entails a threshold inquiry over

whether a certain piece of evidence ought to be admitted at trial. The *Daubert* opinion was primarily about admissibility. It focused on district courts' role in evaluating the methodology and the applicability of contested scientific evidence in admissibility decisions.

This case is about sufficiency, not admissibility. A sufficiency inquiry, which asks whether the collective weight of a litigant's evidence is adequate to present a jury question, lies further down the litigational road.

Applying its analysis of sufficiency review after *Daubert* to the District Court's ruling, the *Asbestos* Court held that the District Court erred in at least the following respects:

1. The district court unfairly discredited an expert's testimony that a number of studies listing standard mortality ratios for asbestos/colon cancer ranging from 1.14 to 1.47 are statistically significant when taken together. The district court had simply asserted, without support, that an SMR of less than 1.50 is "statistically insignificant" and that "no matter how many studies yield a positive but statistically insignificant SMR for colorectal cancer, the results remain statistically insignificant." The Court of Appeals responded: "Although perhaps a floor can be set as a matter of law, we are reluctant to adopt such an approach. We believe that it would be far preferable for the district court to instruct the jury on statistical significance and then let the jury decide whether many studies over the 1.0 mark have any significance in combination."

2. The district court erred in disregarding the studies proffered by the plaintiff's experts revealing SMRs of 1.62 and 1.85 for asbestos exposure and colon cancer, and in disregarding another study which yielded an SMR of 2.27 for colon cancer in plant workers exposed to asbestos. These SMRs exceeded the district court's own threshold for statistical significance, yet that court unaccountably rejected them in its sufficiency inquiry.

3. The district court gave too much weight to contrary epidemiological studies offered by the defendant, and improperly ignored public reports which had found a link between asbestos exposure and colon cancer. The Court of Appeals stated: "For the district judge to supersede the opinions of the expert witnesses with his own lay judgment raises some concerns; for the court to omit any consideration of agency reports backing up the claims of plaintiff's experts and supporting the jury verdict is, in our view, especially troubling."

Daubert* Cannot Be Argued in Terms of Insufficiency on Appeal, Where the Party Failed to Object to Admissibility at Trial: *C.B. Fleet v. Smithkline Beecham Consumer Healthcare, 131 F.3d 430 (4th Cir. 1997): In a Lanham Act case, the major issue of dispute was the scientific reliability of tests conducted by the defendant that were the basis of the defendant's advertised claims of product superiority. The plaintiff made no *Daubert* objection to the

defendant's scientific testimony at trial, choosing instead to call its own scientific experts to attack the defendant's testing procedures. The Trial Judge found in favor of the defendant, and the plaintiff challenged the evidentiary sufficiency for this finding, contending that the judge's determination was based on evidence that failed to meet *Daubert* standards. In pursuit of this claim, the plaintiff argued that it need not have made a *Daubert* objection at trial, because its challenge on appeal was not to the admissibility of the defendant's expert evidence, but rather to "its insufficiency when tested by *Daubert* principles." But the Court of Appeals rejected this argument as confusing admissibility with sufficiency. The Court explained as follows:

> *Daubert* deals with the admissibility of this kind of scientific evidence. As with all rules governing admissibility, its application to particular evidence is to be raised and resolved in the trial court. There the proponent can attempt upon objection to lay the proper foundation for admitting the evidence and the objector can challenge is sufficiency. In this way the question of admissibility can be resolved as a threshold matter. Fleet essentially would have this court engage in a first instance application of *Daubert* principles on a record completely inadequate for the purpose. This cannot be done under the guise of a challenge to the substantive sufficiency of this evidence.

Reliability and Sufficiency Are Intertwined: ***Conde v. Velsicol Chemical Corp.***, 24 F.3d 809 (6th Cir. 1994): The trial court granted summary judgment for the defendant on the plaintiffs' claim for damages allegedly caused by their exposure to chlordane. The plaintiffs complained that the trial court misconstrued *Daubert* by requiring their experts' testimony to be generally accepted. But the Court held that the issue was whether the experts' testimony, even if admissible, was sufficient to prove that chlordane caused the plaintiffs' injuries. The experts could only state that chlordane exposure was "consistent with" the symptoms suffered by the plaintiffs; the experts could not exclude alternative causes, and their conclusions were inconsistent with the fact that tests of the body tissues of the plaintiffs revealed no chlordane, and were also inconsistent with the relevant, peer-reviewed scientific literature. Thus, "the Condes' expert testimony is insufficient to permit a jury to conclude, by a preponderance of the evidence, that chlordane exposure caused the Condes' health problems." See also ***Elkins v. Richardson-Merrell, Inc.***, 8 F.3d 1068 (6th Cir. 1993) ("the Court in *Daubert* indicated that even if expert opinion or evidence on one side were relevant and admissible, if insufficient to allow a reasonable juror to conclude that the position more likely than not is true, it may be the basis for a directed verdict or a grant of summary judgment.").

Failure to Object Precludes Sufficiency Attack: ***Marbled Murrelet v. Babbitt***, 83 F.2d 1060 (9th Cir. 1996): the Court affirmed the grant of injunctive relief against a logging company in an action by an environmental group to protect a nesting habitat. It held that, because the company failed to request a ruling at trial on its *Daubert* objections to expert testimony, it could not make a sufficiency of the evidence argument on appeal that seemed to be based on a *Daubert* analysis.

Summary Judgment

Caution Required in Applying *Daubert* on Summary Judgment: *Cortes-Irizarry v. Corporacion Insular,* 111 F.3d 184 (1st Cir. 1997). The Court addressed the plaintiff's argument that a *Daubert* analysis is improper in the context of summary judgment:

> The plaintiff posits that *Daubert* is strictly a time-of-trial phenomenon. She is wrong. The *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross *Daubert's* threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment. See *Cavallo v. Star Enter.*, 100 F.3d 1150, 1159 (4th Cir. 1996); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297-99 (8th Cir. 1996); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994); *Porter v. Whitehall Lab.*, Inc., 9 F.3d 607, 612, 616-17 (7th Cir. 1993).

However, the Court cautioned against employing the gatekeeper function too rigorously when deciding a summary judgment motion. The Court explained as follows:

> The fact that *Daubert* can be used in connection with summary judgment motions does not mean that it should be used profligately. A trial setting normally will provide the best operating environment for the triage which *Daubert* demands. Voir dire is an extremely helpful device in evaluating proffered expert testimony, and this device is not readily available in the course of summary judgment proceedings. Moreover, given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.
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> We conclude, therefore, that at the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious -- except when defects are obvious on the face of a proffer -- not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.

As the *Cortes-Irizarry* Court notes, the record on summary judgment is ordinarily insufficient for a conscientious *Daubert* determination. It is only where the expert's affidavit is purely conclusory and speculative that the Trial Court would have enough confidence to reject the expert testimony as insufficiently reliable at such an early stage of the proceedings.

Of course it is possible for the Trial Court to speed up the *Daubert* determination by essentially requiring a full presentation of the expert testimony, and rebuttal, at the summary judgment stage. Courts have displayed considerable ingenuity in devising ways in which an

adequate record can be developed so as to permit *Daubert* rulings to be made in conjunction with motions for summary judgment. See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of in limine hearings), *cert. denied,* 115 S. Ct. 1253 (1995); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) 29 F.3d at 502 (discussing the District Court's technique of ordering experts to submit serial affidavits explaining the reasoning and methodology underlying their conclusions). The problem with these methods is that it may result in a trial before the trial. As the *Cortes-Irizarry* Court put it: "We do not in any way disparage such practices; we merely warn that the game sometimes will not be worth the candle."

Use of Rule 403

Requirement of a Record On Which To Base Exclusion: ***Petruzzi's IGA v. Darling-Delaware***, 998 F.2d 1224 (3d Cir. 1993): To prove an antitrust conspiracy, the plaintiffs proffered the testimony of two economists, who applied multiple regression analysis to sales information provided by the defendants in discovery. On the basis of this methodology, the experts concluded that the defendants must have set prices in concert. The Trial Court rejected this testimony by invoking Rule 403, and granted summary judgment for the defendants, but the Court held that this was an abuse of discretion. The Court made the following points:

1. The testimony comported with the scientific method under *Daubert*; multiple regression analysis is reliable and well-accepted, and there was no indication that it was improperly applied by the plaintiffs' experts.

2. The Trial Court's use of Rule 403 to exclude the evidence, in the context of a pre-trial ruling, was inappropriate, because Rule 403 is only to be used as a last resort with respect to expert testimony. This is especially true at the pretrial level, where there is a danger that the perceived risk of confusion and prejudice cannot be accurately assessed. Thus, in order to exclude expert testimony under Rule 403, a court must have a record complete enough to be considered a "virtual surrogate for a trial record." That standard of completeness was not met in this case.

3. The Trial Court employed the wrong test under Rule 403 when it excluded the evidence on the ground that it was not more probative than prejudicial. Rule 403 provides that evidence is admissible unless the probative value is substantially outweighed by the risk of prejudice, confusion and delay.

Special Scrutiny for DNA Probability Evidence: ***United States v. Chischilly,*** 30 F.3d 1144 (9th Cir. 1994): The Court held that evidence of DNA identification was admissible under *Daubert*. It noted, however, that Rule 403 would have special bearing on the statistical probability aspect of DNA evidence. The Court recognized that the jury might assign undue weight to DNA profiling statistics. It specified two "general tendencies that should be guarded against by the use of Rule 403." First, the jury might accept the DNA evidence as a definitive statement of source probability. Second, the jury might equate source with guilt, "ignoring the possibility of non-criminal reasons for the evidentiary link between the defendant and the victim."

As to the second concern, that of equating source with guilt, there was no danger of prejudice in *Chischilly*, since the source of evidence was semen extracted from the murder victim. Under the circumstances presented in the case, this was not susceptible of an innocent explanation.

As to the first concern, the danger is that the jury may equate random match probability with source probability, when in fact "the real source probability will reflect the relative strength of circumstantial evidence connecting the defendant and other persons with matching DNA to the scene of the crime." The *Chischilly* Court noted that the pitfalls of source probability become "more perilous where the defendant is a member of a substructured population" because the danger is created that the odds will be inflated due to underrepresentation of the substructure in the database. In these situations, "the jury may be ill-suited to discount properly the probative value of DNA profiling statistics." The problem of overstated odds is exacerbated further by geographic differences between the database and the possible set of suspects; it is quite possible that the product rule "will understate the random probability that some other nearby resident with a similar genetic profile could have been the source of the sample found on the victim."

Despite all these risks, the *Chischilly* Court held that evidence of statistical probability that is attendant to DNA profiling can survive a Rule 403 objection, so long as "the district court provides careful oversight." The Court found that such oversight was provided by the district court in this case. It noted that the prosecution "was careful to frame the evidence properly" by characterizing the DNA profiling statistics as the probability of a random match, "not the probability of the defendant's innocence that is the crux of the prosecutor's fallacy." Also, the prosecution expert "arguably calculated on the basis of somewhat conservative statistical assumptions"; and the defendant, a Native American, was compared with a Native American database--though admittedly there was a possibility of substructuring because the defendant is a Navajo and the database was of Native Americans throughout the country.

Use of Rule 703

Reliance on Hearsay: ***United States v. Locascio,*** 6 F.3d 924 (2d Cir. 1993): The government called a law enforcement official to testify as an expert concerning the structure and practices of organized crime families. The expert admittedly relied on inadmissible hearsay for some of his conclusions. The defendant argued that after *Daubert*, the trial court must find that the sources of information relied upon by an expert are trustworthy. The Court agreed that under *Daubert*, the trial court had a gatekeeper function as to the sources of information relied upon by an expert. While *Daubert* dealt with Rule 702 and the "source" question is covered by Rule 703, the Court found that "the flexibility of the federal rules also applied to Rule 703 and the determination of the trustworthiness of the sources of expert testimony." However, the court declined "to shackle the district court with a mandatory and explicit trustworthiness analysis." That is, no explicit determination of trustworthiness must be made on the record. The Court found no abuse of discretion in admitting the expert's testimony in this case.

Daubert* Applies to the Rule 703 Enquiry:** ***In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3rd Cir. 1994): The Court held that after *Daubert*, the Circuit's previous view of Rule 703--that the trial judge had no independent role in assessing the reliability of the basis of an expert's opinion--was no longer viable. The Court explained as follows:

> *Daubert* makes clear for the first time at the Supreme Court level that courts have to play a gatekeeping role with regard to experts. In stating that Rule 702 is the primary locus of the gatekeeping role, the Court implies that there are at least some secondary loci in other Rules. By requiring the judge to look to the views of other experts rather than allowing the judge to exercise independent judgment, current Third Circuit case law eviscerates the judge's gatekeeping role with respect to an expert's data and instead gives that role to other experts. * * *
>
> We now make clear that it is the judge who makes the determination of reasonable reliance, and that for the judge to make the factual determination under Rule 104(a) that an expert is basing his or her opinion on a type of data *reasonably* relied upon by experts, the judge must conduct an independent evaluation into reasonableness.

The *Paoli* Court noted that in a trial court's evaluation of reasonable reliance under Rule 703, the views of experts would be relevant, but not dispositive.

II. HARD SCIENCES--EVIDENCE INADMISSIBLE

Causation in Tort Cases

Trial Court Did Not Abuse Its Discretion In Excluding Unfounded Testimony: ***General Electric Company v. Joiner,*** 118 S.Ct. 512 (1997): In a suit alleging that the plaintiff's cancer was caused by exposure to PCB's, the Supreme Court found that the Trial Court did not abuse its discretion in excluding the plaintiff's expert testimony on causation. The experts' reliance on studies involving infant mice was unscientific, because the mice contracted a different kind of cancer than that suffered by the plaintiff; moreover, the studies could not be replicated in adult mice nor in any other species. The experts' reliance on four epidemiological studies was likewise flawed. Two of the studies found no statistically significant connection between PCB's an cancer; one study did not mention PCB's; and the fourth study, which found a statistically significant connection, involved subjects who were exposed to a variety of other carcinogens.

Unreliable Methodology In Light of Contrary Epidemiological Evidence: ***Raynor v. Merrell Dow Pharmaceuticals, Inc.,*** 103 F.3d 1371 (D.C.Cir. 1997): In a Bendectin case, the trial judge, before *Daubert,* granted a JNOV in favor of the defendant. This decision was remanded for consideration in light of *Daubert.* The trial court held that *Daubert* did not change the result, and the Court of Appeals affirmed this decision. The plaintiffs' experts testified to causation on the basis of chemical studies, in vitro studies, and animal studies. The Court concluded that this methodology was unscientific because it came to a conclusion contrary to every existing epidemiological study. The Court distinguished its opinion in *Ambrosini v. Labarraque* (see infra), where the same type of testimony was held admissible, on the ground that the drug at issue in *Ambrosini* had not been the subject of significant epidemiological study. As to the specific factors noted in *Daubert,* the Court stated: 1) The experts' methodology and conclusion had not been peer reviewed; 2) The testimony suffered from "testing" problems since there was no way to verify that animal and chemical studies are accurate as applied to humans--indeed, the only reliable testing in such an area is through epidemiological study, and the experts' conclusions were contrary to these studies; when *Daubert* referred to the importance of testing, it clearly did not mean that expert testimony was admissible when contradicted by the testing; 3) "[W]here sound epidemiological studies produce opposite results from nonepidemiological ones, the rate of error of the latter is likely to be quite high." The Court noted that "epidemiological evidence does not always trump the nonepidemiological." However, in this case the plaintiffs made "no serious argument that the epidemiological sample sizes have been too small to detect the relationship between Bendectin and birth defects, a relationship that has been studied for hundreds of thousands of subjects."; and 4) Reliance on chemical and animal studies in the face of contradicting epidemiological evidence is not a generally accepted methodology.

Unreasonable Extrapolation: ***Cavallo v. Star Enterprise***, 892 F.Supp. 756 (E.D.Va. 1995), *aff'd*, 100 F.3d 1150 (4th Cir. 1996): The plaintiff alleged that she suffered respiratory illness as a result of exposure to aviation jet fuel vapors that were released from an overflow at the defendant's storage terminal. The plaintiff's experts, one a toxicologist and the other an immunologist, were prohibited from testifying at trial after a *Daubert* hearing, and the Court consequently granted summary judgment for the defendant. The toxicologist did not purport to follow the methodology ordinarily followed by toxicologists. Rather, he formed his opinion "and then tried to conform it to the methodology." His reliance on anecdotal case studies was improper, because these studies were not pre-designed in a controlled setting, and moreover they dealt with different exposures, symptoms, and chemicals from those present in this case. The Court noted that the expert extrapolated from the findings in the literature and case studies, without any scientifically valid basis for doing so:

> Although Dr. Monroe found support in the literature for a conclusion that exposure to similar levels of a different mixture of volatile organic compounds produce somewhat similar, short-term effects, he is unable to provide any scientifically valid basis to support the leap from those studies to his opinion in this case. * * * Thus, while the agreed-upon methodology appears to be scientifically valid, it does not appear to have been faithfully applied.

The immunologist was unaware of the plaintiff's level of exposure and could cite no studies or published literature to support a finding of adverse effects from the plaintiff's level of exposure. The immunologist's reliance on the temporal proximity between exposure and injury was "not the method of science." The Court did, however, state that "there may be instances where the temporal connection between exposure to a given chemical and subsequent injury is so compelling as to dispense with the need for reliance on standard methods of toxicology." Here, however, the plaintiff was merely exposed to some level of jet fuel; she was not doused with chemicals and did not thereupon suffer an immediate injury. Nor was there a mass exposure of many people who all thereafter suffered the same symptoms.

The Court closed by noting that "nothing in the Court's review of this issue required any scientific training. Rather, the Court did nothing more than use the customary legal tools of logical reasoning to carry out its gatekeeping function."

On appeal, the Court of Appeals stated that the District Court's ruling was "restrictive" but "not inconsistent with *Daubert*." The Court of Appeals concluded as follows: "Although *Daubert* eliminated the requirement of general acceptance, the five factors it established still require that the methodology and reasoning used by a witness have a significant place in the discourse of experts in the field."

Insufficient Basis: ***Allen v. Pennsylvania Engineering Corp.,*** 102 F.3d 194 (5th Cir. 1996): The Court affirmed the grant of summary judgment in a wrongful death action, finding no error in the exclusion of expert testimony concluding that the decedent's brain cancer was caused by exposure to ethylene dioxide. The Court stated: "Where, as here, no epidemiological study has found a statistically significant link between EtO exposure and human brain cancer; the results of animal studies are inconclusive at best; and there was no evidence of the level of Allen's occupational exposure to EtO, the expert testimony does not exhibit the level of reliability necessary to comport with Federal Rules of Evidence 702 and 703, the Supreme Court's *Daubert* decision, and this court's authorities." The Court rejected the experts' "weight of the evidence" methodology, which the experts employed to reach the conclusion that EtO caused brain cancer. This methodology is used by government agencies to establish prophylactic rules governing human exposure to possible carcinogens. But this preventive perspective is based on a threshold of proof that is "reasonably lower than that appropriate in tort law."

Untested Theory: ***Wheat v. Pfizer, Inc.***, 31 F.3d 340 (5th Cir. 1994): In a wrongful death action, the principal dispute was whether the decedent's hepatitis was viral or whether it was caused by her ingestion of Feldene or Parafon Forte DSC. The trial judge granted summary judgment for one defendant and judgment as a matter of law for the other, holding that the testimony as to causation by the plaintiff's expert was inadmissible. The Court of Appeals affirmed. The expert's theory, that a combination of the two medications could cause hepatitis, was untested; no study of the combined effects of the two drugs had ever been done; and his theory was not published or subject to peer review.

Scientific Rigor Lacking: ***Rosen v. Ciba-Geigy Corp.,*** 78 F.3d 316 (7th Cir.1996): The plaintiff brought a negligence action against the manufacturer of a nicotine patch. The plaintiff claimed that the use of the nicotine patch, together with his continued smoking, caused him to have a heart attack. The Court held that the testimony from the plaintiff's expert cardiologist, concerning the role of the nicotine patch in the plaintiff's heart attack, was properly excluded. The Court noted that the object of *Daubert* was "to make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work. If they do, their evidence (provided of course that it is relevant to some issue in the case) is admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as canonical in their branch of the scientific community." The Court held that the plaintiff's expert's methodology lacked "scientific rigor." The expert offered "neither a theoretical reason to believe that wearing a nicotine patch for three days * * * could precipitate a heart attack, or any experimental, statistical or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on such a theory."

Reliance on Temporal Proximity: ***Porter v. Whitehall Laboratories, Inc.***, 9 F.3d 607 (7th Cir. 1993): The plaintiff sued for damages from kidney failure allegedly caused by ingestion of ibuprofen. The trial court, before *Daubert* was decided, held that expert testimony concluding that the plaintiff's kidney failure was caused by ibuprofen was inadmissible, and granted summary judgment. The Court of Appeals held that the trial court's exclusion of the expert testimony was consistent with *Daubert*. The experts reached their conclusions solely on the basis of the temporal proximity between the plaintiff's use of ibuprofen and his kidney failure. But reliance on this temporal factor alone did not comport with the scientific method. None of the experts could point to studies, records or data which would support the conclusion that ibuprofen was linked to the particular type of kidney failure (known as anti-GBM RPGN) suffered by the plaintiff. Finally, certain of the experts' conclusions were based on factual premises inconsistent with the evidence, and therefore they were properly excluded under the *Daubert* "fit" requirement.

Subjective Methodology: ***O'Conner v. Commonwealth Edison Co.***, 13 F.3d 1090 (7th Cir. 1994): The Court held that testimony of the plaintiff's expert opthamologist, concluding that the plaintiff's cataracts were cause by exposure to nuclear radiation, was properly excluded under *Daubert*. The expert testified that he could identify radiation-induced cataracts by simple visual observation; however, there was no scientific support for this premise. Furthermore, the studies upon which the expert purported to rely for this premise actually contradicted his conclusion. The Court noted that the defendant's experts had shown that a proper methodology for detecting radiation-induced cataracts included a medical work-up, a work-up of the patient's history, and an examination of occupation dosimetry charts.

Hypothetical and Unsupported Conclusions: ***Bradley v. Brown***, 42 F.3d 434 (7th Cir. 1994): The trial court excluded testimony of two clinical ecologists, who would have testified that the plaintiffs were suffering from Multiple Chemical Sensitivity Disorder caused by exposure to the defendant's pesticides. The Court held that the trial court had properly followed the *Daubert* framework and had not abused its discretion. The trial court had found that the etiology of MTS was not known or tested, and that the scientific literature raised doubts about the experts' methodology. Since the experts' conclusions were "hypothetical" at this point, they could not assist the factfinder and were properly excluded under Rule 702.

Speculation, and Insufficient Information about the Specific Case: ***Wintz by and through Wintz v. Northrop Corp.,*** 110 F.3d 508 (7th Cir. 1997): To defeat a motion for summary judgment, the plaintiffs proffered the testimony of a toxicologist who concluded that the plaintiff-infant's birth defects were caused by exposure to bromide in utero. Affirming the order

granting summary judgment, the Court held that the Trial Court did not err in finding this testimony insufficiently reliable under *Daubert*. At the time the expert formed his opinion, he knew only that the infant's mother had worked with a chemical containing bromide, and that the infant's symptoms were consistent with bromide exposure. He did not know the amount or extent of exposure or the specifics of the work environment, nor did he attempt to correlate any specific dose the mother received with the infant's symptoms. The Court concluded as follows:

> Ellenbogen's methodology in attempting to relate the general principles of toxicology and bromide exposure to the facts of this case appears to have been based less on a scientific understanding of the specifics of Jill Wintz's workplace exposure and the potential effects on Jessica, and more on merely a general understanding of bromide, with only unsupported speculation having been used to relate the general knowledge to the facts surrounding Jill Wintz's exposure.

Insufficient Knowledge to Support the Opinion: ***Wright v. Willamette Industries, Inc.,*** 91 F.3d 1105 (8th Cir. 1996): In an action alleging personal injuries due to exposure to formaldehyde emanating from a nearby fibreboard plant, the Court reversed a judgment for the plaintiffs due to insufficient evidence. The Court held that the testimony of the plaintiff's expert on causation should not have been admitted. The expert testified that the injuries were more probably than not related to exposure to formaldehyde, "but that opinion was not based on any knowledge about what amounts of wood fibers impregnated with formaldehyde involve an appreciable risk of harm to human beings who breathe them." Therefore, the expert's testimony was speculative and unscientific under *Daubert*.

Result-Oriented Methodology: ***Sorenson By and Through Dunbar v. Shaklee Corp.***, 31 F.3d 638 (8th Cir. 1994): Affirming summary judgment for the defendant, the Court held that the trial court properly rejected the plaintiffs' experts' testimony which sought to establish a link between the plaintiffs' mental retardation and the ingestion by the plaintiff's parents of alfalfa tablets which had been coated with ethylene dioxide (EtO). The Court first held that the testimony, which concluded that EtO could cause mental retardation in children if taken by parents before childbirth, failed the *Daubert* "fit" requirement, because the plaintiffs produced no evidence that the alfalfa tablets taken by their parents contained any EtO residue. The Court also concluded that the scientific validity prong of *Daubert* had not been met, because the experts' conclusions as to causation were not based on any studies, their theories had not been published or peer reviewed, were not based on any well-accepted methodology, and did not purport to exclude or analyze other possible causes. The Court concluded: "Instead of reasoning from known facts to reach a conclusion, the experts here reasoned from an end result in order to hypothesize what needed to be known but what was not."

Improper Extrapolation: ***Schudel v. General Electric Co.,*** 120 F.3d 991 (9th Cir. 1997): In a toxic tort case alleging injuries from exposure to trichloroethane and perchloroethylene, the Court held that testimony by the plaintiff's expert on neurological symptom causation was improperly admitted in light of *Daubert.* The expert based his conclusion of causation on studies involving organic solvents other than those involved in the case. Moreover, the studies examined long-term exposure at low concentration, and short-term exposure at high concentration, rather than the short-term, moderate exposure suffered by the plaintiff. The Court stated that "[e]xtrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable."

Improper Extrapolation: ***Lust v. Merrell Dow Pharmaceuticals, Inc.,*** 89 F.3d 594 (9th Cir. 1996): In a case alleging that a drug caused a birth defect, the Court held that the testimony of an expert employed by the plaintiff in *Daubert* was properly excluded. Doctor Done testified that the plaintiff's birth defect, hemifacial microsomia, was caused by the mother's use of Clomid. Doctor Done based his conclusion on epidemiological studies which showed a link between Clomid and other types of birth defects. He concluded that since Clomid is capable of causing other birth defects, it also caused hemifacial microsomia. The Court held that this reasoning was not scientific. The Doctor's testimony "was influenced by litigation-driven financial incentive", and the Doctor's premise--that a positive association between a drug and some birth defects indicates an association with other birth defects--was not recognized by even a minority of scientists. The Court concluded as follows:

> When a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the district court should be wary that the method has not been faithfully applied.

Thus, the exclusion of the testimony in *Lust* was not based solely on the unsupported conclusion of the expert--in violation of *Daubert's* directive to focus on methodology rather than conclusion--but rather on the likelihood that the expert misapplied standard scientific methodology.

Failure to Consider Alternative Causes: ***Claar v. Burlington Northern R. Co.,*** 29 F.3d 499 (9th Cir. 1994): Plaintiffs brought an action under FELA alleging that they were injured by exposure to chemicals. Affirming an order of summary judgment for the defendant, the Court held that the proffered testimony of the plaintiffs' experts was inadmissible. The experts concluded that the plaintiffs' injuries were caused by exposure to chemicals, but they failed to articulate any basis for these conclusions, and could not describe the methodology by which they reached those conclusions, despite the fact that the trial judge ordered the experts to provide affidavits explaining their methodology. Also, the experts neglected to investigate any other possible causes of the plaintiffs' injuries. Finally, the experts appeared to have first concluded that the plaintiffs were injured due to exposure to chemicals, and then consulted the relevant literature in the field to support their conclusions. The *Claar* Court stated:

> Coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method. Certainly, scientists may form initial tentative hypotheses. However, scientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed by the district court as lacking the objectivity that is the hallmark of the scientific method.

In a footnote, the *Claar* Court stated that the *Daubert* standards are applicable to all expert testimony, not just scientific expert testimony.

Result-Oriented Methodology: ***Diaz v. Johnson Matthey, Inc.***, 1995 U.S. Dist. Lexis 10970 (D.N.J. 1995): The plaintiff claimed that his asthma was caused by his workplace exposure to platinum salts. The Court granted summary judgment after holding a *Daubert* hearing and concluding that the plaintiff's expert testimony as to causation was unreliable. The Court found the following flaws in the expert's testimony: 1) The expert failed to conduct a differential diagnosis, even though the plaintiff smoked a pack of cigarettes a day for fifteen years, had a family history of asthma, and was exposed to other potential causes of asthma; and 2) The expert's only diagnosis of this specific condition was for purposes of this particular litigation.

"Working Hypothesis" Based on Speculation: ***Ballinger v. Atkins,*** 947 F.Supp. 925 (E.D.Va. 1996): The plaintiff claimed neurological damages caused by using Nutrasweet in conjunction with a ketogenic diet. After a *Daubert* hearing, the Court held that the plaintiff's biochemist expert would not be permitted to testify at trial. The expert described his opinion as a "working hypothesis"; he testified only that Nutrasweet together with a ketogenic diet "can be unsafe", and he could not state or estimate at what level of consumption the unsafe effects could arise. His methodology was not tested or peer-reviewed, no studies supported his theory, and his opinion was generated solely for litigation purposes.

No Supporting Studies: ***Schmaltz v. Norfolk & Western Ry. Co.***, 878 F.Supp. 1119 (N.D.Ill. 1995): A railroad employee claimed that he developed "reactive airway disfunction syndrome," a respiratory disease, by exposure to the herbicides atrazine and tebuthiuron. The Court granted the defendant's motion *in limine* to exclude two experts proffered by the plaintiff to prove causation, determining that neither expert's methodology could be validated. Neither expert could point to any documented cases of the herbicides causing a respiratory disease. One expert's reliance on high dose studies on rabbits, resulting in eye irritation, was plainly inconsistent with the scientific method. Neither expert was aware of the concentration of the herbicides to which the plaintiff was exposed. One expert's reliance on temporal proximity between exposure and injury was similarly insufficient because "[i]t is well-settled that a causation opinion based solely

on a temporal relationship is not derived from the scientific method." Finally, the experts could not find any peer-reviewed studies to support their conclusions (even though the herbicides had been used for many years), and indeed all of the published studies indicated that there was no harm involved in using these herbicides.

Anecdotal Evidence: ***Casey v. Ohio Medical Products***, 877 F. Supp. 1380 (N.D.Cal. 1995): The Court granted summary judgment for the defendant in a case in which the plaintiff alleged that he contracted hepatitis shortly after his exposure to halothane. The plaintiff's expert, an occupational health physician, relied solely on anecdotal evidence, and this was not sufficient scientific support for the expert's conclusion on causation.

Unsupported Speculation: ***Trail v. Civil Engineer Corps.***, 849 F. Supp. 766 (W.D.Wash. 1994): The District Court granted summary judgment for the defendant United States in an action for alleged health risks caused by leakage and runoff from a waste disposal site at a federal facility. The Court held that the defendant's experts provided reliable scientific expert testimony which proved that any health risk from the leakage and runoff was negligible. The plaintiff's expert testimony to the contrary did not satisfy the *Daubert* standards. The plaintiff's witness was qualified as an expert on sampling and testing for hazardous substances; but he had no expertise regarding the health effects of these substances. Any extrapolations from the level of contaminant to its health risk were simply "subjective belief or unsupported speculation not validated by any known facts or inferences presented to the court and are thus unreliable and inadmissible under the *Daubert* standard."

Speculation: ***Chikovsky v. Ortho Pharmaceutical Corp.***, 832 F. Supp. 341 (S.D. Fla. 1993): Relying on *Daubert*, the Court granted summary judgment after holding inadmissible the plaintiff's expert's testimony that Retin-A caused the plaintiff's birth defects. The Court noted the following points: 1. No published studies have made a connection between Retin-A and birth defects; 2. The expert did not know how much Retin-A the plaintiff's mother had applied to her skin during pregnancy; 3. The expert's admitted extrapolation from Vitamin A and Accutane studies was "wanting" because the studies concerned far different circumstances, products and exposures than those existing in this case; 4. The expert was an obstetrician, not a geneticist, and so he was not able to rule out a genetic explanation for the plaintiff's birth defects; and 5. The expert's self-defined "common sense" assumption that there is evidence of the teratogenetic effects of Retin-A, but that the evidence has not been released to the public, was nothing more than speculation. **See also** ***Everett v. Georgia-Pacific Corp.***, 949 F.Supp. 856 (S.D.Ga. 1996) (expert opinion as to causation held unreliable under *Daubert* where it was based solely on the fact of exposure to the substance; expert did not review medical history, and did not eliminate other causes; this testimony was nothing more than pure speculation).

Failure to Eliminate Alternatives, Failure to Consider Epidemiological Evidence, etc.: ***Haggerty v. Upjohn Co.,*** 950 F.Supp. 1160 (S.D.Fla. 1996): Plaintiff claimed that he was injured as a result of taking a single Halcion tablet--the injuries coming from his erratic and violent behavior after taking the Halcion. Granting summary judgment for the defendant, the court held that the testimony of the plaintiff's expert pharmacologist did not satisfy *Daubert.* The expert would have testified that the plaintiff's behavior was caused by the single Halcion tablet, but this opinion was not scientifically valid for several reasons: 1) the expert ignored the results of thousands of clinical trials and the corresponding epidemiological evidence; 2) she relied only on summaries of a few case studies; 3) she did not consider alternative causes, such as the plaintiff's diagnosed mental disorder which had led to previous violent episodes; 4) her hypothesis was untested and not peer-reviewed; 5) the general view in the scientific community is that the methodology employed by the expert "can be used to generate hypotheses about causation, but not causation conclusions."

Environmental Experts

Speculative Assumptions as to Specific Causation: ***Thomas v. FAG Bearings Corp.***, 846 F.Supp. 1382 (W.D.Mo. 1994): The defendant in a suit to recover response costs brought third-party actions against other property owners seeking recovery under CERCLA. The question was whether contaminants from these other properties caused the contamination in the drinking wells at Silver Creek and Saginaw Village. The defendant's expert, a hydrogeologist, was deposed and stated that based on his investigation, there was an underground waterway running somewhere among the various properties and Silver Spring and Saginaw Village, but that more testing was required to determine the probable cause of the contamination of the drinking wells at issue. He concluded that there was a "potential" that the contaminants came from one or more of the third party properties.

The District Court granted summary judgment for the third parties on the issue of causation, holding that the hydrogeologist's testimony was inadmissible under *Daubert.* The Court explained that "a scientific opinion that cannot establish a probability cannot be the basis on which a reasonable juror can find in favor of a proposition" and that courts "are particularly wary of unfounded expert opinion when causation is the issue." Applying these principles to the expert's testimony, the Court declared as follows:

> Overton's opinions are concocted of impermissible bootstrapping of speculation upon conjecture. He first speculates that any contamination in the soil at third-party defendant sites entered the groundwater. The first conjecture is made without the benefit of any factual data about the nature or depth of the alleged contamination, the composition of the earth below the site, its proximity to the "conceptual" underwater pathway of the amount of contaminants actually released. Overton's second speculative assumption is that the contaminants * * * may have

travelled this generalized, uncharted subterranean river and contaminated Silver Creek and Saginaw Village. He admits that, although he is confident of the existence of the pathway and its general flow, there is no information available to say to any degree of certainty that contaminants went from point "A" to point "B".

While Overton may be permitted to testify that such groundwater pathways are generally accepted in his scientific community, opinions about causation on a particular site must be supported by some factual basis to remove them from the realm of impermissible speculation. * * * He cannot say, with any reasonable degree of scientific certainty that any cause is more than just a possibility. His opinions have nothing to do with probabilities and, therefore, are not properly the subject of expert testimony.

Medical Testimony

Inadmissible PET Scan: ***Penney v. Praxair, Inc.,*** 116 F.3d 330 (8th Cir. 1997): To prove the existence of brain injury after a car accident, the plaintiff offered testimony from a doctor who conducted a Position Emission Tomography (PET) scan of the plaintiff's brain. The Court held that the testimony concerning the results of the PET scan was properly excluded under *Daubert.* A PET scan measures brain functions, and the results of the scan are compared to a control group to detect abnormalities. In this case, the plaintiff, who was 62 years old, was compared with a control group of 31 persons, with ages from 18 to 70. The parties agreed that PET scan results can be affected by a person's age, and yet the plaintiff made no showing that comparison of his results with those of a control group of such widely disparate ages would be reliable. Moreover, PET scan results can be affected by the patient's medication; the plaintiff's test was conducted while he was on medication for his heart condition and other maladies, whereas none of the control-group subjects was on medication at the time of their PET scans. While it was not clear whether these problems actually led to an unreliable expert opinion, "it was the plaintiff's burden to establish a reliable foundation for the PET scan readings." Here, the plaintiffs failed to establish such a foundation, and there was no error in excluding the PET scan evidence.

The Court recognized that in *Hose v. Chicago Northwestern Transp.Co.*, 70 F.3d 968 (8th Cir. 1995), it had held that PET scan testimony was admissible under *Daubert.* "However, because the admission of scientific evidence in one case does not automatically render that evidence admissible in another case, we assume that *Hose* did not present the same evidentiary problems as does this case."

Statistics

Flawed Comparisons: ***Raskin v. Wyatt Co.,*** 125 F.3d 55 (2d Cir. 1997): In an ADEA action, the Trial Court granted summary judgment for the defendant, excluding testimony from the plaintiff's expert statistician. The expert found that the defendant's employees retired earlier than comparable employees in the workforce generally, and concluded that this was attributable to the defendant's discrimination against older workers. Affirming the Trial Court, the Court found that this testimony was properly excluded as unreliable under *Daubert*. The statistical conclusion was defective in at least two respects. First, the expert did not account for the presence in the comparison group of those without pension plans and those who were self-employed--"categories of people who tend to work longer and to an older age than people who work for companies that have pension plans." Thus, the expert artificially inflated the retirement age in the comparison group. Second, the expert failed to account for other possible causes of differentiation between the defendant's employees and the population at large.

Failure to Account for Confounding Factors: ***Sheehan v. Daily Racing Form, Inc.,*** 104 F.3d 940 (7th Cir. 1997): The plaintiff brought an age discrimination action when he was terminated from employment after his job was computerized and the offices of the employer were consolidated. The district court's grant of summary judgment in favor of the employer was upheld. In opposition to the motion for summary judgment, the plaintiff relied on an affidavit of a statistician, who compared the age of those who were dismissed and those who were retained. The statistician concluded that the probability that retention of office personnel was uncorrelated with age was less than five percent. The Court held that the expert's affidavit failed to meet the *Daubert* standard, "which requires the district judge to satisfy himself that the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting." The statistician's methodology was defective because: 1) He arbitrarily excluded certain personnel from the sample tested; and 2) He failed to correct for any potential explanatory variations other than age (e.g., that those who were retained might have had better computer skills than those who were let go, and that the employees in the office held a variety of jobs). The court concluded as follows:

> The expert's failure to make any adjustment for variables bearing on the decision whether to discharge or retain a person on the list other than age--his equating a simple statistical correlation to a causal relation ("of course, if age had not role in termination, we should expect that equal proportions of older and younger employees would be terminated"--true only if no other factor relevant to termination is correlated with age)--indicates a failure to exercise the degree of care that a statistician would use in his scientific work, outside the context of litigation. In litigation an expert may consider (he may have a financial incentive to consider) looser standards to apply. Since the expert's statistical study would have been inadmissible at trial, it was entitled to zero weight in considering whether to grant or deny summary judgment.

See also ***People Who Care v. Rockford Board of Education,*** 111 F.3d 528, 537 (7th Cir. 1997) (holding that expert testimony attributing discrimination as the cause of underperforming of minority students was unreliable under *Daubert;* the expert made no attempt to exclude causes other than poverty, and used an unreliable indicator of poverty levels: "A statistical study is not inadmissible merely because it is unable to exclude all possible causal factors other than the one of interest. But a statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in a federal court.").

Using the Wrong Numbers: ***United States v. Artero,*** 121 F.3d 1256 (9th Cir. 1997): The Court rejected the defendant's challenge to the ethnic composition of the grand jury. The defendant presented testimony from a statistician that the percentage of Hispanics on the jury wheel was substantially less than the percentage of Hispanics in the local population. This conclusion of underrepresentation was unreliable, however, because "the defense expert used the wrong numerator for the ratio of Hispanics to the general population." The expert used the percentage of Hispanics in the general population, whereas "[t]he right question is whether Hispanics eligible to serve on federal juries were unreasonably represented because of systematic exclusion." The Court declared:

> But Dr. Weeks did not provide any data responsive to that question. He provided an answer to a different question, whether Hispanics, whether eligible to serve on federal juries or not, were represented in jury wheels at a lower rate than their proportion of the population as a whole. Irrelevant question, irrelevant answer.

The percentage of Hispanics in the general population was an erroneous indicator because many Hispanics in Southern California have recently arrived in this Country and as such are ineligible for jury service. The Court, citing *Daubert,* concluded as follows:

> An expert witness's post-graduate degree does not protect the court against the tendentiousness of advocacy research. A judge must exercise independent judgment to ensure that any and all scientific testimony or evidence is not only relevant, but reliable.

III. HARD SCIENCES--EVIDENCE ADMISSIBLE

Causation in Tort Cases

Limited Gatekeeper Role: ***Ambrosini v. Labarraque,*** 101 F.3d 129 (D.C.Cir. 1996): In an action alleging that birth defects were caused by the drug Depo-Provera, the Court held that the Trial Court improperly granted summary judgment for the defendants. The Trial Court rejected the testimony of two experts, an epidemiologist and a teratologist. The Court held that the Trial Court had misconceived "the limited gatekeeper role envisioned in *Daubert.*" Both of the plaintiff's experts had relied on standard methodologies and published studies. Both were highly qualified, a fact which the Court treated "as circumstantial evidence as to whether the expert employed a scientifically valid methodology or mode of reasoning." The fact that one expert had not published his conclusions was of no moment, because the drug Depo-Provera is no longer prescribed during pregnancy, and thus there would be "no reason in the world" to publish those findings. The Court also found it relevant that the teratologist had testified to his conclusions about Depo-Provera at an FDA hearing, before the instant litigation arose. Both experts sufficiently ruled out some other possible causes for the plaintiff's birth defect, including viruses and genetic defect. The fact that several possible causes might have remained "uneliminated" went only to weight and not to admissibility. Finally, the fact that the epidemiologist could not state categorically that Depo-Provera causes birth defects did not render his testimony inadmissible under the "fitness" prong of *Daubert.* The Court reasoned that the "fitness" prong is satisfied if the testimony is relevant--it need not be sufficient to prove the point. The dissenting judge argued that the experts' testimony was conclusory and unscientific.

Standard Procedures Followed: ***Holbrook v. Lykes Bros. S.S. Co., Inc.,*** 80 F.3d 777 (3d Cir. 1996): The plaintiff alleged that he contracted mesothelioma from exposure to asbestos. He objected to testimony from defense experts that the cause of his condition was radiation. The Court held that the experts' testimony was properly admitted. One expert was a pathologist and the other was a specialist in occupational lung disease. Both relied on medical literature, their knowledge of mesothelioma and its causes, animal studies, and the plaintiff's medical history. The Court concluded: "As required by *Daubert*, their procedures for examining the facts presented to them and their own research methodologies were based on the methods of science and did not reveal opinion based merely on their own subjective beliefs."

Liberal Test of Admissibility: ***Kannankeril v. Terminix Intern., Inc.,*** 128 F.3d 802 (3d Cir. 1997): The plaintiff claimed that her exposure to Dursban, an insecticide, caused a loss of cognitive ability. The Trial Court excluded the plaintiff's medical expert, who testified to

causation on the basis of the plaintiff's medical records; literature indicating that Dursban has a harmful effect on humans, and the "temporal relationship" between the plaintiff's exposure and her injuries. The Trial Court reasoned that the expert's differential diagnosis was flawed, because the expert relied only on medical records and not on any diagnostic tests of the plaintiff; the expert ignored blood tests indicating no abnormal results; the expert failed to consider other causes; the expert relied on improper information to assume a certain level of exposure; and the expert had not published in the area. The Court held that the trial court abused its discretion, confusing issues of admissibility and credibility. The expert's reliance on medical records to support a differential diagnosis was permissible--personal inspection is not required. As to the blood test, the expert's discarding of the test and reliance on other information presented a question of weight and not admissibility. As to alternative causes, the Court held that the defendant failed to present any alternative causes for the plaintiff's injury that the expert would then be obligated to explain away. As to reliance on improper information, the court found this a question of weight and not admissibility. As to lack of publication, the Court found this to be unimportant, given the fact that the expert's opinion was "supported by widely accepted scientific knowledge of the harmful nature of organophosphates."

It should be noted that the Court, in taking a very liberal "weight rather than admissibility" view of the expert's testimony, relied on the 11th Circuit opinion in *Joiner*. As seen elsewhere in this Outline, that opinion has been subsequently repudiated by the Supreme Court. Moreover, the Court's finding that the district court abused its discretion in excluding the expert's clearly shaky testimony is suspect after *Joiner*, which prohibits appellate courts from second-guessing district court exclusions of expert testimony under *Daubert*. Finally, the *Kannankeril* Court seems clearly wrong in asserting that the burden is on the opponent to come up with alternative explanations for causation, that the proponent's expert must then explain away. Under Rule 104(a), it is the proponent of the expert that has the burden of going forward and of proving that the expert's testimony is reliable.

Standard Procedures Followed: ***Benedi v. McNeil-P.P.C., Inc.***, 66 F.3d 1378 (4th Cir.1995): Plaintiff alleged that his liver failure was caused by his having taken Tylenol together with alcohol. Plaintiff's experts testified to causation on the basis of the following: the microscopic appearance of the plaintiff's liver, the Tylenol found in his blood when he was admitted to the hospital, the plaintiff's history of Tylenol use after alcohol consumption, the liver enzyme blood level, the lack of any evidence of a viral or any other cause of liver failure, and numerous articles and treatises that described the increased risk of liver injury when acetominophen is combined with alcohol. The Court found no error in the Trial Court's admission of the experts' testimony. The experts' methodology was reliable under *Daubert*; it was the same methodology employed daily by the medical community in diagnosing patients. The Court rejected the defendant's argument that the testimony should have been excluded because the experts did not rely upon

epidemiological data. It concluded: "Under the *Daubert* standard, epidemiological studies are not necessarily required to prove causation, as long as the methodology employed by the expert in reaching his or her conclusion is sound."

Note that there is no indication in the case that any epidemiological studies had been conducted; presumably the result would have been different if the plaintiffs' experts had simply ignored reliable epidemiological studies.

Peer-reviewed Studies Indicate a Reliable Methodology: ***Glaser v. Thompson Medical Co., Inc.***, 32 F.3d 969 (6th Cir. 1994): Reversing a grant of summary judgment for the defendant in an action brought by the plaintiff for alleged damages caused by ingestion of the diet pill Dexatrim, the Court held that the testimony of the plaintiff's expert created a triable issue of fact as to whether the plaintiff's acute hypertension and related injuries were caused by using Dexatrim. The expert's conclusion that there was an 80% likelihood that the plaintiff's injuries were caused by taking a single dose of Dexatrim was scientifically valid. The conclusion was based on eight clinical studies, several conducted by the expert himself, which detected a significant connection between ingestion of small doses of the active ingredient in Dexatrim and acute hypertension. None of these studies were prepared in anticipation of litigation. The *Glaser* Court concluded:

> These studies, together with Dr. Zaloga's extensive experience and work in this area, provide sufficient, reliable scientific data upon which Dr. Zaloga may base his conclusion. All of these papers have clearly explained, solid scientific methodologies upon which they have tested their theories, and all have been peer-reviewed and published in reputable medical journals * * *. The error rates are published and their impact on the studies explained.

The fact that other studies disagreed with the expert's conclusion was not critical, because the expert distinguished many of them and pointed out flaws in the techniques of others. The Court stated that "[s]uch differences in opinions among medical experts do not invalidate Dr. Zaloga's opinion, but rather create material issues of fact which must be resolved by the jury."

Anecdotal Evidence as Confirmatory Data: ***Cantrell v. GAF Corp.***, 999 F.2d 1007 (6th Cir. 1993): Plaintiffs claimed that their exposure to asbestos in the workplace created a legitimate fear that they would develop laryngeal cancer in the future. The plaintiff's expert testified that asbestos created a risk of laryngeal cancer, basing his conclusion on epidemiological evidence reported in the medical literature, and on the relatively high incidence of persons at the plaintiffs' workplace whom the expert had personally diagnosed as having laryngeal cancer. The defendants objected to the expert's testimony under *Daubert* insofar as it was based on anecdotal evidence, because the expert had not evaluated a sufficient number of cases from which to draw a proper statistical conclusion of cause and effect. But the Court held that the expert testimony was

properly admitted. It stated: "Nothing in Rules 702 and 703 or in *Daubert* prohibits an expert from testifying to confirmatory data, gained through his own clinical experience, on the origin of a disease or the consequences of exposure to certain conditions." The Court noted that the expert was cross-examined and freely acknowledged that his anecdotal evidence was not dispositive but rather simply confirmatory of the medical literature. Presumably the result would have been different had the expert relied only on personal anecdotal evidence for his conclusion.

Reliable Basis in the Absence of Epidemiological Findings: ***Hopkins v. Dow Corning Corp.***, 33 F.3d 1116 (9th Cir. 1994): Affirming a judgment for the plaintiff in an action for damages suffered from defective silicon breast implants, the Court held that testimony from the plaintiff's experts was properly admitted as proof of causation. Relying on *Daubert*, the Court concluded that the experts "based their opinions on the types of scientific data and utilized the types of scientific techniques relied upon by medical experts in making determinations regarding toxic causation where there is no solid body of epidemiological data to review." The Court also noted that the Trial Court is not required under *Daubert* to hold a formal hearing, so long as a determination is made that the expert is qualified and that the testimony is reliable.

Generally Accepted Methodology: ***Zuchowitz v. United States***, 870 F. Supp. 15 (D.Conn. 1994): In a suit for personal injury resulting from an excessive dose of Danocrine, the Court held that the testimony of the plaintiffs' experts on causation was admissible. The testimony was based on epidemiological, clinical and animal studies which had been subjected to peer review and publication, and the experts used methodologies which had gained general acceptance within the relevant scientific community. These findings were sufficient to qualify the testimony as admissible after *Daubert*. The Court found that there was no requirement under *Daubert* that the expert assert his conclusions to a level of certainty.

Computers

Standard Components: ***Roback v. V.I.P. Transport Inc.***, 90 F.3d 1207 (7th Cir. 1996): The defendant, a truck driver who rammed another car, brought a third-party action claiming that he was distracted by the erratic operation of a faulty cruise control system. The defendant retained an engineer who used a computerized data acquisition system he refers to as the DATAQ, to gather data on the performance of various systems within an automobile or truck. The expert took the truck on a 90 mile drive and used the DATAQ to document how the vehicle performed. He

paid particular attention to the engine throttle, the position of the accelerator pedal, and the operation of the cruise control. He concluded that the cruise control, when engaged, caused the engine to rev and the speedometer to fluctuate dramatically, even though the truck would not exceed the set speed limit. The third- party defendants argued that this testimony was inadmissible under *Daubert* because the DATAQ system had not been subject to peer review. But the Court held that the testimony was sufficiently scientific to satisfy *Daubert*:

> Documenting the malfunction of a vehicle by gathering and compiling data during a test run is hardly a novel methodology. In a basic sense, Rosenbluth was no different than an eyewitness who may have observed Martin's truck malfunction on another occasion. Arguably, however, his testimony would have been more reliable because his observations were quantified. The only thing apparently unique to Rosenbluth's approach was the DATAQ, in the sense that he put together the hardware and designed the software and * * * only he had ever used them. But Rosenbluth used standard components to assemble the DATAQ, and he certainly could have been interrogated about the way in which his software worked. His data were subject to examination and independent verification. We see no way in which Rosenbluth's testimony did not qualify for admission under Rule 702.

DNA Testing

RFLP Identification Satisfies *Daubert: United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993): The Court found no error in admitting expert testimony on DNA identification, through the Restriction Length Fragment Polymorphism process, by an FBI crime laboratory. While the lower court's rulings admitting the DNA evidence were couched in *Frye* terminology, the findings were still relevant because "general acceptance is still one factor the Supreme Court has said can impact on a court's scientific validity determination * * *." The Court found that DNA identification was scientifically valid, and made the following points:

> 1. The methodology employed by the FBI was tested by internal proficiency testing, validation studies and environmental insult studies.
> 2. The methodology had been published and was exposed to some peer review, and the fact that some flaws in the methodology were exposed by peer review went to weight and not admissibility. As *Daubert* says, the very reason for requiring peer review is so that the methodology can be evaluated and criticized.
> 3. There was an absence of proof as to rate of error, because the FBI had failed to conduct any external blind proficiency tests to account for the possibility of laboratory error. While this was a negative factor, "the error rate is only one in a list of nonexclusive factors that the *Daubert* Court observed would bear on the admissibility question."

4. The methodology employed by the FBI for determining a DNA match was generally accepted as a reliable testing technique; acceptance need not be universal to be deemed general acceptance, and therefore the fact that the reliability of the methodology is in some dispute goes to weight and not admissibility.

The Court held that "criticisms touching on whether the lab made mistakes in arriving at its results is for the jury." Thus, in the Sixth Circuit, an admissibility hearing is not required to determine whether protocols were followed in the particular case. As the Court put it: "the criticisms about the specific application of the procedure used or questions about the accuracy of the test results do not render the scientific theory and methodology invalid or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility."

The Court in *Bonds* further held that the probability estimates employed by the FBI were admissible even though they did not take account of possible ethnic subgrouping in the sample data base. The Court stated: "This substructure argument involves a dispute over the accuracy of the probability results, and thus this criticism goes to the weight of the evidence and not its admissibility."

Errors Claimed in a Particular Test Are Part of the *Daubert* Enquiry: *United States v. Martinez*, 3 F.3d 1191 (8th Cir. 1993): Applying *Daubert,* the Court held that a trial court may take judicial notice of the reliability and scientific validity of the general theory and techniques of DNA profiling. However, the Court held that *Daubert* requires the trial court to "inquire into whether the expert properly performed the techniques involved in creating the DNA profiles." In this respect, the Court differed with the pre-*Daubert* case of *United States v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992) (issue of whether protocols were properly performed generally goes to weight and not admissibility), and with the Sixth Circuit's view in *Bonds, supra*. The *Martinez* Court stated that trial courts "should require the testifying expert to provide affidavits attesting that he properly performed the protocols involved in DNA profiling" and that if the opponent challenges the application of the protocols in a specific case, "the district court must determine whether the expert erred in applying the protocols, and if so, whether such error so infected the procedure as to make the results unreliable." The Court cautioned, however, that not every error in protocol would result in exclusion of DNA profiling testimony. To warrant exclusion, the error must be such as "to skew the methodology itself."

PCR Testing Reliable under *Daubert: United States v. Beasley,* 102 F.3d 1440 (8th Cir. 1996): The Court held that DNA testing by the polymerase chain reaction method (PCR) was reliable under *Daubert*, and that courts could take judicial notice of its reliability in the future. PCR testing depends on replicating DNA samples through a heating process. It has forensic advantages over the traditional RFLP testing because an infinitesimal sample can be replicated. The Court found that any potential for contamination of samples was a question of weight rather than admissibility. The Court noted, however, that in any particular case, "the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has

been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the proper protocols, and the like."

Questions of Weight: ***United States v. Chischilly,*** 30 F.3d 1144 (9th Cir. 1994): The Court held that evidence of DNA identification prepared by an FBI laboratory was admissible under *Daubert*. The defendant's objections as to potential faults in the RFLP identification process (e.g., contaminants could have affected the samples, inconsistencies in the gel could have affected allele mobility, and the use of ethidium bromide in the test could have retarded the migration of DNA fragments) went to weight and not admissibility after *Daubert*. Moreover, the defendant's contention that protocols were not followed in the particular case went to weight and not admissibility, because the *Daubert* admissibility rules are designed to regulate the reliability of methodology, not execution. As to peer review, the Court stated that the National Research Council (NRC) report on DNA identification was "the functional equivalent of a publication subject to peer review under *Daubert's* liberally framed second factor." The fact that the NRC report criticized much of the FBI's DNA analysis was not critical, since criticism is the very purpose of peer review.

The Court also rejected the defendant's attacks on the FBI's statistical techniques for determining the probability of a match, even though the Court acknowledged that the defendant had "significant scientific backing" on the questions concerning ethnic subgrouping. The Court stated that the defendant's citations of scientific detractors might have been dispositive under *Frye*, but not under *Daubert*:

> While perhaps some support for exclusion of Chischilly's DNA test results under the superseded *Frye* test, with its requirement of general acceptance of a theory in the scientific community, these same [critical] statements take on the hue of adverse admissions under *Daubert's* more liberal admissibility test: evidence of opposing academic camps arrayed in virtual scholarly equipoise amidst the scientific journals is scarcely an indication of the "minimal support within a community" that would give a trial court cause to view a known technique with skepticism under *Daubert's* fourth factor.

PCR Testing Satisfies *Daubert:* *United States v. Hicks,* 103 F.3d 837 (9th Cir. 1996): The Court held that the trial court did not abuse its discretion in admitting, after a *Daubert* hearing, evidence based on the DNA testing procedure known as PCR. The Court declared that though "PCR testing is relatively new to the federal appeals courts, its novelty should not prevent the district court from exercising its sound discretion in admitting such evidence once a proper *Daubert* showing has been made." The Court held that the risk of contamination during PCR testing presented a question of weight and not admissibility, noting that similar risks apply to all forensic testing. Nor should the evidence have been excluded under Rule 403; unlike RFLP

testing, which assesses the probability of a DNA match and which can lead to very high improbability numbers, PCR testing simply results in a conclusion that a person cannot be excluded from a match. Therefore, the risk of prejudicial effect is not as great.

Statistical Probability of a Match: ***United States v. Davis,*** 40 F.3d 1069 (10th Cir. 1994): Affirming bank robbery convictions, the Court held that evidence of DNA testing, as well as expert testimony as to the improbability of another person matching the DNA found at the scene, were properly admitted. The Court found it unnecessary to decide a question in dispute among the circuits: whether *Daubert* requires a pre-trial hearing to determine if a particular DNA test followed protocol. It held that the trial court in this case had conducted "the functional equivalent of a preliminary hearing" because the government expert testified and was heavily cross-examined at a hearing conducted before the jury, without objection from the defendant. As to the contested evidence of probability, the Court stated that "statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed."

RFLP Testing Satisfies *Daubert: Government of Virgin Islands v. Penn,* 838 F.Supp. 1054 (D.V.I. 1993): Ruling on a motion *in limine* in a rape case, the Court held that the FBI's DNA profiling process, including its assessment of improbability of a random match, satisfied *Daubert*. The opinion contains an extensive and well-informed discussion of the RFLP process, the use of probability theory, and of all the things that can go wrong in the DNA identification process. The Court made the following conclusions in its *Daubert* analysis:

1. The DNA profiling process can be verified because the protocol has been published and widely replicated.
2. The FBI's profiling process was subject to peer review from its inception, because independent scientists were called in to review the process and make suggestions as it was being implemented.
3. Any risk of error that could occur during the test--such as degraded DNA, improper movement of the band fragments, degraded HAE III (the cutting enzyme), and human error--would be readily determined by the protocol and would result in the FBI either rejecting the test or resolving any uncertainty in the defendant's favor.
4. It was not improper to assign bin frequencies derived from a United States Black database to the DNA bands of a Black suspect from St. John's, because the FBI provided expert testimony which indicated that the frequency estimates from the same racial group do not vary significantly by geographic location.
5. The FBI uses standard methodologies that are generally employed in the scientific community.

Fingerprint Identification

General Acceptance and Peer-Review: ***United States v. Sherwood***, 98 F.3d 402 (9th Cir. 1996): Affirming convictions arising out of a kidnapping, the Court found that testimony from the prosecution's fingerprint identification expert was properly admitted. The defendant argued that the Trial Court failed to conduct a *Daubert* analysis. The Court noted that not every one of the *Daubert* factors would be applicable in every case. Here, the defendant admitted that the expert's identification technique was generally accepted and that fingerprint comparison has been subjected to peer review and publication. This was sufficient to satisfy the *Daubert* reliability requirements. And since the testimony would assist the jury in determining the identity of the kidnappers, it also satisfied the "fit" requirement of *Daubert.*

Gas Chromatography

Peer Review and General Acceptance: ***United States v. Bynum***, 3 F.3d 769 (4th Cir. 1993): In a narcotics prosecution, the government sought to link co-conspirators by expert testimony that the cocaine samples possessed by various persons came from the same batch. The experts' methodology consisted of gas chromatographic analysis. The defendant argued on appeal that gas chromatography was novel and not generally accepted under *Frye*. But while the appeal was pending, *Daubert* was decided. The *Bynum* Court held that the experts' testimony was scientifically valid under *Daubert*:

> Though it invoked *Frye*, the government's proffer of evidence could hardly have better anticipated *Daubert*. The government explained the hypotheses underlying the technique, listed the numerous publications through which the technique had been subjected to peer review, and concluded with a citation to authority that gas chromatography enjoys general acceptance in the field of forensic chemistry.

Ink Analysis

Rate of Error Only One Factor: ***Janopoulos v. Harvey L. Walner & Assocs.***, 866 F. Supp. 1086 (N.D. Ill. 1994): In an employment discrimination case, the plaintiff objected to expert testimony concluding that certain documents offered by the plaintiff had been backdated. The expert investigated the ink on the documents using a process known as thin layer chromatography ("tlc"). The plaintiff argued that under *Daubert* the testimony was inadmissible, because the expert had no information about the known or potential rate of error of tlc testing.

But the Court held that the expert's methodology was a "generally accepted" test for determining the validity of documents. Citing *Daubert*, the Court stated: "Rates of error, or confidence rates, are only one factor to consider in determining the admissibility of an expert's testimony."

Medical Testimony

Standard of Care: ***Carroll v. Morgan***, 17 F.3d 787 (5th Cir. 1994): Affirming a judgment for the defendant in a wrongful death medical malpractice action, the Court found no error under *Daubert* when the Trial Court permitted the defendant's expert cardiologist to testify as to the standard of medical care owed to the decedent. The plaintiff did not allege that the expert relied on "a particularly objectionable or unconventional scientific theory or methodology." Moreover, the expert based his testimony on thirty years of experience as a cardiologist, a review of the decedent's medical records, the coroner's report, and a "broad spectrum of published materials." The Court found that the expert's testimony was grounded in the procedures and methods of science, and was not mere "unsupported speculation."

Excluding Alternative Causes: ***Hose v. Chicago Northwestern Trans. Co.***, 70 F.3d 968 (8th Cir. 1995): The plaintiff claimed that he contracted manganese encephalopathy while at the defendant's worksite. The plaintiff's doctor conducted a "PET" scan of the plaintiff's brain, and used this to exclude alternative sources of the plaintiff's condition, such as Alzheimer's disease. He concluded that the PET scan result was consistent with menganese encephalopathy. The Court held that this testimony was properly admitted under *Daubert:*

> Dr. Gupta's testimony clearly showed the limited use of the PET scan, but that use was nonetheless relevant. In determining the cause of a person's injuries, it is relevant that other possible sources of his injuries, argued for by the defense counsel, have been ruled out by his treating physicians. Indeed, ruling out alternative explanations for injuries is a valid medical method.

The Court also noted that "the fact that Hose's treating physician ordered the PET scan prior to the initiation of litigation is another important indication that this technique is scientifically valid."

Photogrammetry

United States v. Quinn, 18 F.3d 1461 (9th Cir. 1994): In a bank robbery trial, the prosecution called an expert who used the process of photogrammetry to determine the height of the bank robber in the bank surveillance photographs. The process of photogrammetry derives a formula by measuring the change in dimensions of objects as they move away from the camera, and tests that formula against objects of known dimensions in the photograph. The Trial Court admitted the photogrammetry-based evidence on the ground that the process was nothing more than a series of computer-assisted calculations "that did not involve any novel or questionable scientific technique." The Court of Appeals found no abuse of discretion, and held that the defendant was not entitled to a full evidentiary hearing on the reliability of the evidence, given the fact that he could provide no evidence to question the reliability of the process used by the government's expert.

IV. "SOFT" SCIENCE, SOCIAL SCIENCE--EVIDENCE INADMISSIBLE

Accident Reconstructions

Failure to Meet the "Fit" Requirement: ***Habecker v. Clark Equipment Co.,*** 36 F.3d 278 (3rd Cir. 1994): A product liability action for wrongful death was brought after the decedent was crushed by a forklift which fell from a ramp. In the course of remanding the case for a new trial, the Court held that the Trial Court had properly excluded testimony from the plaintiff's expert, who had conducted an investigation and attempted to simulate the accident. The Court stated that the expert's testimony did not "fit" with the facts of the case, as is required by *Daubert*, because the conditions of the simulation were far different from those existing at the time of the accident. Specifically, there was no attempt to replicate the velocity or the rearward movement of the forklift, the height of the fork was disregarded, and there was no operator in the forklift nor cargo on the fork during the purported simulation.

Insufficiently Similar Circumstances: ***Guillory v. Domtar Industries Inc.,*** 95 F.3d 1320 (5th Cir. 1996): The plaintiff was severely injured while working in a salt mine, when a fork fell off a forklift and hit him on the head. The defendant's expert, a mechanical engineer and specialist in accident reconstruction, was excluded by the Trial Court under *Daubert*. The Court found no error, because the expert would have testified on the basis of forklift models and exhibits that were not sufficiently similar to the forklift which caused the accident. The Court stated that the Trial Court's gatekeeping role is "designed to extract evidence tainted by farce or fiction. Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all. Both analyses result in pure speculation." The Court rejected the defendant's argument that any discrepancy in the expert's testimony went to weight rather than admissibility:

> Normally, the truth regarding differences in models and demonstrations surfaces with vigorous cross-examination; however, where technical information is involved, it is easier for the jury to get lost in the labyrinth of concepts. We are convinced that cross-examination of Dr. Reed could not salvage the truth. Equipment and procedures in a salt mine are foreign to the average juror. The jury, frantically grasping at complex forklift and mining concepts, could easily miss subtle distinctions revealed on cross-examination and then drown in the untrue and the unproven. This is especially true because the unreliable evidence here would have been presented in a format resembling a recreation of the event that caused the accident.

Child Sexual Abuse

No Generally Accepted Standards: ***United States v. Powers***, 59 F.3d 1460 (4th Cir. 1995): Affirming a defendant's conviction for sexual abuse of his minor daughter, the Court held that the Trial Judge properly excluded the results of a "penile plethysmograph" test offered to prove that the defendant did not exhibit the characteristics of a "fixated pedophile." The Court found that the test is not a valid diagnostic tool and that it lacked accepted standards, although it might be useful in the treatment of offenders. The Court also noted that the expert testimony violated the "fit" requirement of *Daubert*: Powers was charged with statutory rape of his daughter, not with being a "fixated pedophile." Powers had offered no supporting evidence "showing that those who are not fixated pedophiles are less likely to commit incest abuse."

Subjective Enquiry: ***Gier v. Educational Service Unit No. 16,*** 845 F.Supp. 1342 (D.Neb. 1994), *aff'd* 66 F.3d 940 (8th Cir. 1995): In an action brought against a school on behalf of mentally retarded students for alleged sexual, physical and emotional abuse, the Magistrate Judge held a *Daubert* hearing and ruled *in limine* that three experts would not be permitted to testify that the plaintiffs were abused, nor to any opinion based on such a conclusion. The Magistrate Judge reasoned that the expert had used child abuse methodology ordinarily applied to non-retarded children; as such, the witnesses "made an incorrect extrapolation by comparing the behavior of mentally retarded children to the model of abused non-retarded children." The Court also expressed concern about the subjective nature of the investigation of specific instances of child abuse, and about the vagueness of the standard protocol, which "leaves a gaping hole in the direction it provides the master's level clinician to conduct the interview." Finally, the Court held that the *Daubert* "fit" requirement was not met, because the methodologies employed were for therapeutic rather than investigative purposes:

> The witnesses all testified that their purposes in evaluating plaintiffs were for the provision of therapy, not investigation. The methods used here may well have been sufficiently reliable for purposes of choosing a course of psychotherapy for these disturbed children, a course which must, to some extent, rely upon perception as well as reality, and upon the subjective reports of parents and others. However, the methodologies have not been shown to be reliable enough to provide a sound basis for investigative conclusions and confident legal decision-making.

On appeal, the Court of Appeals declared that the Magistrate Judge's analysis "is precisely the type of analysis the decision in *Daubert* would appear to contemplate." The Court concluded that while the evaluation methodology employed by the experts might be useful for treatment purposes, it was "not reliable enough to make factual or investigative conclusions in legal proceedings."

Failure to Meet the "Fit" Requirement: ***United States v. Reynolds,*** 77 F.3d 250 (8th Cir. 1996): The defendant, who was charged with sexual abuse of a child, proffered an expert to testify as to the unreliability of the standard techniques for interviewing children about sex abuse. The trial court excluded the testimony because no evidence was presented that the victim had ever been interviewed. The Court of Appeals found the exclusion proper, because the testimony failed, under *Daubert*, to fit the facts of the case.

Economists

Speculative Assumptions: ***Joy v. Bell Helicopter Textron, Inc.***, 999 F.2d 549 (D.C.Cir. 1993): In a wrongful death action, the Court held that an economist's testimony as to the decedent's earning capacity was improperly admitted because it was wholly speculative. For example, the expert hypothesized, without any basis, that the decedent would have entered a different and more lucrative line of work had he lived, and that he would have built a house on an empty lot he owned and sold it at a profit. The Court relied on *In re Air Crash Disaster at New Orleans,* 795 F.2d 1230 (5th Cir. 1986), in which an economist's testimony as to a decedent's future earnings was held improperly admitted because it was based on speculative assumptions. The Court noted that the teaching from the *Air Crash* case--that the courts must take greater control over speculative expert testimony--was supported by *Daubert*. Quoting *Daubert*, the Court concluded that an expert must testify on the basis of "knowledge" and that "knowledge connotes more than subjective belief or unsupported conclusion."

Insufficient Factual Foundation: ***Boucher v. U.S. Suzuki Motor Corp.,*** 73 F.3d 18 (2d Cir. 1996): The Court vacated a damages award for a plaintiff in a personal injury action, holding it was error to permit the plaintiff's expert to testify as to the plaintiff's lost earnings. The expert assumed that the plaintiff would work 40 hours per week, 52 weeks per year, with fringe benefits and regular pay increases for the rest of his career. These assumptions represented a "complete break" with the plaintiff's work history of seasonal and intermittent employment. The Court also found error in the expert's reliance on unsupported assumptions concerning fringe benefits, absent any evidence that the plaintiff received benefits of any kind from his employment. The Court concluded that "[s]ince Boucher's expert testimony was not accompanied by a sufficient factual foundation before it was submitted to the jury, it was inadmissible under Federal Rule of Evidence 702."

Improper Methodology: ***In re Aluminum Phosphide Antitrust Litigation***, 1995 U.S. Dist. Lexis 11026 (D.Kan. 1995): The Court held that while not all of the *Daubert* factors are applicable to expert testimony in the social sciences, "the Court has no doubt that *Daubert* requires it to act as gatekeeper" to assure that an economist's expert testimony is reliable. In this case, an expert's conclusion about the damages suffered by victims of price-fixing was unreliable. The expert purported to employ the standard "before and after" methodology used by economists, but he did not employ it properly. He did no assessment of the period before the price-fixing; his choice of a time period to evaluate after the price-fixing was arbitrary; and he failed to conduct a multiple regression analysis to determine whether other market forces may have affected pricing.

Ergonomics

Insufficient Basis: ***Bennett v. PRC Public Sector, Inc.***, 931 F.Supp. 484 (S.D.Tex. 1996): The plaintiffs, who worked at computer keyboards, alleged that they suffered repetitive motion disorders as a result of a defectively designed work station. The Court held that the plaintiff's expert on ergonomics would not be permitted to testify at trial. The expert would have testified that the plaintiffs suffered from repetitive motion disorders because the workstation was defectively designed, in that it could not be easily adjusted to fit the requirements of individual workers. However, the expert never met or interviewed any of the plaintiffs; he made no attempt to exclude other potential causes of the plaintiff's injuries; and he made no attempt to do any statistical analysis of the frequency of injuries at the workplace, or to compare that frequency with injuries at adjustable workstations. Thus, the expert's methodology was inadequate under *Daubert*. The methodology consisted of only a superficial review of medical records, some measuring of the offending equipment (with uncertainty as to which stations were used by the plaintiffs), and a brief visual observation of certain workers performing the jobs in issue. The Court concluded that this methodology "is not consistent with the methodologies described by the authors and experts whom Dr. Schulze identifies as key authorities in the field."

Hedonic Damages

Insufficiently Scientific: ***Hein v. Merck & Co.***, 868 F. Supp. 230 (M.D. Tenn. 1994): Ruling on a motion *in limine* to exclude expert testimony, the Court held that testimony as to the "hedonic damages" suffered by the plaintiff in a tort action would not be admissible. The Court reasoned as follows: 1. The theory could not be tested by any independent verification; 2. The thesis that life can be valued by what an individual would pay for the reduced probability of dying was subject to dispute in the literature; 3. The potential rate of error was great given the wide disparity of hedonic damages valuations among experts in the field; 4. The methodology is based

on a faulty assumption that "people have complete freedom of choice in the decisions they make and that they perceive the risks accurately"; and 5. To the extent the conclusion is based on surveys of people to determine how much they would pay to decrease their chance of dying, it is based on unreliable hearsay.

Failure to Meet the Fit Requirement: ***Ayers v. Robinson,*** 887 F.Supp. 1049 (N.D. Ill. 1995): The Court held that expert testimony on hedonic damages--an economic attempt to place a value on human life--was inadmissible under *Daubert*. The hedonic damages theory is based on a willingness to pay model--how much would a person pay to decrease his chance of dying. But that model estimates the value of a statistical life, not necessarily the life of the decedent with all its individual circumstances. Consequently, the expert testimony failed the *Daubert* fit requirement. Also, the willingness to pay model is scientifically flawed, because it rests on assumptions that people have freedom of choice in deciding to confront risk, that people perceive risks accurately, that people never make decisions based on other considerations than a willingness to live, and that government regulation has no effect on the model. But these assumptions are not grounded in scientific knowledge or method. Therefore the testimony fails the scientific knowledge prong of *Daubert* as well.

Failure to Meet the Fit Requirement: ***Sullivan v. United Gypsum Co.***, 862 F. Supp. 317 (D. Kan. 1994): The Court granted a motion to preclude expert testimony on hedonic damages. It reasoned that the "willingness-to-pay" studies on which the expert's testimony was based had "no apparent relevance to the particular loss of enjoyment of life suffered by a plaintiff due to an injury or death." Accordingly, the testimony failed the *Daubert* "fit" requirement. The Court concluded that hedonic damages are, "by their very nature, not subject to such analytical precision."

Hypnotically Refreshed Testimony

Competency Question Does Not Implicate ***Daubert: Borawick v. Shay***, 68 F.3d 597 (2d Cir. 1995): In a case alleging sexual abuse and based heavily on the plaintiff's repressed memories, the Trial Judge granted the defendant's motion *in limine* to exclude the plaintiff's testimony. The Judge reasoned that the testimony was "hypnotically refreshed" and consequently would not be admissible under *Daubert* unless the hypnotist was qualified and certain procedural safeguards were met. Here, the plaintiff's hypnotist had no college or graduate degree, had worked with faith healers and as a hypnotist on the theatrical stage, and had failed to preserve a record of the plaintiff's hypnosis session. The Court of Appeals affirmed the Trial Court's

exclusion of the testimony and grant of summary judgment, but used a somewhat different analysis. The Court of Appeals found that *Daubert* was not directly applicable since there was no testimony from any expert witness that was being challenged. Rather, the question was whether the plaintiff was a competent witness after having had her memory refreshed by hypnosis. Applying a totality of the circumstances test under Rule 403, the Court agreed with the Trial Court that exclusion was appropriate due to the unqualified expert and the failure to preserve the hypnosis session.

Identification Evidence

Failure to Explicate Methodology: ***United States v. Brien***, 59 F.3d 274 (1st Cir. 1995): The Court declined to adopt a per se rule either admitting or excluding expert testimony concerning the unreliability of identification evidence. It found no abuse of discretion, however, in the trial court's exclusion of the defense expert in this case. The expert's proffered testimony was very general, and did not fit with many of the circumstances underlying the identifications in this case. Nor did the expert explicate the methodology by which he concluded that the identifications were unreliable. The Court concluded:

> If presented with a fair sample of the underlying data, the district court might have decided (as the trial judge here offered to consider) that some of the warnings were best reflected in instructions; that other portions of the proposed testimony were reliable and helpful; and that still other portions failed one or both of these criteria or met them but were outweighed by confusion or misleading character. *Daubert*, as well as common prudence, entitled the judge to require such underlying information, and the failure to provide it supplies an adequate basis of the trial court's decision to reject that proffer.

Daubert **Factors Not Met:** ***United States v. Dorsey***, 45 F.3d 809 (4th Cir. 1995): Affirming a conviction for bank robbery, the Court found no abuse of discretion in the exclusion of the testimony of two forensic anthropologists who would have testified that the person depicted on surveillance photographs was not the defendant. The Court held that the testimony was not scientifically valid because the methodology had not been tested, there was no peer review, the potential rate of error was high due to differing camera angles, and there was no general acceptance of the methodology used by the experts. Moreover, the testimony was not helpful because the "the comparison of photographs is something that can sufficiently be done by the jury without help from an expert," and it was impermissible to introduce expert testimony simply to cast doubt on the credibility of identification witnesses.

Testimony Not Helpful Under *Daubert: United States v. Smith,* 122 F.3d 1355 (5th Cir. 1997): In a bank robbery case, the Court held that testimony from the defendant's expert concerning the unreliability of identification procedures was properly excluded. The Circuit's prior case law excluding this testimony was not put in question by *Daubert*. Under *Daubert*, expert testimony must assist the jury to be admissible. Expert testimony concerning the unreliability of identification procedures does not assist the jury; it is not needed, "because the jury [can] determine the reliability of identification with the tools of cross-examination."

Subjective Methodology: ***United States v. Jones***, 24 F.3d 1177 (9th Cir. 1994): Affirming a narcotics conviction, the Court found no abuse of discretion when the Trial Court refused to allow a defense witness to testify as an expert in voice identification. While the Trial Court prohibited the testimony under the then-applicable *Frye* test, the same result was appropriate under *Daubert*. The witness' methodology for voice comparison "involved an aural, subjective" comparison between the defendant's recorded voice and the voice on tape recordings derived from government surveillance. The witness did not employ a voice spectrograph, had done no research to verify his theory, and had not subjected it to peer review or publication. No other expert used this subjective technique. The *Jones* Court concluded: "[E]ven under *Daubert*, Jones failed to establish the scientific validity of his proffered expert's voice identification technique."

Individualized Enquiry Mandated: ***United States v. Rincon***, 28 F.3d 921 (9th Cir. 1994): In a bank robbery trial, the Trial Court excluded, under *Frye*, expert testimony proffered by the defendant on the unreliability of identification evidence. Ultimately, the Supreme Court remanded for reconsideration in light of *Daubert*. Applying *Daubert* on remand, the District Court again excluded the testimony, and the Court of Appeals affirmed. The Court held that the defendant had failed to prove that the testimony was on a scientific subject, because the defendant had not proffered any research or studies which supported the expert's conclusions. The Court also found that the District Court had not erred in excluding the testimony under Rule 403 as unduly confusing. The Court noted that the jury was instructed about the perils of identification evidence in much the same terms as the proffered expert testimony. The Court then added a cautionary note:

> Notwithstanding our conclusion, we emphasize that the result we reach in this case is based upon an individualized inquiry, rather than strict application of the past rule concerning expert testimony on the reliability of eyewitness identification. Our conclusion does not preclude the admission of such testimony when the proffering party satisfies the standard established in *Daubert* by showing the expert opinion is based upon "scientific knowledge" which is both reliable and helpful to the jury in any given case. District courts must strike the appropriate balance between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible approach outlined in *Daubert*.

Police Practices

Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994): In a case brought against the city for the use of excessive force by one of its police officers, the plaintiff called an expert to testify that the particular act of excessive force was caused by the police department's failure to previously discipline other officers who had committed similar acts. The Court held that the admission of this testimony was reversible error. It stated that the *Daubert* principles applied to all expert testimony, not just scientific testimony, and that in this case the expert's conclusion was unreliable within the meaning of *Daubert*. The expert's theory--that police excessiveness can be caused by failure to discipline other officers--had not been tested, published or peer reviewed. There was no indication that other experts ascribed to this discipline theory. Finally, the expert misinterpreted data which he claimed showed a rise of unjustified shooting incidents on the Detroit police force.

Polygraphs

Ambiguous Questions: *United States v. Kwong,* 69 F.3d 663 (2d Cir. 1995): Without deciding whether polygraph evidence was sufficiently reliable to be admissible under *Daubert,* the Court held that the polygraph testimony offered by the defendant in an attempted murder case was properly excluded under Rule 403. The defendant was charged with an attempt to murder a United States Attorney by sending her a booby-trapped briefcase. The Court found that the questions posed to the defendant were inherently ambiguous no matter how they were answered. Question one asked whether Kwong conspired with anyone--but Kwong was not charged with conspiracy. Question two asked whether Kwong was the one who sent the package--but "even if Kwong honestly answered that he did not personally mail the package, this does not mean that he did not construct the booby-trap and arrange to have it mailed." Question three asked whether Kwong "knew for sure" who bought the gun in question. This phrasing rendered the negative answer "chimerical at best."

No *per se* Rule of Exclusion, But Test Results Excluded on Remand: *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995): Concluding that the Circuit's per se rule against admission of polygraph testimony could not survive *Daubert*, the Court reversed drug convictions due to the Trial Court's exclusion of defense polygraph evidence, and remanded the case for further proceedings. The Court reasoned as follows:

> There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since *Frye*. * * * Current

> research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time. Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. Such variation also exists in many of the disciplines and for much of the scientific evidence we find admissible under Rule 702. Further, there is good indication that polygraph technique and the requirements for professional polygraphists are becoming progressively more standardized. In addition, polygraph technique has been and continues to be subjected to extensive study and publication. Finally, polygraphy is now widely used by employers and government agencies alike.

The Court emphasized that it was not holding that polygraph examinations are scientifically valid or that they always will assist the trier of fact. In removing the per se exclusion of polygraph evidence, the Court recognized that Rule 403 might appropriately be invoked to exclude polygraph evidence in some cases.

On remand in *Posado*, the District Court held a *Daubert* hearing and found the polygraph results to be inadmissible. ***United States v. Ramirez***, 1995 WL 918083 (S.D.Tex. 1995). The Court found that the low rate of error asserted was unreliable, because the error rate was determined in laboratory tests, in which the participants had no real stake in the outcome. It also noted that people can use countermeasures (such as self-infliction of pain) to fool the examiner, and that while these can be detected with an activity monitor, no activity monitor was used in the present case. Moreover, the results can be skewed if, as in the instant case, an interpreter is required, and the interpreter is familiar with the case. Finally, the Court noted that "polygraph theory is based on the underlying presumption, which may or may not be accurate for a given subject, that telling lies is stressful. A polygraph examination of subjects who provide false information without fear or stress will not measure truthfulness."

Rule 403 Analysis: ***United States v. Pettigrew***, 77 F.3d 1501 (5th Cir. 1996): The Court concluded that the Trial Judge did not err in excluding polygraph evidence offered by a defendant. Two of the questions asked by the polygraph examiner were not relevant to any disputed issue and the third question was not conclusive. The Court emphasized the enhanced role that Rule 403 may play when polygraph evidence is offered, and the safeguards that might increase the potential for admissibility of polygraph evidence--e.g., affording the other side the opportunity to participate in the examination, and offering the evidence in a bench rather than jury proceeding.

Unilateral Testing: ***Conti v. Commissioner of Internal Revenue***, 39 F.3d 658 (6th Cir. 1994): Affirming a Tax Court finding that the taxpayers had substantially understated their income, the Court found no error in the exclusion of polygraph evidence offered by the taxpayers.

The Court noted that the taxpayers had unilaterally arranged for polygraph tests after the Commissioner refused to agree to such tests. Under circuit precedent, unilaterally obtained polygraph tests are excluded under Rule 403 because the results of the tests would not be disclosed if they were unfavorable, and therefore the party offering them does not have a sufficiently "adverse interest at stake while taking the test." Given its rationale for exclusion, the *Conti* Court found it unnecessary to decide whether polygraph evidence is sufficiently reliable under *Daubert*. ***See also United States v. Sherlin***, 67 F.3d 1208 (6th Cir. 1995)(relying on Rule 403 and finding that the results of a polygraph examination were properly excluded where the defendant took the test without an agreement in advance that the results would be admissible no matter what); ***Barker v. Jackson National Life Insurance Co.***, 896 F.Supp. 1159 (N.D.Fla. 1995) (results of unilateral polygraph tests are inadmissible).

Questions Peripheral to the Crime: ***United States v. Williams,*** 95 F.3d 723 (8th Cir. 1996): The Court held that the results of a polygraph test conducted on a prosecution witness were properly excluded under Rule 403. The questions asked the witness concerned only peripheral details of the crime; the defendants rejected the government's proposal to conduct a new test that would go to the "heart of the matter." The Court concluded as follows:

> Introducing evidence that Campbell failed a polygraph examination on questions relating to the murder without permitting the jury to know whether he could have passed a test asking far more relevant questions would be unfair and misleading. It is, of course, relevant that Campbell was found to be dishonest, no matter what the questions were. Still, in light of the potential for misleading the jury, the court did not abused its discretion in ruling that evidence of the first test alone would be more prejudicial than probative.

Excluded Under Rule 403: ***United States v. Call,*** 129 F.3d 1402 (10th Cir. 1997): In a drug case, the central question was whether the defendant knew that drugs were hidden in his car. The defendant proffered expert testimony regarding the results of his polygraph test, but the trial court excluded the evidence. The Court found that after *Daubert*, the Circuit's rule of *per se* inadmissibility of unilaterally taken polygraph tests was no longer tenable. However, this did not suggest "a newfound enthusiasm for polygraph evidence." The Court found it unnecessary to determine whether the defendant satisfied the *Daubert* standards, choosing instead to uphold the Trial Judge's decision to exclude the evidence under Rule 403. The Court noted that the evidence was proffered to bolster the defendant's credibility, and that expert testimony in support of a witness's credibility "is often excluded because it usurps a critical function of the jury." It also noted "the danger that the jury may overvalue polygraph results as an indicator of truthfulness because of the polygraph's scientific nature."

Testimony of Psychophysiologist Required: ***Jesionowski v. Beck,*** 995 F.Supp. 149 (D.Mass. 1997): The Magistrate Judge ruled that polygraph evidence would be excluded in the absence of specific testimony by a psychophysiologist "as to the reasons why the measurable physiological reactions are reliable indicators of whether the examinee is being truthful." Reliance on court opinions finding polygraph evidence to be reliable was an insufficient predicate to admissibility. Likewise, testimony by a certified polygrapher would not establish admissibility.

Excluded Under Rule 403: ***United States v. Lech,*** 895 F.Supp. 582 (S.D.N.Y. 1995): In a bribery and conspiracy case, the defendant sought to introduce his responses to certain questions on a polygraph examination. The defendant was asked whether he tried to bribe or take part in bribing anyone, and he answered no. The Court, while questioning the reliability of polygraph results, found it unnecessary to decide the *Daubert* issue, because the answers to the general questions were substantially more prejudicial than probative. It reasoned as follows:

> Each of the questions Lech seeks to introduce call for his belief about the legal implications of his actions, without setting forth the factual circumstances underlying such a conclusion. In other words, the jury would receive evidence showing Lech's personal belief that he did not violate any federal criminal statute, but would not receive any information that would assist its inquiry to find the facts.

The Court noted that the case might be different where a defendant completely denies any connection or involvement with the charged conduct. Under those circumstances, "the factual predicates for the polygraph examiner's conclusions are relatively simple, and thus may be less likely to confuse the jury."

Nothing Changed by ***Daubert: United States v. Black,*** 831 F.Supp. 120 (E.D.N.Y. 1993): The Court held that nothing in *Daubert* required a change in the Circuit's long-standing rule that polygraph evidence is inadmissible. Polygraphs are excluded because they are unreliable, and *Daubert* supports the view that unreliable evidence is inadmissible.

Subjective Enquiry: ***Meyers v. Arcudi,*** 947 F.Supp. 581 (D.Conn. 1996): The Court excluded the results of a unilateral polygraph. The Court engaged in an extensive analysis of many of the reasons why polygraphs are unreliable under *Daubert*. Among others: there is still dispute in the relevant field as to whether polygraph results are reliable; the risk of error is significant; and the control questions, which are needed to compare to the relevant questions, vary from subject to subject and examiner to examiner.

Subjective Analysis and Unacceptable Rate of Error: *United States v. Dominguez,* 902 F.Supp. 737 (S.D.Tex. 1995): The Court refused to admit an exculpatory polygraph offered by the defendant. The Court, after holding a *Daubert* hearing, found as follows: polygraph tests enjoy only a 70 to 90 percent rate of accuracy; that people of different cultures have different value systems, and thus respond to the questions differently; test results are measured against the subjective values of the test examiner; the test is begun by telling the suspect an untruth, and the procedure involved varies from examiner to examiner.

The Court concluded that the following requirements were relevant to determining whether a polygraph test was admissible:

> 1. All parties should be present to observe the proceedings; 2. The parties should agree in advance to allow the admission of the results by either side; 3. The subject should agree to be examined by any polygraphic expert designated by the other side; 4. When more than one exam is contemplated, the choice of the first examiner should take place by chance; 5. All parties should be present at the pre-test interview; 6. All parties should be present at the post-test interview; 7. Immediately prior to the test, the subject should be tested for drug use; 8. The parties should waive the rules limiting the admissibility of character evidence; 9. No questions should be permitted as to the mental state of a defendant at the time of the alleged commission of the event; and 10. The subject should make himself available for cross-examination at trial.

Since none of these factors were met in the instant case, the Court refused to admit the results of the polygraph test.

Insufficient Specific Showing of Reliability: *Miller v. Heaven,* 922 F.Supp. 495 (D.Kan.1996): In an excessive force case, the Court excluded evidence that the plaintiff passed her polygraph test and the defendant failed his. The Court concluded that the polygraph examiner, "although able to discuss the reliability of polygraph examinations in general terms, was unable to articulate with sufficient precision the reasons for its reliability and the manner with which the polygraph examinations such as those he performed on Miller and Officer Heaven have been proven reliable."

Psychiatric Testimony

Speculation as to Past Mental State: *Goomar v. Centennial Life Ins. Co.,* 855 F. Supp. 319 (S.D. Cal. 1994): In an action to recover from disability insurers for psychiatric disability, the plaintiff proffered two psychiatrists who testified that he suffered from a psychotic condition from 1980-84 (the relevant time period). These experts did not see the plaintiff until 1992 and 1993

respectively, but claimed that they could opine as to the plaintiff's previous condition based upon his self-report to them. The Court held that this testimony was speculative and unscientific and excluded it under *Daubert*. It stated: "Retrospective expert testimony regarding the existence or onset of a mental illness is inadmissible speculation." Since there was no competent medical evidence that the plaintiff suffered from a psychiatric disability during the relevant time period, the District Court granted the defendants' motion for summary judgment.

Surveys

Unreliable Methodology: ***Arche, Inc. v. Azaleia, U.S.A., Inc.***, 882 F. Supp. 334 (S.D.N.Y. 1995): In a trade dress infringement action involving shoe styles, the results of a survey intended to show the likelihood of consumer confusion were excluded as unreliable. The survey was unscientific because it was conducted by a single interviewer, wearing the defendant's shoes, who stood in a park within blocks of one of the plaintiff's stores and asked well-dressed passers-by whether they had an opinion as to the brand of the shoes. The interviewer often departed from her prepared script, and interviewed only 46 people. The survey was unreliable because, among other things, it drew from an unrepresentative universe of likely consumers; since the plaintiff's shoes sold for more than the defendant's, the plaintiff's choice of wealthy respondents was self-selected to reach a predetermined result. This was especially so since the survey was conducted near one of the plaintiff's stores. The plaintiff was allowed to introduce the testimony of some of the individual survey respondents, however.

V. "SOFT" SCIENCE, SOCIAL SCIENCES--EVIDENCE ADMISSIBLE

Accident Reconstructions

Cautionary Approach: Robinson v. Missouri Pacific R.Co., 16 F.3d 1083 (10th Cir. 1994): Affirming an award for fatal injuries arising from a collision at a railroad crossing, the Court held that a videotaped simulation of the accident, prepared by the plaintiff's expert, was properly admitted to illustrate the expert's opinion. However, the Court expressed caution about such evidence in light of *Daubert*:

> Here, the physical phenomena of crash movements may be explained on scientific principles but an argument can be made that it is outside scientific knowledge to opine in a crash such as this one that a car struck at an angle will necessarily leave the railroad tracks on impact.
>
> Concerning future similar issues under Rule 702, we suggest that as "gatekeeper" the district court carefully and meticulously make an early pretrial evaluation of issues of admissibility, particularly of scientific expert opinions and films or animations illustrative of such opinions. Recent amendments to the federal discovery rules will permit an early and full evaluation of these evidentiary problems.

Clinical Medical Testimony

***Daubert*, Applies to All Expert Testimony, But Clinical Medical Testimony Is Not Evaluated by the Standards of Hard Science: *Moore v. Ashland Chemical, Inc.*,** 126 F.3d 679 (5th Cir. 1997): The plaintiff was exposed to certain vapors while cleaning spilled chemicals from the back of a tractor trailer. He was thereafter diagnosed as having Reactive Airway Disease Syndrome (RAD). He proffered experts in clinical medicine, who testified that the RADS was caused by exposure to the chemicals. The Court reversed a verdict for the defendant, holding that the clinical medical testimony was admissible, and that it was not harmless error to exclude the causation testimony of one of the experts. The Court concluded that: 1) The *Daubert* principles apply to every type of expert testimony; 2) a Trial Judge must assess every proffer of expert testimony to determine whether it is "reliable under the principles and methodology of the discipline" practiced by the particular expert; 3) the Supreme Court's application of what has come to be known as the *Daubert* factors (i.e., falsifiability, peer review, rate of error, existence of standards and controls) was in the context of "hard" or "Newtonian" scientific knowledge; 4)

clinical medicine, as opposed to research and laboratory medicine, "is not a hard science discipline"; 5) a Trial Judge assessing the reliability of testimony from a clinical medical expert "should determine whether it is soundly grounded in the knowledge, principles and methodology of clinical medicine; the *Daubert* factors, which are techniques derived from hard science methodology, are, as a general rule, inappropriate for use in making the reliability assessment of expert clinical medical testimony."

Applying these principles to the facts, the Court found that the plaintiff's expert clinicians' testimony was properly grounded in the methodology of clinical medicine. The expert whose testimony on causation was erroneously excluded had examined the plaintiff, conducted medical tests, eliminated alternative causes, reviewed occupational safety standards, reviewed pertinent medical literature, and utilized his extensive experience in treating patients with respiratory diseases. The Court concluded that the expert "based his opinion on principles, theories, methodology and techniques, which are well accepted within his discipline." Accordingly, it was not a problem that the expert was not certain of the exact level of exposure suffered by the plaintiff; nor was the lack of epidemiological evidence critical.

The dissenting Judge assailed the majority's "remarkable premise" that clinical medicine is not hard science, and is therefore to be treated more permissibly. He also complained that the expert could cite no scientific support for his conclusion that exposure to any irritant at unknown levels can trigger RADS. He concluded that the purpose of *Daubert* was "to exclude such speculation, based primarily on a temporal connection, as lacking any scientific validity."

Note: The dissenting judge is clearly correct in his assertion that *Moore* is the first case to hold that medical testimony is not hard science within the meaning of *Daubert*. The problem created by the case is that a plaintiff can evade the requirements of hard science simply by calling a clinical expert who can testify to causation without having to rely on epidemiological evidence, animal studies, or any other of the bases ordinarily used by scientists. The fact that clinical medicine and laboratory medicine have different goals does not mean that a clinical doctor should be able to testify to causation on the basis of information that a laboratory scientist would reject as insufficient. The other cases on medical experts can be found in the "hard science" sections, supra.

Economists

Standard Economics Methodology: ***Khan v. State Oil Co.,*** 93 F.3d 1358 (7th Cir. 1996): The plaintiff leased a gas station and alleged that the defendant engaged in maximum price-fixing, thereby damaging the plaintiff's ability to make a profit. In order to prove damages resulting from the maximum price-fixing, the plaintiff presented expert testimony from an economist, who concluded that the plaintiff could have made a profit if the retail price of the gas and the plaintiff's profit margin had not been capped by the defendant. The economist based this

conclusion on the operation of the gas station by a receiver after the plaintiff failed. The receiver's records showed a profit margin greater than that permitted the plaintiff by the defendant, from which the economist concluded that the receiver charged more for gas than was permitted under the plaintiff's contract. The Court held that this testimony was improperly excluded. It was possible that the plaintiff may not have been able, due to differing market conditions, to charge more for gas than the retail price set forth in the contract, in which case there would have been an antitrust violation but no injury. "But this is just to say that the evidence presented by the expert was not conclusive on the subject of injury." The Court elaborated as follows:

> The only ground on which it could be argued to be inadmissible would be that the expert, although a Ph.D in economics from a reputable university and an experienced consultant in antitrust economics, * * * had failed to conduct a study that satisfied professional norms. As we have emphasized in cases involving scientific testimony--and the principle applies to the social sciences with the same force that it does to the natural sciences--a scientist, however reputable, is not permitted to offer evidence that he has not generated by the methods he would use in his normal academic or professional work, which is to say in work undertaken without reference to or expectation of possible use in litigation. The district judge identified no basis, and State Oil can point to none, for supposing that the expert's report flunked this test. The inference regarding the receiver's profit margin, drawn from the station's cost and revenue data, was straightforward, and, so far as appears, was made in just the way that an economist interested in a firm's profit margins for reasons unrelated to litigation would make it; and likewise the inference that if Khan had enjoyed the freedom that the receiver evidently thought *he* had he would have charged a higher price, and made more money, than he did. If anything, the economist was overqualified to give evidence that could as easily have been given by an accountant; but over-qualification is not yet a recognized basis for disqualification.

Testimony Not Based on Rampant Speculation: ***Boyar v. Korean Air Lines,*** 954 F.Supp. 4 (D.D.C. 1996): Testimony from an economist on the decedent's future earnings was held admissible. The expert's factual assumptions were not speculative as a matter of law. While all predictions of future earnings are to some extent speculative, the expert's testimony in this case was not impermissibly so. He reasonably assumed that the decedent's business would have expanded, given the expansion the two years before the decedent's death, and given the decedent's own statements of intent. Unlike other cases in which an economist's testimony has been excluded as speculative, the expert in this case did not assume a complete break from the decedent's previous work history, and did not assume facts that were completely contradicted by the record.

Permissible Extrapolation: ***Newport Limited v. Sears, Roebuck and Co.,*** **1995 WL 328158 (E.D.La. 1995):** An economist was permitted to testify to the amount of lost profits suffered by the plaintiff as a result of a breach of a real estate contract. The economist used a multiple regression analysis, which is "an appropriate methodology to determine the absorption

rate of land because it is a viable method to attain simultaneous control of variables and give each characteristic the weight it deserves." While this methodology may never have been used in the context of industrial park real estate, such as at issue in this case, there is no indication that the methodology should be differently applied in this instance. The expert's use of national statistics of industrial park absorption did not render his opinion unreliable--the validity of his choice of comparables was a question of weight. While some of the expert's underlying assumptions were not sufficiently established at the *Daubert* hearing, the Court did not find this problematic: "the Court believes that Newport could not be expected to demonstrate the true viability of these assumptions in the context of a *Daubert* hearing; indeed, the matter of damages would have then been tried twice. Instead, the Court will require that Newport satisfy the Court of a significant number of these factors prior to Dr. Conte taking the stand."

Ergonomics

"Fit" Close Enough: ***Vice v. Northern Telecom, Inc.***, 1996 WL 200281 (E.D.La. 1996): The plaintiff alleged that she suffered repetitive strain injury (RSI) as a result of operating a defectively designed computer keyboard. The defendant challenged the testimony of two experts under *Daubert*, but the Court found that the testimony of both experts was sufficiently reliable. The first expert, a professor of clinical medicine, testified to the connection between RSI and the use of computer keyboards. While the expert did not rely on epidemiological studies, the Court rejected the proposition that "expert testimony is rendered unreliable merely because it does not rely on such data, particularly where, as here, the party seeking to exclude the testimony has offered no epidemiological data repudiating the existence of an exposure-response relationship." The Court noted that the expert's conclusion was properly based on a substantial body of scientific literature demonstrating a positive temporal relationship between the number of hours spent typing at a keyboard and the incidence of RSI symptoms. Although these studies contained weaknesses--including the existence of confounding factors such as the failure to adjust for different height and weight of persons, and different working conditions--the differences were not "so grievous as to render the testimony inadmissible."

The second expert, an ergonomist, reached a cause/effect conclusion by considering the studies of factory workers that have demonstrated a correlation between the forcefulness and repetitiveness of manual work and RSI, and applying this learning to other tasks such as keyboard operation. "While the fit might be less than perfect, this does not render the methodology wholly unreliable, particularly in light of the growing number of peer reviewed studies and papers on the subject."

Human Factors Experts

Flexible Approach Required: ***Surace v. Caterpillar, Inc.,*** 1995 U.S. Dist. Lexis 6683 (E.D.Pa. 1995), *affirmed in pertinent part,* 111 F.3d 1039 (3d Cir. 1997): The plaintiff was struck by a pavement profiler that was being operated in reverse with its back-up alarms sounding. The plaintiff, a worker, was wearing earplugs as protection against the noise of the machinery, and did not move out of the machinery's path. The plaintiff's witness, an expert in human factors, testified at the *Daubert* hearing as to the inadequacy of the alarm on the profiler in light of human behavioral patterns, including a phenomenon known as "habituation" i.e., that workers would become accustomed to the alarm sound and would not respond to it. The Court found that the expert's opinion was based on "good grounds" and was sufficiently reliable under *Daubert*. The expert began his analysis with a review of pertinent literature on human factors and auditory warning devices, then proceeded to review material specific to the pavement profiler. He also reviewed measurements of decibel levels of the machine and the effect of the earplugs worn by the plaintiff. Combining this background with his knowledge and experience, the expert evaluated whether the alarm, under usual operating conditions, would be subject to habituation, and determined that it was. He then considered various devices that would address the deficiencies he found with the current alarm system. The Court concluded as follows:

> Dr. Lambert thus approached this issue in a methodical, reasoned manner, and his result is therefore reliable. * * * Given his experience and knowledge, he is qualified to analyze the alarm sound and to determine, under ordinary operating conditions, whether that sound would be subject to habituation. No peer review or testing is necessary in order to form an opinion based on the relevant facts and his knowledge.
>
> With respect to Dr. Lambert's opining as to the type of alarms that would counteract the deficiencies he found, his opinion is also on solid footing. He analyzed the deficiencies of the current alarm system based on his experience; having done so, he is also qualified to determine what alarms possess the characteristics that would not present similar defects. Given the nature of his opinion, he need not develop prototypes or submit his opinion as to this particular piece of machinery to peer review in order to validate his conclusions.

The *Surace* Court noted that with experts in soft sciences such as human factors, the *Daubert* analysis requires some modification, because such experts do not employ "the objectively quantifiable data that lend itself to the methodical and quantifiable [*Daubert*] factors."

Polygraphs

No per se* Rule of Exclusion: *United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997): The Court revisited the Circuit's rule that unstipulated polygraph evidence is *per se* inadmissible. The Court held that under the "flexible inquiry" mandated by the Supreme Court's decision in *Daubert,* such a *per se* rule of exclusion is no longer tenable. The Court reasoned further that while *Daubert* did not deal directly with Rule 403, a *per se* rule of inadmissibility under Rule 403 would be as inconsistent with *Daubert* as it would under Rule 702. The Court remanded for a determination of whether the defendant's exculpatory polygraph examination was sufficiently reliable under *Daubert.* It emphasized that its opinion was not to be taken as an indication of enthusiasm for unstipulated polygraph evidence, but rather was simply a recognition that a *per se* rule of exclusion is inconsistent with *Daubert.*

Test Results Sufficiently Reliable: *Ulmer v. State Farm Fire and Casualty Co.,* 897 F.Supp. 299 (W.D.La. 1995): In a civil case to collect on fire insurance, an exculpatory polygraph test of plaintiff-insureds satisfied *Daubert.* The Court declaraed that polygraph theory has been tested and peer reviewed, and a 10-30% error rate is not an unreasonable potential rate of error. Most importantly, the instant test was administered by a licensed polygraphist at the request of a law enforcement official, presumably with interests adverse to the insureds.

Exculpatory Polygraph Results Reliable: *United States v. Crumby,* 895 F.Supp. 1354 (D.Ariz. 1995): The Court held that exculpatory polygraph results are sufficiently reliable to be admissible under *Daubert.* It concluded that polygraph research had been peer reviewed, and was conducted outside the realm of litigation. It stated that "the science of polygraphy has been subjected to vigorous scientific testimony and the assumptions underpinning the science have been deeply analyzed by those in the field of polygraphy and psychophysiology." The Court ruled that polygraph evidence could only be admissible for the limited purpose of rebutting an attack on the subject's credibility; the parties would not be allowed to bring in the specific questions used or the specific answers.

Test Results Sufficiently Reliable: *United States v. Galbreth,* 908 F.Supp. 877 (D.N.Mex. 1995): The Court held that the defendant could present testimony that he passed a lie detector test, where the relevant questions were whether the defendant knowingly failed to report

certain items of income on his tax return. The Court held that under *Daubert,* the proponent of the expert testimony must show not only that the scientific technique is reliable, but also that the specific application of the technique was reliably conducted. As to the general question of reliability of polygraph tests, the Court relied on laboratory studies (known as "mock crime" studies) which indicate an error rate of false positives at 5%, and an error rate of false negatives at 10%. It also relied on field studies in which "ground truth" was assessed on the basis of the defendant having confessed after failing a polygraph test. The Court noted that the "numerical" method of evaluating polygraph results "helps to ensure a rigorous, semi-objective evaluation of the physiological information contained in the charts, thereby guarding against examiner bias."

The Court stated that for the results of polygraph tests to be admissible, it is critical that the test be conducted by a competent examiner, since it is the examiner "who determines the suitability of the subject for testing, formulates proper test questions, establishes the necessary rapport with the subject, stimulates the subject to react, and interprets the charts." It also noted that it was critical for the session to be taped, in order to allay the otherwise legitimate concern that the polygraph examiner might "manipulate the subject and the examination in such a way as to produce a desired result." On the question of properly conducting the test, the Court concluded as follows:

> It is clear from the studies and even proponents of the polygraph technique readily concede that the polygraph technique produces reliable results only where certain conditions exist, such as administration of the test by a well trained, experienced and competent examiner, the utilization of the control question technique and the utilization of a quantitative scoring system.

The Court noted the legitimate concern of "habituation" if more than one test is conducted, but noted that this concern was not applicable in this case. The Court rejected the argument that drug use can act as a countermeasure against a polygraph examination. It reasoned that "the control question technique requires differential reactivity between the control and the relevant questions and there is simply no drug that can selectively reduce the reaction to relevant questions while leaving the control questions unaffected." The Court also rejected the argument that polygraph tests are unreliable where the subject knows that negative test results would remain undisclosed. This argument was found flawed on a theoretical basis because "in order for it to work, the subject would still have to react to the control questions. If the subject is not worried or concerned about the outcome of the test, then the subject would not react anymore to the control questions that to the relevant questions."

The Court recognized that countermeasures (such as biting the tongue unobtrusively while answering control questions) can be used to defeat polygraph tests. However, "because an individual must receive highly specialized, hands-on training in order to successfully engage in countermeasures, the possibility that a subject will succeed is very slight." The Court considered this problem to go to weight rather than admissibility.

Test Results Admissible If Credibility Attacked: ***United States v. Padilla,*** 908 F.Supp. 923 (S.D.Fla. 1995): The Court held that the defendant's polygraph results would be admissible to bolster her credibility if she were to take the stand and testify that her confession was coerced, and if the government then attacked her credibility. The Court found that a sufficient showing of reliability was made, and held that the use of a translator from the Public Defenders Office presented a question of weight rather than admissibility.

Psychologists and Psychiatrists

Daubert **Applicable, Testimony Helpful**: ***United States v. Hall,*** 93 F.3d 1337 (7th Cir. 1996): The Court vacated a kidnapping conviction because the defendant had not been permitted to introduce testimony from a psychologist and a psychiatrist that would have shown his susceptibility to giving a false confession. The Trial Judge erred in failing to apply the *Daubert* framework. The first question that a Trial Judge should address in ruling on the admissibility of expert testimony is whether the proffer demonstrates that a sufficiently reliable body of specialized knowledge exists. the Court recognized that "because the fields of psychology and psychiatry deal with human behavior and mental disorders, it may be more difficult at times to distinguish between testimony that reflects genuine expertise--a reliable body of specialized knowledge--and something that is nothing more than fancy phrases for common sense." In the instant case, the prosecution did not challenge the scientific basis for the proffered testimony, so the Court assumed it was valid. The Court concluded that "it was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will case individuals to make false confessions that the testimony would have assisted the jury in making its decision."

Per se Exclusion of Psychological Expert Testimony Was Abuse of Discretion: ***Jenson v. Eveleth Taconite Co.,*** 130 F.3d 1287 (8th Cir. 1997): In the damages phase of a Title VII action arising from sexual harassment in the workplace, the Special Master relied on *Daubert* to exclude all of the plaintiffs' testimony from psychological experts. The Special Master reasoned that the experts had not "advanced a validated theory which furnishes a scientific basis for distinguishing between the causal effect of multiple psychological stresses or trauma, or for assigning relative impact or degree of impact to different trauma or stresses." The Court, finding the per se exclusion to be error, held that it did not have to decide whether the *Daubert* standards applied to the soft sciences, since even if they did, the plaintiffs' experts had satisfied *Daubert.* The testimony of the expert psychologists was "thorough and meticulously presented" and the experts' methodology "was laid out clearly by each witness." The Court, in remanding for reconsideration of damages, emphasized "the probative value of expert psychological proof

regarding causation of the claimant's depression and emotional distress."

Daubert* Inapplicable To Sex Abuse Syndrome Testimony: *United States v. Bighead, 128 F.3d 1329 (9th Cir. 1997): In a child sex abuse prosecution, the government was permitted to call a director of forensic services at a children's advocacy center as an expert witness. The expert testified about general characteristics of child sex abuse victims, specifically the timing and their recollection of details. The defendant argued that this testimony did not satisfy *Daubert* because it lacked foundation, was untested, and had not been peer reviewed. But the Court held that "Daubert's tests for the admissibility of expert scientific testimony do not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory." Because the expert's opinion was based upon "many years experience interviewing many, many persons, interviewed because they were purported victims of child abuse," the testimony was properly admitted. The dissenting judge noted that the 9th Circuit has not been consistent in its holdings on the applicability of *Daubert* to non-scientific testimony, and that at any rate the expert's testimony should have been scrutinized under *Daubert* because the expert "was offering testimony based on what is purportedly a novel scientific technique", i.e., child sex abuse syndrome.

Repressed Memory

Permissive View: *Isely v. Capuchin Province,* 877 F.Supp. 1055 (E.D.Mich. 1995): In a pretrial ruling, the Court held that the plaintiff's expert would be permitted to testify about the plaintiff's repressed memory of acts of sexual abuse in his childhood. The Court noted that repressed memory was the subject of a good deal of psychological literature and that a fair number of clinicians in the field have accepted repressed memories as being reliable accounts of the past. The Court concluded as follows:

> In this case, Dr. Hartman knowledgeably testified about several studies which have validated the theory of repressed memory. Whether other experts agree with the theory or not, because there is no absolute empirical way to prove that (1) an event happened and/or (2) that the memory of it was repressed, it will be up to the jury to determine the probative value of Dr. Hartman's opinion. In the Court's view, there is a sufficient scientific basis of support for the theory in Dr. Hartman's field of expertise, through the studies and writings, to permit the issue to go to the jury.

The Court emphasized, however, that the expert would not be permitted to give her opinion that the plaintiff was telling the truth about the alleged instances of child sexual abuse, since that would "invade the province of the jury by vouching for the credibility of Isely and would, in any event, be unhelpful to the jury since everything she knows about the alleged events is hearsay

from Mr. Isely."

Note: It is notable that the *Isely* Court assumed that the expert testimony should go to the jury so long as it satisfied the standards of Rule 104(b)--in this instance, that the proponent established that a reasonable juror could find the expert testimony to be reliable. This is why the Court was rather permissive in assessing the reliability of the proffered testimony on repressed memories. In fact, however, after *Daubert*, the admissibility of expert testimony is governed by Rule 104(a). The proponent must prove to the judge that the expert testimony is reliable by a preponderance of the evidence. Applying the more permissive standard of Rule 104(b) is inconsistent with the "gatekeeper" role that the Court established for trial judges in *Daubert*.

Sociology

Daubert* Framework Applies: *Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996): The plaintiffs appealed a judgment rendered for the defendants in a suit alleging that advertising for a rental building targeted only whites, in violation of the Fair Housing Act. The plaintiffs proffered two social science experts at trial. One would have testified to how an all-white advertising campaign affects African-Americans. The other would have described the history of racial discrimination in the local market. The Trial Court, without conducting a *Daubert* analysis, excluded both experts on the ground that their testimony was too general to be helpful. The Court found that the Trial Court erred in failing to scrutinize the expert's testimony under the *Daubert* "framework", and reversed the judgment. The Court declared that the central teaching of *Daubert*--that expert testimony "must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work"--was fully applicable to the testimony of experts in the social sciences. The Court noted the following caveat:

> It is true, of course, that the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, we agree * * * that genuine expertise may be based on experience or training. In all cases, however, the district court must ensure that it is dealing with an expert, not just a hired gun.

The Court found that the Trial Court erred in excluding the expert who would testify about the effect of the advertisements. Such testimony "would have given the jury a view of the evidence well beyond their everyday experience"; moreover, the expert's research was based on peer-reviewed articles, and his "focus group" method was a well-accepted methodology in the field of social science. As to the expert who would testify to the history of local discrimination, the Court recognized that the Trial Court had the discretion to exclude the testimony under Rule 403. However, the Trial Court's failure to use the *Daubert* framework put the Court at a "significant

disadvantage" in determining whether error occurred. Therefore, the proper course was to leave the matter open for another proffer by the expert at the retrial.

Surveys

Accepted Principles Establish Reliability: ***Southland Sod Farms v. Stover Seed Co.,*** 108 F.3d 1134 (9th Cir. 1997): Reversing a grant of summary judgment for the defendant in a suit brought under the Lanham Act, the Court found that survey evidence proffered by the plaintiff's expert was improperly excluded. The defendant contended that the survey was unreliable because it was improperly confined to a certain geographical area, and the people conducting the survey used leading questions. The Court, however, concluded that the survey was conducted pursuant to well-accepted principles, including the use of closed-ended rotating questions. The Court declared: "[A]s long as they are conducted according to accepted principles, survey evidence should ordinarily be found sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able to determine whether asserted technical deficiencies undermine a survey's probative value."

VI. NON-SCIENTIFIC TESTIMONY (INCLUDING TESTIMONY ON TECHNICAL SUBJECTS)--INADMISSIBLE

Accountants

Failure to Consider Obvious Factors: ***Frymire-Brinati v. KPMG Peat Marwick***, 2 F.3d 183 (7th Cir. 1993): In an action for securities fraud, plaintiff's expert, an accountant, was allowed to testify that a Peat Marwick audit had overvalued certain property interests. To reach this conclusion, the accountant used a discounted cash flow analysis, by which he assessed property value solely on the basis of net, rather than potential, cash flow. Reversing a judgment for the plaintiff, the Court held that the Trial Court abused its discretion in admitting the expert's valuation, because the expert's methodology was faulty: the expert failed to consider potential cash flow, and his methodology would lead to the conclusion that "raw land is worthless and that a large office building in the final stages of construction also has no value even though it is fully leased out and could be sold for a hundred million dollars." As such, the expert's testimony lacked validity within the meaning of *Daubert*.

Banking Practices

Legal Analysis in the Guise of Banking Expertise: ***Minasian v. Standard Chartered Bank,*** 109 F.3d 1212 (7th Cir. 1997): Plaintiffs claimed that they were defrauded by a bank. They bought a business which had a line of credit with the bank, and claimed that the bank fraudulently asserted that it would continue the line of credit unabated. The bank eventually financed a loan with the plaintiffs, but on different terms and in a lesser amount than that allegedly agreed to previously. The plaintiffs defaulted on the loan. To defeat summary judgment, the plaintiffs proffered an affidavit of an expert on banking practices. The Court found that the affidavit was properly rejected, as it "did little beyond demonstrating how vital it is that judges not be deceived by the assertions of experts who offer credentials rather than analysis." The Court provided a further critique of the expert's affidavit:

> Schroeder's affidavit exemplifies everything that is bad about expert witnesses in litigation. It is full of vigorous assertion (much of it legal analysis in the guise of banking expertise), carefully tailored to support plaintiffs' position but devoid of analysis. Schroeder must have allowed the lawyers to write an affidavit in his name. He does not identify and test

any hypothesis; he does not identify hypotheses considered and rejected; indeed, he does not suggest any way in which his views may be falsified. For example, Schroeder declared that it was not "commercially reasonable" for the Bank to declare Par-Inco in default, just because it gave away collateral, failed to deposit proceeds into a cash collateral account, neglected to inform the Bank of the status of the collateral, and refused to allow inspections of its books. This assertion (a) is unreasoned; (b) is economically ludicrous (a secured creditor is vitally interested in the status and disposition of the collateral); [and] (c) ignores the contract between Par-Inco and the Bank, which made violation of the commitments concerning collateral good reasons to accelerate payment and did not require that the defaults be material * * *. Schroeder asserts that banks just don't accelerate the principal indebtedness because of shortcomings of the kind Par-Inco displayed. Apparently we are supposed to take this on faith, because Schroeder did not gather any data on the subject, survey the published literature, or do any of the other things that a genuine expert does before forming an opinion. An expert is entitled to offer a view on the ultimate issue, see Fed. R. Evid. 704(a), but an expert's report that does nothing to substantiate this opinion is worthless, and therefore inadmissible.

Design Engineering

Engineering Testimony Concerning Faulty Automobile Design Held Inadmissible: ***Bogosian v. Mercedes-Benz of North America, Inc.,*** 104 F.3d 472 (1st Cir. 1997): The plaintiff was run over by her car after putting it in park and exiting the vehicle. She sought to have an engineer testify about the phenomenon of "false park detent"--where the car feels as if it is in park but is not. The Court held that this testimony was properly excluded under *Daubert*. The Court found it unnecessary to determine whether the evidence was "scientific" or "technical"--"even if *Daubert's* specific discussion of the admissibility of scientific principles did not strictly apply to Davidson's testimony, the admissibility of the testimony was still controlled by the requirement of factual relevance and foundational reliability." The expert's testimony was unreliable in this case because he rested on a factual premise--that the plaintiff did not look at the console shift before turning off the car--that was at odds with the plaintiff's own testimony: "The district court appropriately found it very odd that Bogosian would present an expert witness who would testify that her own unwavering testimony was incorrect."

Daubert* Applicable, Engineer's Conclusions Unreliable:** ***Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997): A wire rope supporting a conveyor snapped and the conveyor fell on and killed the decedent. Plaintiff's engineering expert, who would have testified that the design of the conveyor was defective and alternative designs were reasonable, was excluded under

Daubert. The Court found no error and affirmed the grant of summary judgment in favor of the defendant. The Court rejected the position of the Tenth Circuit (see *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (5th Cir. 1996)), that *Daubert* is inapplicable to expert testimony based on technical experience. The Court recognized that "[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience." However, the Trial Court is still obligated under Rule 702 to determine whether expert testimony is reliable. Therefore, "[w]hether the expert would opine on economic evaluation, advertising psychology, or engineering," the Court must determine under *Daubert* "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers." The Court noted that the *Compton* view leads to the anomalous proposition "that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert's opinion, the better. *Compton's* view of the admissibility of expert testimony is untenable."

Turning to the testimony of the plaintiff's engineering expert, the Court found that it was not reliable under *Daubert*. The expert had not tested any of his expressed alternatives; his stated experience with conveyors was vague; and the expert "did not even make any drawings of perform any calculations that would allow a trier of fact to infer that his theory that the conveyor design was defective and that alternative designs would have prevented the accident without sacrificing utility were supported by valid engineering principles."

Lack of Testing: ***Smelser v. Norfolk Southern Ry. Co.,*** 105 F.3d 299 (6th Cir. 1997): The Court reversed a judgment for an employee in an FELA case, finding that testimony from a biomechanical engineer did not satisfy *Daubert*. The expert testified that a shoulder belt, not a lap belt, failed in an accident in which the plaintiff was rear-ended. He further testified that the defective shoulder belt was the cause of the plaintiff's neck injury. The Court concluded that neither of these opinions were sufficiently reliable to withstand a *Daubert* enquiry. The main problem with the conclusion as to the shoulder belt was lack of sufficient testing. The Court stated:

> *Daubert* teaches that expert opinion testimony qualifies as scientific knowledge under Rule 702 only if it is derived by the scientific method and is capable of validation. Huston's opinion that the shoulder belt, but not the lap belt, failed in the August 29, 1989 accident cannot be based on "good science" when he (1) failed to perform any tests on the lap belt yet concluded it was in proper working condition; (2) conducted no testing to verify his conclusion the shoulder belt was damaged in the June 1989 accident; (3) failed to adequately document testing conditions and the rate of error so the test could be repeated and its results verified and critiqued; and (4) failed to discover, use or at least consider the degree the restraint system was actually mounted at in the subject vehicle and explain whether that information would affect his pendulum test for compliance with the federal

> safety standard. Smelser failed to establish that any of Huston's seat belt tests were based on scientifically valid principles, were repeatable, had been the subject of peer review or publication or were generally accepted methods for testing seat belts in the field of biomechanics. Accordingly, Huston's opinion testimony that the pick-up truck's shoulder belt, but not the lap belt, was defective should have been excluded.

As to the opinion on causation, the Court held that the testimony was improperly admitted because it was beyond the biomechanical engineer's field of expertise to determine that an injury was caused by a defective shoulder belt. Moreover, the testimony was unreliable because the expert failed to take account of the plaintiff's pertinent medical history.

Lack of Testing: ***Cummins v. Lyle Industries,*** 93 F.3d 362 (7th Cir. 1996): Affirming a judgment for the defendant in a product liability case, the Court held that the testimony of the plaintiff's design engineer, to the effect that the defendant should have used a different design to make its product safer, was properly excluded under *Daubert*. The Court held that the *Daubert* analysis was fully applicable to testimony which "involves the application of science to a concrete and practical problem." It concluded that the expert's testimony was unscientific, because the expert had never tested his proposed alternative design. The Court noted that a number of factors must go into the conclusion that an alternative design should have been employed:

> These include, but are not limited to, the degree to which the alternative design is compatible with existing systems and circuits; the relative efficiency of the two designs; the short- and long-term maintenance costs associated with the alternative design; the ability of the purchaser to service and to maintain the alternative design; the relative cost of installing the two designs; and the effect, if any, that the alternative design would have on the price of the machine. Many of these considerations are product-and-manufacturer-specific, and most cannot be determined reliably without testing.

Subjective Observation: ***Deimer v. Cincinnati Sub-Zero Products, Inc.***, 58 F.3d 341 (7th Cir. 1995): The plaintiff was injured when some mobile medical equipment fell on her. The Trial Court excluded the plaintiff's expert, who would have testified about the equipment's faulty design. The Court held that this testimony was properly excluded under *Daubert*. The expert gave an opinion without foundation; he had no basis upon which to conclude that the accident happened in any particular way; rather, the conclusion was simply a subjective observation. Moreover, the testimony failed the "fit" requirement because the witness did not have the requisite experience to assess the equipment's suitability for use where the accident occurred.

Unsupported Conclusion: ***Navarro v. Fuji Heavy Industries, Ltd.***, 117 F.3d 1027 (7th Cir. 1997): Affirming the grant of summary judgment in favor of the defendant in a personal injury case, the Court held that the Trial Court properly excluded an expert's affidavit under *Daubert.* The expert asserted that the defendant, a car manufacturer should have known about the risk of internal rusting, but the expert had not conducted a study of the matter and was thus his assertions were "nakedly conclusional". The Court rejected the plaintiff's argument that the gaps in the expert's testimony would have been filled in if the defendant, before moving for summary judgment, had deposed the expert. The Court declared that "there is no duty to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit. An expert's affidavit must be sufficiently complete to satisfy the *Daubert* decision, and one of those criteria * * * is that the expert show how his conclusion * * * is grounded in--follows from--an expert study of the problem."

Insufficient Testing: ***Pestel v. Vermeer Manufacturing Co.***, 64 F.3d 382 (8th Cir. 1995): The plaintiff was injured when he slipped on the ground while operating a stump cutter and his foot went into the cutter wheel. The plaintiff's expert designed a guard for the stump cutter. While he was working on the design, the expert did not look at any other manufacturer's stump cutters. The expert had never used a stump cutter, and he did not consult with anyone to determine how his design would work in the field. The defendant then manufactured a guard according to the expert's design; videotaped demonstration indicated that the guard rendered the stump cutter difficult to operate in several recurring situations. The expert admitted that the design needed some modification. The Court held that the expert's testimony, that the stump cutter should have been designed with a guard, was properly excluded under *Daubert*. The expert's design had not been sufficiently tested, and there was no general acceptance of the premise that guards were necessary for stump cutters.

Insufficient Testing: ***Peitzmeier v. Hennessy Indus., Inc.,*** 97 F.3d 293 (8th Cir. 1996): The Court affirmed a summary judgment for the manufacturer of a tire changer sued by a mechanic who was injured while using the changer when a tire exploded. It held that an engineering expert's testimony was properly excluded where the expert had not designed or tested any of the proposed safety devices he claimed were missing from the tire changer, and the expert had never designed or tested a platform for a tire changer. The Court also rejected the argument that review of an expert's methodology by other courts could constitute "peer review" within the meaning of *Daubert*. **See also** ***Dancy v. Hyster Co.,*** 127 F.3d 649 (8th Cir. 1997) (mechanical engineer's testimony that a fork lift was defectively designed was properly excluded under *Daubert;* the expert's theory as to the safety of an alternative design could be, but had not been, tested). In both *Peitzmeier* and *Dancy,* the Court declared that *Daubert* applies to expert testimony even where that testimony does not rely on scientific principles or methods.

Testimony Subjective and Not Helpful: ***Diviero v. Uniroyal Goodrich Tire Co.,*** 114 F.3d 851 (9th Cir. 1997): The district court granted summary judgment in a personal injury case alleging that an accident was caused by a defectively designed tire. The Court affirmed and held that the testimony of the plaintiff's expert was properly excluded. The expert concluded that an adhesion defect caused the steel belts of the tire to separate. But the Court found the testimony "unsubstantiated and subjective" and therefore inadmissible. The expert could not dismiss other possible causes, he knew nothing about adhesion failures generally, and he could not explain the reasoning behind his opinion. The Court concluded that it did not have to decide whether *Daubert* applied to the expert's testimony, "because we find that his testimony does not meet Rule 702's reliability standard."

Relevance of Testing in Design Cases: ***Tassin v. Sears Roebuck,*** 946 F.Supp. 1241 (M.D.La. 1996): The plaintiff was injured while operating a power saw, and proffered an engineer who concluded that alternative designs were safer, and that the defendant failed to provide adequate warnings. The Court provides an excellent survey of the post-*Daubert* cases dealing with design engineers. On the relevance of the *Daubert* analysis, the Court declared as follows:

> [T]his Court does not believe that the *Daubert* factors are irrelevant to a case involving alternative product designs. If an engineering expert can demonstrate that his proposed design has been tested, peer reviewed, or is generally accepted, so much the better. On the other hand, this does not mean that engineering testimony on alternative designs should be excluded automatically if it cannot withstand a strict analysis under *Daubert*. * * * It may well be that an engineer is able to demonstrate the reliability of an alternative design without conducting scientific tests, for example, if he can point to another type of investigation or analysis that substantiates his conclusions. For example, an expert might rely upon a review of experimental, statistical, or other technical industry data, or on relevant safety studies, products, surveys, or applicable industry standards. He could also combine any one or more of these methods with his own evaluation and inspection of the product based on experience and training in working with the type of product at issue. The expert's opinion must, however, rest on more than speculation, he must use the types of information, analyses and methods relied on by experts in his field, and the information that he gathers and the methodology that he uses must reasonably support his conclusions. If the expert's opinions are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches, then rigid compliance with *Daubert* is not necessary.

Applying these standards to the facts, the Court excluded the expert's testimony on certain alternative designs based on parts that he had never tested or even seen, and the safety of which was not supported by the tests of others nor by any relevant literature. However, the Court held testimony as to another alternative design admissible, where the expert had actually conducted

some testing, and where the safety of the product received support from the relevant literature. The expert could have tested more systematically or extensively, but this presented a question of weight. Finally, the Court held the expert's conclusion as to inadequate warnings to be admissible. The alternative warnings suggested by the expert had not been scientifically tested. But the Court found that testing as to warnings (as opposed to testing alternative designs) was not critical where the expert had substantial experience in both product design and in preparing product manuals and warnings.

Untested, Subjective Hypothesis: *Brown v. Miska,* 1995 WL 723156 (S.D.Tex. 1995): The plaintiff's seatback collapsed when she was rear-ended by another car, and she claimed that the design of the seat was defective. The Court granted summary judgment for the car manufacturer, because the plaintiff's expert testimony as to defective design did not satisfy *Daubert,* which the Court found fully applicable to expert testimony of engineers:

> As presented to the court, Plaintiff's expert's opinions and methodology are untested and inherently untestable. Indeed, Cox's deposition does not reflect the application of any particular methodology. Rather, Cox only testifies about (1) his understanding of the events surrounding Plaintiff's collision, which he has developed third-hand through Plaintiff's counsel, (2) the nature of his "expert" credentials, and (3) his subjective opinion that an ultimate fact for trial -- "product defect" -- is supported by his examination of a model Mitsubishi seat and Plaintiff's counsel's version of the events. At no time has Cox ever explained the chain of reasoning that, in his mind at least, links the underlying facts to his ultimate conclusion.
>
> Without any account of Cox's intermediate reasoning of methodology, the validity of that reasoning cannot be tested. If a methodology cannot be falsified, refuted, or tested by any objective means, then it is incapable of meeting the "validity" criterion of *Daubert* because it can never be subjected to the scrutiny that any "valid" methodology must survive. Were his opinion admitted, Plaintiff's expert would bring to the jury no more than her lawyer can offer in argument.

Electrical Engineers

Failure to Follow Standard Protocol: *American and Foreign Insurance Co. v. General Electric Co.*, 45 F.3d 135 (6th Cir. 1995): In an action arising from a fire in a school building, the Trial Judge excluded testimony from the plaintiff's expert, an electrical engineer, that the fire was caused by a defectively designed and manufactured circuit breaker. While the Trial Judge's ruling was rendered before *Daubert,* the Court held that the Judge's reasoning was equally

sound after *Daubert*. The expert's testimony had been properly excluded because: 1. His theories about circuit breakers were not accepted by experts in the field; 2. He did not follow standard protocol when conducting his tests on the circuit breaker in question; 3. The raw data of the expert's test was not preserved; and 4. His instruments were not calibrated.

Lay Witnesses

Daubert* Applies to Lay Witnesses Who Testify on Technical Subjects: *Asplundh Manufacturing Division v. Benton Harbor Engineering, 57 F.3d 1190 (3rd Cir. 1995). In a trial for contribution among defendants arising out of an injury to a worker when an aerial lift collapsed, the insurance company seeking contribution called the maintenance supervisor. The witness had maintenance responsibility for the aerial lift, and had investigated it after the accident. He opined that the collapse of the lift was caused by metal fatigue and that the rod manufactured by the defendant was designed improperly. The Trial Court permitted this testimony under Rule 701. The Court of Appeals found this to be reversible error. While Rule 701 has been read to permit technical testimony from lay witnesses, the Court declared that the "spirit" of *Daubert* "counsels trial judges to carefully exercise a screening function with respect to Rule 701 opinion testimony when the lay opinion offered closely resembles expert testimony." The Court set forth the following test for assessing technical testimony from a lay witness:

> In determining whether a lay witness has sufficient special knowledge or experience to ensure that the lay opinion is rationally derived from the witness's observation and helpful to the jury, the trial court should focus on the substance of the witness's background and its germaneness to the issue at hand. Though particular educational training is of course not necessary, the court should require the proponent of the testimony to show some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion regarding the disputed factual issues in the case.

The Court held that the insurance company had failed to establish that the maintenance supervisor had a sufficient background of specialized knowledge to rationally conclude that the collapse of the aerial lift had been caused by metal fatigue. **See also** ***United States v. Figueroa-Lopez,*** 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, expert qualification was required where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices).

Legal Questions

Safety Standards: ***Bammerlin v. Navistar Intern. Transp. Corp.***, 30 F.3d 898 (7th Cir. 1994): The plaintiff was injured in a truck accident and claimed that his injuries were caused by a defective seatbelt which did not comply with Federal Motor Vehicle Safety Standards. The Court found that the Trial Court committed reversible error in permitting two of the plaintiff's experts to testify that the seat belt did not comply with two specific safety standards, because the experts were unfamiliar with the legal interpretation of the safety standards and their test protocols did not conform to those used by the National Highway Transportation Safety Administration. The Court concluded that under *Daubert*, the Trial Judge erred when he "conceived of this as a problem of credibility." The Court elaborated further:

> All questions of testing method to one side, however, the initial step here was one of legal interpretation. What do the safety standards mean? The district judge should have resolved that question and provided the jury with the proper answer, so that experts for each side could address their testimony to the governing standards. By treating the meaning of the rules as if it were an issue of fact, and the reliability of the tests as if it were an issue of credibility, the district judge left the jury adrift * * *.

Legal Conclusions: ***Pries v. Honda Motor Co., Ltd.***, 31 F.3d 543 (7th Cir. 1994): Citing *Daubert*, the Court held that the testimony of the plaintiff's expert in a product liability case was properly rejected and summary judgment for the defendant was properly granted, because the testimony was "not scientific." The expert testified that the plaintiff's seatbelt latch was defective because it was possible for objects to strike and open it during an accident. But the Court found that this testimony was based on a misunderstanding of the word "defect." The question is not whether it is possible for something bad to happen during an accident, but whether the device is unreasonably dangerous. See also ***Berry v. City of Detroit***, 25 F.3d 1342 (6th Cir. 1994) (expert should not have been permitted to testify that the city was recklessly indifferent to the rights of citizens, as that is a legal conclusion).

Personal Conduct

Failure to Meet the "Fit" Requirement: ***United States v. Lilly***, 37 F.3d 1222 (7th Cir. 1994): In a prosecution of a Reverend and his wife for income tax evasion, the defendant-wife sought to call an expert witness to testify about the general duties of Baptist ministers' wives. The Court held that the testimony was properly excluded for lack of "fit", because the witness' expertise "on the general duties of ministers' wives, without specific reference to whether those duties would render a minister's wife incapable of willingly evading tax, could not have aided a jury in determining the issue of Mrs. Lilly's intent."

VII. NON-SCIENTIFIC TESTIMONY (INCLUDING TESTIMONY ON TECHNICAL SUBJECTS)--ADMISSIBLE

Accountants

Standard Accounting Methodology: ***Tamarin v. Adam Caterers, Inc.***, 13 F.3d 51 (2d Cir. 1993): In a dispute concerning delinquent contributions to employees pursuant to a collective bargaining agreement, the Court held that summary judgment was properly granted against the employer. The employer argued that the payroll review prepared by the union accountant was inadmissible under *Daubert*, but the Court found that *Daubert* was inapposite because that case dealt only with scientific evidence. In this case, the expert evaluated payroll records, which are "straightforward lists of names and hours worked."

Automotive Engineers

Daubert* Found Inapplicable:** ***Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996): The Court affirmed a judgment finding an automobile manufacturer and its distributor liable for more than 50% of a passenger's injuries in a roll-over accident. The Court, reviewing the applicability of *Daubert* under a de novo standard, rejected the defendants' argument that the Trial Judge failed to exercise the gatekeeper role imposed by *Daubert*, and held that *Daubert* was inapplicable to the testimony of the plaintiff's engineering expert. The Court reasoned that "[t]he language in *Daubert* makes clear the factors outlined by the [Supreme] Court are applicable only when a proffered expert relies upon some principle or methodology," and that "application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training." In the latter cases, the Court asserted that "Rule 702 merely requires the trial court to make a preliminary finding that proferred expert testimony is both relevant and reliable." The Court also observed that it did "not believe *Daubert* completely changes our traditional analysis under Rule 702." In the instant case, the plaintiff's expert relied upon general engineering principles and his 22 years of experience as an automotive engineer. The Court found that the Trial Judge erred in applying *Daubert* to the witness's testimony, but that the Trial Judge had properly admitted the testimony nonetheless. **See also** ***Freeman v. Case Corp.***, 118 F.3d 1011 (4th Cir. 1997) (design engineer's testimony properly admitted: "In cases like this one, where an expert relies on his experience and training and not a particular methodology to reach his conclusion, application of the *Daubert* analysis is unwarranted."). **Compare** ***Taylor v. Cooper***

Tire & Rubber Co., 130 F.3d 1395 (10th Cir. 1997) (no error in finding expert *unqualified* to testify in an exploding tire case; the witness was an expert in materials failure, and would have testified that the tire failure was a result of a manufacturing defect; the expert conducted no tests on the tire and was not an expert in tire manufacturing).

Daubert* Inapplicable to Testimony Based on Experience with Product Failure:** ***Carmichael v. Samyang Tire, Inc., 131 F.3d 1443 (11th Cir. 1997) : In a product liability action brought against a tire manufacturer, the Trial Court applied *Daubert* and excluded the testimony of the plaintiff's tire failure expert. The Court found this to be error, reasoning that the tire failure expert did not purport to testify on the basis of a scientific methodology, but rather had based his conclusion on years of experience in analyzing failed tires. The Court held that *Daubert* was inapplicable to expert testimony grounded in non-scientific training or expertise. However, "the inapplicability of *Daubert* should not end the day regarding [the expert's] reliability" because Rule 702 requires the Trial Court to exclude any expert's testimony if it is unreliable. The Court remanded the case to permit the Trial Court to address some of the "troubling criticisms" of the expert's methodology, including the fact that the expert came to his conclusion before he had ever inspected the tire in question.

Construction Litigation

Daubert* Inapplicable:** ***Iacobelli Const., Inc. v. County of Monroe, 32 F.3d 19 (2d Cir. 1994): In a case arising out of a construction contract dispute, the Court held that the Trial Court erroneously granted summary judgment for the defendant. The Trial Court had rejected affidavits of the plaintiff's experts, a geographical consultant and an underground-construction consultant, by relying on the Court's "gatekeeping" function established by the Supreme Court in *Daubert.* The Court found that this reliance on *Daubert* was "misplaced," reasoning that the experts' affidavits "do not present the kind of 'junk science' problem that *Daubert* meant to address." Rather, the experts had relied "upon the type of methodology and data typically used and accepted in construction-litigation cases."

Contractual Damages

Use of Comparables: ***Ventura v. Titan Sports, Inc.,*** 65 F.3d 725 (8th Cir.1995): The Court affirmed a judgment on a quantum meruit claim brought by a professional wrestler who contended that he was entitled to some of the profits from sales of videotapes on which he served

as a commentator. The defendant argued that the plaintiff's expert on damages should have been excluded under *Daubert*, because he relied upon royalty percentages owed to the plaintiff that had no basis in fact. But the Court held that the expert's methodology in arriving at the royalty percentages was reliable. The expert based his opinion upon a survey of thousands of licensing agreements in the field of entertainment and sports, and it is "common practice to prove the value of an article (e.g., a videotape license) by introducing transactions involving substantially similar articles (i.e., other licenses)." The Court stated that, "[a]lthough no individual arrangement examined by [the expert] was 'on all fours' with the predicted Ventura-Titan license, in the aggregate, the licenses provided sufficient information to allow [the expert] to predict a royalty range for a wrestling license."

Design Engineering

Daubert* Inapplicable to Expert Testimony Based on Experience Rather Than Methodology:*McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997): The plaintiff was injured on the job while operating a stock picker. The Trial Court granted an in limine motion to exclude the plaintiff's expert, who would have testified that the stock picker was designed in such a way as to be unsafe, and that safer alternative designs were available. The basis for the expert's opinion was 30 years of experience in dealing with this machinery. The Trial Court reasoned that the testimony failed the *Daubert* test because it was not based on sound scientific principles. The Trial Court was especially concerned that the expert had not tested the alternative design he proposed. The Court of Appeals declared that the Trial Court erred "in applying the *Daubert* factors, which are relevant only to testimony bearing on scientific knowledge." Because the expert's testimony was "based on his engineering experience and his having investigated hundreds of fork lift cases over the past thirty years", it was admissible.

While stating that *Daubert* is inapplicable to testimony based on experience rather than a scientific methodology, the Court emphasized that it was referring to *Daubert* in a "narrow sense." It stated that "if one views *Daubert* in a broader context, the *Daubert* Court is giving strong advice to district courts: in ruling on admissibility, trials judges are the gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony. In that sense, *Daubert* applies to all expert testimony."

Emphasis on General Acceptance: *Officer v. Teledyne Republic/Sprague*, 870 F. Supp. 408 (D.Mass. 1994): The Court denied summary judgment in a product liability case, and held that the opinion of the plaintiff's expert, a design engineer, created a triable issue of fact. The defendant relied on *Daubert* and argued that the expert's opinion was unbolstered by field tests or other empirical data. But the Court stated: "While *Daubert*'s principles have valuable application

in determining the admissibility of controversial and novel scientific hypotheses, they have less use in fields like design engineering where 'general acceptance' is the norm, not the exception."

Emphasis on Traditional Expertise: ***Lappe v. American Honda Motor Co., Inc.***, 857 F. Supp. 222 (N.D.N.Y. 1994): In a suit arising from a car accident in which the plaintiff alleged that the vehicle was defectively designed, the Court denied the defendant's motion for summary judgment and held that the testimony of the plaintiff's engineering expert (to the effect that the vehicle's roof and foot pedals were defectively designed) was admissible. The Court rejected the defendant's contention that the expert's testimony was not scientifically valid under *Daubert*:

> The application of *Daubert* to the testimony in the present action, however, would require an expansion of the Supreme Court's language beyond its obvious scope and meaning. *Daubert's* narrow focus is on the admissibility of "novel scientific evidence" under Fed.R.Evid. 702. * * * *Daubert* only prescribes judicial intervention for expert testimony approaching the outer boundaries of traditional scientific and technological knowledge.
>
> The participation of plaintiff's expert is not based on novel scientific evidence or testimony. In this action, he will participate as an engineer and convey opinions relating to the happening of an automotive accident. * * * [H]is opinions are based on facts, an investigation, and traditional/mechanical expertise. More important, the expert's opinions are supported by rational explanations which reasonable men might accept, and none of his methods strike the court as novel or extreme.

More Flexible Approach Required: ***Surace v. Caterpillar, Inc.***, 1995 U.S. Dist. Lexis 6683 (E.D.Pa. 1995), *affirmed in pertinent part,* 111 F.3d 1039 (3d Cir. 1997): The Court rejected the defendant's motion *in limine* to exclude testimony from the plaintiff's expert, in a case where the plaintiff was struck by a pavement profiler that was being operated in reverse with its back-up alarms sounding. The plaintiff, a worker, was wearing earplugs as protection against the noise of the machinery, and did not move out of the machinery's path. The plaintiff's witness, an expert in mechanical and safety design, testified at the *Daubert* hearing that the single auditory alarm was insufficient in light of the noise involved in operating the machinery. The expert based his opinion on his own experience, review of literature and industry safety standards, information about the accident, and tests conducted on the pavement profiler. The Court found the expert's opinion to be sufficiently probative and reliable under *Daubert*. The Court stated that the *Daubert* factors needed a more flexible application in engineering and similar areas of expertise. It reasoned as follows:

> In *Daubert* * * *, objective, quantifiable tests and reproducible results which

could be analyzed and which were achieved through standard methods were involved. In the situation at bar that is not the case. There is no real "scientific methodology" at issue. A flaw in the applied methodology of producing a scientific opinion such as that in *Daubert* * * * would adulterate the analysis and render the opinion substantially or totally flawed. Given that the opinion would inexorably and scientifically link the injury to the defendant's action or inaction, the resultant prejudice would be overwhelming. In contrast, Mr. Stephens has opined on the existence and benefits of alternate devices and that CMI's failure to include alternate devices was a cause, not the definitive cause, of the accident.

Electrical Engineers

Theory as to Causation: ***Kieffer v. Weston Land, Inc.,*** 90 F.3d 1496 (10th Cir. 1996): The plaintiff alleged that he received an electrical shock from a Pepsi machine, that resulted in a burn and a broken shoulder. The Pepsi machine was removed from the site, and the plug removed, so it could not be tested by the plaintiff. The plaintiff's expert electrical engineer testified that if the wrong type of plug had been attached to the machine, it could have produced a shock sufficient to cause the plaintiff's injuries. The defendant objected that the expert's testimony was based on speculation, but the Court found the testimony properly admitted under *Daubert*. The expert did not testify that the soda machine actually caused the injuries, but merely theorized circumstances under which the machine could have created an electical shock sufficient to cause the injuries. The Court also noted that any lack of factual basis in the expert's opinion was attributable to the defendant's own failure to preserve the evidence.

Handwriting Identification

Emphasis on Experience Rather than Experimentation: ***United States v. Jones,*** 107 F.3d 1147 (6th Cir. 1997): The Court affirmed convictions for credit card fraud that were based in large part on expert testimony identifying the handwriting on certain documents as the defendant's. The Court refused to evaluate handwriting analysis as scientific evidence, noting that handwriting examiners "do not concentrate on proposing and refining theoretical explanations about the world" and do not rely on experimentation and falsification, the way scientists do. Rather, handwriting analysts are governed by the "technical or other specialized knowledge" prong of Rule 702. The Court declared that "*Daubert* does not create a new framework" for

analyzing technical or other specialized expert testimony. If the *Daubert* framework were extended without modification outside the realm of scientific testimony, "many types of relevant and reliable expert testimony--that derived substantially from practical experience--would be excluded." Without relying on *Daubert,* the Court concluded that handwriting analysis is a field of non-scientific expertise within the meaning of Rule 702. The Court found no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail to the jury.

***Daubert* Inapplicable, But Reliability Still Required: *United States v. Starzecpyzel*,** 880 F.Supp. 1027 (S.D.N.Y. 1995): The defendants were charged with conspiring to steal artwork and jewelry, by delivering stolen items to auction houses and authorizing their sale by way of forged documentation. They moved *in limine* to exclude expert testimony that certain signatures were forged. The prosecution expert was a forensic document examiner. The Court concluded that forensic document examination (FDE) could not satisfy the *Daubert* reliability standard, because the process relied on subjective factors and the expert's practical experience, rather than upon any scientific method. Yet the Court held the testimony admissible anyway, reasoning that *Daubert* is not applicable to FDE testimony. The Court stated that *Daubert* merely established reliability standards "for expert testimony in fields whose scientific character is undisputed." It reasoned that many of the *Daubert* factors, "such as peer review and publication, are irrelevant for many categories of expert testimony." The Court declared that *Daubert* does not impose any new standard for the admissibility of the testimony of non-scientific witnesses.

The Court, however, rejected the notion that non-scientific testimony from a qualified expert is automatically admissible. It noted that a trial court must still scrutinize the reliability of the expert's opinion. As applied to FDE testimony, which was largely based on practical experience in comparing handwriting samples to detect forgery, the Court found a sufficient indication that the expert relied on enough points of comparison to reach his conclusion.

While permitting the FDE expert to testify, the Court held that under Rule 403, the jury must be instructed that the FDE witness was offering practical rather than scientific expertise. Moreover, the FDE expert could not be permitted to testify as to his certainty on the basis of a nine-level scale of probability that is employed by FDE experts. Such probabilistic assertions would give the expert's testimony a scientific aura that was unjustified in light of the practical, subjective methodology employed by the expert. Finally, the Court permitted testimony only as to forgery detection, not as to forger identification (the more difficult task of identifying who committed a known forgery), since there was no showing made that the technique of forger identification was sufficiently reliable under Rule 702.

Law Enforcement Agents

Scrutiny Under *Daubert: United States v. Daccarett,* 6 F.3d 37 (2d Cir. 1993): The Court cited *Daubert* as signalling the Supreme Court's willingness to permit more active supervision by the trial court over expert testimony. It opined that active supervision was especially necessary as to law enforcement agents testifying as experts in civil forfeiture cases, given the "heavy burden placed on claimants" in such cases. See also ***United States v. Johnson,*** 28 F.3d 1487 (8th Cir. 1994) (citing *Daubert* and finding no error in permitting an unindicted co-conspirator to testify as an expert on drug trafficking).

Daubert* Analysis Inapplicable: *United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997): In the course of remanding a drug conviction on other grounds, the Court found no error in the admission of a law enforcement agent's expert testimony that sophisticated narcotics traffickers do not entrust 300 kilograms of cocaine to someone who does not know what he is transporting. The Court found the testimony helpful to explain the modus operandi of drug dealers, in a complex criminal case. The Court rejected the defendant's argument that the expert testimony was inadmissible under *Daubert.* It concluded that "*Daubert* applies only to the admisson of scientific testimony" and that the law enforcement expert "testified on the basis of specialized knowledge, not scientific knowledge."

Gatekeeper Function Applicable: *United States v. Webb,* 115 F.3d 711 (9th Cir. 1997): In a felon-gun-possession case, the Trial Court admitted testimony from a law enforcement expert on why "people" conceal who possess a gun would conceal it in the passenger compartment of a car. The defendant challenged this testimony as unreliable under *Daubert.* The three-judge panel was divided on whether *Daubert* is applicable to testimony of a law enforcement expert. Judge Trott, writing the opinion for the Court, stated that because "the expert testimony in this case constitutes specialized knowledge of law enforcement, not *scientific* knowledge, the *Daubert* standards for admission simply do not apply. Judge Jenkins, concurring in the result, stated that while the four *Daubert* factors (i.e., publication, falsifiability, etc.) might not be applicable to law enforcement experts, the *gatekeeper* function set forth in *Daubert* was fully applicable. He reasoned that Rule 702 requires that *all* experts must speak from "knowledge", and must give testimony which is helpful to the jury. Judge Jenkins explained as follows:

> In saying that "the *Daubert* standards for admission simply do not apply" to "specialized knowledge of law enforcement," we cannot be suggesting that the district court examine less rigorously the specialized knowledge underlying proffered *nonscientific* testimony, or that the district court may abdicate its role as gatekeeper where the subject matter does not depend on the scientific method. The trial court's role as gatekeeper concerning nonscientific "specialized knowledge" proves equally crucial to the integrity of the trial process, particularly where, as here, the proffered testimony's potential for prejudice to the defendant runs so high.

Judge Jenkins criticized Judge Trott as implying that modus operandi testimony would always be admissible if the law enforcement expert was qualified. He concluded that "Rule 702 as amplified in *Daubert* requires trial courts as gatekeepers to engage in a more thoughtful, more deliberate process testing specialized knowledge and helpfulness anew in each situation." He concurred in the result on the ground that the trial judge made an implicit finding that the modus operandi testimony was helpful and reliable, and that this finding was not clearly erroneous.

Judge Fletcher concurred in Judge Jenkins's opinion insofar as it highlighted "the need for district courts to perform adequately the gate-keeper function in determining whether expert testimony is truly 'expert' and likely to be of help to the jury."

Machines

Technical Devices Covered by *Daubert: United States v. Lee,* 25 F.3d 997 (11th Cir. 1994): In a pre-*Daubert* prosecution for narcotics possession, the defendant unsuccessfully objected, under *Frye*, to evidence from two machines which detected trace amounts of cocaine on his personal effects. These machines--the Sentor and the Ionscan-- incorporate the scientific techniques of gas chromatographic luminescence and ion mobility spectography, respectively. The Court remanded for a hearing in light of *Daubert*, and in the course of doing so, rejected the contention that *Daubert* is inapplicable to the results obtained by specialized technical equipment. The Court stated:

> The results of such specialized, technical, diagnostic machinery are only admissible through the testimony of an expert witness; courts do not distinguish between the standards controlling admission of evidence from experts and evidence from machines. * * * Rule 702 specifically applies to the admission of "scientific, technical, or other specialized *knowledge*," a category of evidence that includes the results of technical devices. * * * *Daubert* applies not only to testimony about scientific concepts but also to testimony about the actual applications of those concepts.

Safety Conditions

Testifying on the Basis of Experience: *Thomas v. Newton Intern. Enterprises,* 42 F.3d 1266 (9th Cir. 1994): In a suit by a longshoreman for injuries suffered on a boat, the Court held that the Trial Court erred when it excluded the testimony from the plaintiff's proffered expert to the effect that the defendant had left a boat in an unsafe condition. The expert was sufficiently

qualified due to his 29 years of experience as a longshoreman. The defendant's reliance on *Daubert* was misplaced, because "*Daubert* was clearly confined to the evaluation of *scientific* expert testimony." The Court stated: "While a scientific conclusion must be linked in some fashion to the scientific method, * * * non-scientific testimony need only be linked to some body of specialized knowledge or skills." In this case, the expert's 29 years of experience provided the necessary link.

Valuation of Property

Hybrid of Two Recognized Methodologies: *F.D.I.C. v. Suni Associates, Inc.*, 80 F.3d 681 (2d Cir. 1996): In a proceeding for a deficiency judgment, the F.D.I.C. offered the testimony of an expert, who valued the real estate on the basis of a sale of all of the property to a single purchaser and testified that he used a valuation methodology that was a blend of two approaches to valuation: direct sales comparison and income capitalization. The defendant objected that the testimony was based on "a developmental analysis unknown to appraisal literature, unique to [the expert] and on factual assumptions which were without any reasonable foundation." But the Court found the testimony sufficiently reliable, citing *Daubert* as establishing a flexible and permissive approach. It found the expert's "hybrid of two widely-recognized methods" of valuation to be sufficiently reliable, and dismissed the internal contradictions in the expert's testimony as a question of weight.

Straightforward Application of Economics: *Masayesva on Behalf of Hopi Indian Tribe v. Hale,* 118 F.3d 1371 (9th Cir. 1997): In a dispute between Indian tribes over the value of grazing land, the Navajo tribe challenged the Hopi tribe's expert's testimony under *Daubert*. The Court held that the expert, an economist with a specialty in range economics and with dozens of peer-reviewed articles to his credit, was properly qualified to testify to the value of the property. The Court stated that "[t]he Navajo's reliance on *Daubert* is misplaced because Dr. Workman's testimony derives from his relatively straightforward application of range economics, rather than on a novel scientific theory."

VIII. GATEKEEPING PROCEDURES

Court-appointed Experts

Assistance in the *Daubert* Enquiry: ***DeAngelis v. A. Tarricone, Inc.***, 151 F.R.D. 245 (S.D.N.Y. 1993): In this personal injury case, the Court granted the defendant's motion for a court-appointed expert, after the plaintiff had successfully objected to neurotoxological and psychiatric examinations by defense experts. The Court held that after *Daubert*, the trial court's role in assessing the reliability of expert testimony is critical, and that court-appointed experts might often be helpful. Recognizing that a court-appointed expert may carry undue weight before the jury, the Court stated that "the source of appointment of an expert can be placed in proper perspective by awareness of the factfinder that even an impartial expert can be wrong, and the impartial expert must be subjected to the same evaluation of credibility as any other witness."

Limitations on Deposition: ***In re Joint E. and S. Dists. Asbestos Litigation,*** 151 F.R.D. 540 (S.D.N.Y. 1993): The Court denied a motion to depose court-appointed experts. The motion was made by counsel for a handful of plaintiffs in a mass tort litigation, and was not joined by counsel for the plaintiff class. The Court reasoned that, in light of *Daubert* and the gatekeeping function that it imposes, it is more efficient for a court to hold a pre-trial "*Daubert* hearing" at which the court-appointed expert could be questioned by all parties in the presence of the trial judge.

Hearing Requirement

Party Unprepared: ***Holbrook v. Lykes Bros. S.S. Co., Inc.***, 80 F.3d 777 (3d Cir. 1996): The Court found no error in the Trial Court's admitting the defendant's expert testimony without having held a *Daubert* hearing. The Court found that the Trial Court had scheduled a *Daubert* hearing, but that plaintiff's counsel was unprepared. At that point, it was sufficient for the Trial Court to entertain a motion to strike at trial. The Court concluded: "Counsel failed to prepare appropriately and the court exercised sound discretion in controlling the efficient and orderly disposition of this case to avoid unnecessary inconvenience to the jury."

Hearing Must Be Held: ***Gruca v. Alpha Therapeutic Corp.***, 51 F.3d 638 (7th Cir. 1995): In an action arising from a hemophiliac's death from AIDS, the plaintiffs claimed, among other things, that the decedent's death was hastened by additional exposure to HIV contained in

the defendants' blood coagulant products. The plaintiffs provided expert scientific testimony based on the theory of antigenic stimulation. Under this theory, an infected person's exposure to additional HIV, other viruses, or foreign proteins shortens the asymptomatic period of the initial infection and leads to quicker death from HIV. The defendants objected to the experts' testimony on *Daubert* grounds, but the district court declined to rule on the objection and instead directed a verdict on the merits of the plaintiffs' claim as to additional exposure--the court found no jury question on the issue of subsequent infection. The Court of Appeals held that the Trial Court's approach was improper. *Daubert* requires that when faced with the proffer of expert scientific testimony, the district court must determine "at the outset" whether it comports with the scientific method. The Court declared that the district court "abdicated its responsibility under Rule 104(a) by failing to conduct a preliminary assessment of the admissibility of the plaintiffs' expert testimony concerning antigenic stimulation before permitting the plaintiffs' experts to testify." The Court reversed the directed verdict and remanded the antigenic stimulation claim with instructions to evaluate the expert testimony under the *Daubert* framework. It emphasized that it took no view on the admissibility of antigenic stimulation testimony under *Daubert*.

Party Waives a Pre-trial Hearing: *Hose v. Chicago Northwestern Trans. Co.*, 70 F.3d 968 (8th Cir. 1995): Affirming a judgment for an employee who brought an FELA action alleging that his employer was liable for his suffering from manganese encephalopathy, the Court upheld the Trial Judge's admission of medical testimony which the employer challenged under *Daubert*. It observed in a footnote that "[c]hallenges to the scientific reliability of expert testimony should ordinarily be addressed prior to trial," because "an early evidentiary challenge allows the trial judge to exercise properly the gatekeeping role regarding expert testimony envisioned under *Daubert*." The Court noted, however, that the employer apparently chose not to seek a pre-trial hearing in this case.

IX. APPELLATE REVIEW

Preserving Objections

Failure to Object Results in Heavy Presumption That Trial Court Conducted a Proper *Daubert* Review: *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995): The plaintiff recovered damages against her father for sexual assaults that occurred during her childhood. At trial she called an expert in repressed memories, who supported her testimony. The defendant did not object. On appeal from denial of relief under Rule 60(b), he argued that his failure to object was not dispositive, because under *Daubert* the trial court must make a *sua sponte* ruling on the admissibility of expert testimony. The Court stated that while *Daubert* does instruct district courts to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection, it does not require a court to *sua sponte* hold a hearing and make explicit on-the-record findings. In the absence of an explicit objection, "we assume that the district court performs such an analysis *sub silentio* throughout the trial with respect to all expert testimony." The Court found that the trial court's admission of the expert testimony was not a "mistake" within the meaning of Rule 60(b).

Daubert* Cannot Be Argued in Terms of Insufficiency on Appeal, Where the Party Failed to Object to Admissibility at Trial: *C.B. Fleet v. Smithkline Beecham Consumer Healthcare, 131 F.3d 430 (4th Cir. 1997): In a Lanham Act case, the major issue of dispute was the scientific reliability of tests conducted by the defendant that were the basis of the defendant's advertised claims of product superiority. The plaintiff made no *Daubert* objection to the defendant's scientific testimony at trial, choosing instead to call its own scientific experts to attack the defendant's testing procedures. The Trial Judge found in favor of the defendant, and the plaintiff challenged the evidentiary sufficiency for this finding, contending that the judge's determination was based on evidence that failed to meet *Daubert* standards. In pursuit of this claim, the plaintiff argued that it need not have made a *Daubert* objection at trial, because its challenge on appeal was not to the admissibility of the defendant's expert evidence, but rather to "its insufficiency when tested by *Daubert* principles." But the Court of Appeals rejected this argument as confusing admissibility with sufficiency. The Court explained as follows:

> *Daubert* deals with the admissibility of this kind of scientific evidence. As with all rules governing admissibility, its application to particular evidence is to be raised and resolved in the trial court. There the proponent can attempt upon objection to lay the proper foundation for admitting the evidence and the objector can challenge is sufficiency. In this way the question of admissibility can be resolved as a threshold matter. Fleet essentially would have this court engage in a first instance application of *Daubert* principles on a record completely inadequate for the purpose. This cannot be done under the guise of a

challenge to the substantive sufficiency of this evidence.

Objection Not Specific Enough: ***McKnight v. Johnson Controls, Inc.***, 36 F.3d 1396 (8th Cir. 1994): Affirming a judgment for the plaintiff in an action alleging personal injury caused by an exploding battery, the Court held that the defendant failed to preserve its objection that the plaintiff's expert's testimony was not scientifically valid within the meaning of *Daubert*. The plaintiff's expert testified on the basis of tests he conducted on a battery similar to the battery which exploded. The defendant objected that the expert was using "a test on a battery, for which a foundation hasn't been laid sufficiently, to prove the ultimate issue in this case." The Court held that this objection failed "to raise any question about the scientific validity of the principles and methodology" underlying the expert's testimony. The Court rejected the argument that district judges have an obligation to exercise their *Daubert* gatekeeping function even in the absence of a specific objection.

Failure to Object Precludes Sufficiency Attack: ***Marbled Murrelet v. Babbitt***, 83 F.2d 1060 (9th Cir. 1996): the Court affirmed the grant of injunctive relief against a logging company in an action by an environmental group to protect a nesting habitat. It held that, because the company failed to request a ruling at trial on its *Daubert* objections to expert testimony, it could not make a sufficiency of the evidence argument on appeal that seemed to be based on a *Daubert* analysis.

Standard of Review

Abuse of Discretion Standard Applies to All *Daubert* Rulings: ***General Electric Company v. Joiner***, 118 S.Ct. 512 (1997): In a suit alleging that the plaintiff contracted cancer from exposure to PCB's, the trial court excluded the plaintiff's expert's causation testimony under *Daubert*, and granted summary judgment to the defendants because, in the absence of expert testimony, the plaintiff presented no triable issue of fact. The Court of Appeals reversed, holding that the expert's testimony was sufficiently reliable under *Daubert*. The Court applied a "hard look" standard of review to the District Court's *Daubert* rulings--a standard somewhere between abuse of discretion and de novo review. The Supreme Court reversed and reinstated the grant of summary judgment. It rejected the "hard look" standard and held that a District Court's rulings under *Daubert* are to be reviewed pursuant to the abuse of discretion standard traditionally applied to evidentiary rulings. The Court rejected any distinction between rulings admitting and excluding evidence, and likewise rejected a more searching standard of review for evidentiary rulings that are "outcome-determinative."

FORDHAM Agenda Item II B
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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 701 and Advisory Committee Note
Date: March 1, 1998

Attached is a proposed amendment to Rule 701, and the accompanying Committee Note, all as drafted by the *Daubert* subcommittee. The goal of the proposal is to make sure that all expert testimony is channeled through the reliability requirements of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

I also attach the following:

1. Two background cases which shed light on the problem that the subcommittee is addressing--Judge Becker's *Asplundh* opinion, and the Ninth Circuit's recent opinion in *Figueroa.*

2. A letter from Roger Pauley and Mary Harkenrider, stating their objections to the Rule 701 proposal.

3. Letters and memoranda responding to the objections by Roger and Mary.

Proposed Amendment to Rule 701

Rule 701 Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which ~~are~~ (a) <u>are</u> rationally based on the perception of the witness, ~~and~~ (b) <u>are</u> helpful to a clear understanding of the witness' testimony or the determination of a fact in issue~~.~~ <u>and</u> <u>(c) are not based on scientific, technical or other specialized knowledge.</u>

Proposed Advisory Committee Note

Lay witnesses have often been permitted to testify on complicated, technical subjects. This permissiveness has created a problematic overlap between lay and expert witness testimony. See, e.g., *Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991) (insurance broker, who might have been qualified as an expert, was permitted to testify that the construction collapse at issue may have contributed to a substantial increase in the plaintiff's insurance premiums). Some courts have found it unnecessary to decide whether a witness is offering expert or lay opinion, reasoning that the proffered opinion would be admissible under either Rule 701 or 702. See *Malloy v. Monahan*, 73 F.3d 1012 (10th Cir. 1996) (the plaintiff's testimony as to future profits was admissible under either Rule 701 or Rule 702); *United States v. Fleishman*, 684 F.2d 1329 (9th Cir.), *cert. denied,* 459 U.S. 1044 (1982) (whether the testimony was lay or expert opinion, it was permissible for an undercover agent to testify that a defendant was acting as a lookout). Other courts have held that a witness need not be qualified as an expert where the opinion is helpful and admissible under Rule 701. See, e.g., *United States v. Paiva*, 892 F.2d 148, 156 (1st Cir. 1989) (Rule 701 ``blurred any rigid distinction that may have existed between" lay and expert testimony).

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness's testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing scientific, technical, or other specialized information to the factfinder. See generally *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3rd Cir. 1995). By channeling testimony on scientific, technical and other specialized knowledge through the rules governing expert testimony, the amendment also ensures that a party will not evade the the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a layperson. See Joseph, *Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure,* 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony", and that "the court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of

Criminal Procedure 16(a)(1)(E)").

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g, *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, expert qualification was required where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or specialized knowledge is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

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ASPLUNDH MANUFACTURING DIVISION, a Division of Asplundh Tree Expert Co.; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. Asplundh Manufacturing Division and National Union Fire Insurance Company of Pittsburgh, PA Appellants in No. 94-1201 v. BENTON HARBOR ENGINEERING, Benton Harbor Engineering Appellant in No. 94-1095

Nos. 94-1095, 94-1201

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

57 F.3d 1190; 1995 U.S. App. LEXIS 15111; 42 Fed. R. Evid.

Serv. (Callaghan) 597

August 12, 1994, Argued
June 20, 1995, Filed

SUBSEQUENT HISTORY: [**1] As Amended June 26, 1995. Second Amendment June 28, 1995.

PRIOR HISTORY: On Appeal From the United States District Court For the Eastern District of Pennsylvania. (D.C. Civ. No. 89-cv-00252).

COUNSEL: BASIL A. DiSIPIO, ESQUIRE (ARGUED), THOMAS FINARELLI, ESQUIRE, Lavin, Coleman, Finarelli & Gray, Penn Mutual Tower, 12th Floor, 500 Walnut Street, Philadelphia, PA 19106, Attorneys for Asplundh Manufacturing, Division, a Division of Asplundh Tree, Expert Co. and National Union Fire, Insurance Co. of Pittsburgh.

JOHN M. CORCORAN, ESQUIRE (ARGUED), ROBERT G. KELLY, JR. ESQUIRE, Kelly, McLaughlin & Foster, 1700 Atlantic Building, 260 South Broad Street, Philadelphia, PA 19102, Attorneys for Benton Harbor Engineering.

JUDGES: Before: BECKER, ALITO, Circuit Judges, and GIBSON, Senior Circuit Judge *

* Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

OPINIONBY: BECKER

OPINION:
[*1192] BECKER, Circuit Judge.

The defendant, Benton Harbor Engineering ("Benton Harbor"), appeals from an order of the district court denying its motion for a new trial, and also from a judgment against it on a contribution claim brought by Asplundh Tree Expert Co. ("Asplundh") and by National Union [**2] Fire Insurance Company of Pittsburgh ("National Union"), Asplundh's liability insurance carrier. Asplundh and National Union sought to recover some or all of their costs in settling a wrongful death suit brought against Asplundh by the estate of Jeffrey Sackerson, who was killed when an Asplundh aerial lift in which he was working [*1193] fractured (Benton Harbor having manufactured the component part of the aerial lift which allegedly failed). Benton Harbor's principal argument on appeal is that the district court erred in permitting Asplundh to adduce lay opinion testimony pursuant to Federal Rule of Evidence 701 regarding what appear to be complex technical issues concerning the cause of the metal failure.

Rule 701, which contemplates admission of lay opinions rationally based on personal knowledge so as to be helpful to the trier of fact, was primarily designed to allow lay individuals to express opinions that are in reality only a shorthand statement of fact. However, this court, like other courts, has commonly interpreted the rule to permit individuals not qualified as experts, but possessing experience or specialized knowledge about particular things, to testify about technical matters [**3] that might have been thought to lie within the exclusive province of experts. This flexible, arguably expansive, interpretation of Rule 701 appears to be consistent with its text. Where, however, a party proffers a witness expressing an opinion on matters such as the design of hydraulic cylinders or the cause of metal failure, the trial court must be rigorous in assuring that the lay witness satisfies the strictures of Rule 701. In particular, the proponent of technical lay opinion testimony must show that the testimony is based on sufficient experience or specialized knowledge and also show a sufficient connection between such knowledge or experience and the lay opinion such that the testimony may be fairly considered to be "rationally based on the perception of the witness" and truly "helpful" to the jury.

Given the standard we articulate today for the admission of lay opinion evidence of a technical nature, we conclude that the district court's ruling was based on an impermissible interpretation of Rule 701, because the court failed to examine with sufficient rigor whether the testimony in question was informed by sufficient experience or specialized knowledge. More particularly, [**4] in order to satisfy the rationally derived and helpfulness standards of Rule 701, Asplundh needed to demonstrate that the witness possessed sufficient experience or specialized knowledge which qualified him to offer a technical opinion regarding the cause of metal failure and the design of hydraulic cylinders. While a lay witness could acquire this additional insight either by formal education or practical experience, it appears the witness at issue simply possessed neither. Because the admission of the testimony was not harmless, we will reverse the judgment of the district court and remand for further proceedings.

Although Asplundh and National Union cross appeal, arguing that the district court erred in failing to award prejudgment interest, we do not, in view of our result, reach this question.

I. Facts and Procedural History

Jeffrey Sackerson was killed while operating an aerial lift, manufactured by Asplundh, which was mounted onto a truck chassis and used in tree trimming operations. At the time, Sackerson was employed by the city of Portland, Oregon, which owned, operated, and maintained the aerial lift. When Sackerson's estate filed a wrongful death suit against Asplundh, [**5] Asplundh and its insurer, National Union, brought a third-party action seeking contribution and indemnity from Benton Harbor, the manufacturer of the lower boom cylinder containing the piston rod which allegedly fractured and caused the accident. The jury returned a verdict for Asplundh and National Union, finding Asplundh eighty percent responsible and Benton Harbor twenty percent responsible. The district court entered judgment for Asplundh and National Union in the amount of $ 185,881.60, twenty percent of the Sackerson settlement. Post-trial motions were filed by both parties. Asplundh and National Union sought prejudgment interest, and Benton Harbor sought a new trial based on alleged error in admitting the lay opinion testimony of Michael Jones. Both motions were denied by the district court. These appeals followed.

Jones, the witness whose testimony is at issue, had been fleet maintenance supervisor for the City of Portland for more than ten years at the time of the accident. Jones's responsibilities covered all city equipment, including the Asplundh aerial lift. He supervised between sixty and one hundred employees, [*1194] six or seven city repair shops, and the maintenance of 1385 [**6] pieces of equipment.

After the accident, Jones and his employees took apart and inspected the aerial lift's boom assembly in the City of Portland's shop. During this inspection, Jones observed the rod from a distance of about fifteen inches. In his deposition, Jones stated his opinion that a component of the lower boom assembly -- the rod end -- had fractured. The rod end was a threaded metal rod that was screwed into a threaded metal casing called the rod cylinder. A hole was drilled through both the casing and the rod end, and a metal pin was inserted through the hole. See App. at 315.

Jones expressed the opinion that the fracture was caused by metal fatigue and was attributable to the design of the rod end. Id. at 161, 167. Specifically, he stated that there was a "problem" because Benton Harbor's design called for a hole to be drilled through the rod end at a point where it was threaded. Id. Moreover, Jones noted that the cylinder rod had oxidized around a portion of the break which was a different, duller color than the rod's fresh break. From this, Jones concluded that the break occurred in stages. Jones also related that the break was in a threaded area where [**7] a hole had been drilled through the rod. Jones concluded that the rod fatigued inside the rod eye, causing the accident, stating that the stop block on the lower boom cylinder rods did not contribute to the accident. n1

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n1 Jones stated:

Well, it seems like -- seemed to me that all the bulletins that came out after the fact, after

Sackerson's death, were dealing with the stop blocks as if the stop blocks somehow would have saved his life. And there's no way I happen to believe that. Stop blocks didn't have a damn thing in the world to do with Sackerson's death.

App. at 166.

----------End Footnotes----------

In particular, Jones attributed the accident "to the way the rod was drilled through, and the fact that the rod eye was screwed on on a threaded -- two threaded surfaces." App. at 167; App. at 160-61 ("The reasons [for the accident] are two: one, the hole through the pin caused . . . the rod to be weakened and, two, the threads . . . on the rod itself caused the breaking point. They were sharp, and it broke right at the [**8] point where all of those things intersected. That was the problem. There's no doubt in my mind about it. . .

."). He questioned the appropriateness of this rod end design, stating that before his examination he "had no idea that this thing was threaded on and then drilled and pinned, up to that point," since he "had never seen a cylinder that size configured that way." Id. Jones reiterated that he "never saw other cylinders configured that way," and that he "knew how other cylinders were configured differently," since he was a production control manager for a company that produced hydraulic cylinders. Id. Moreover, Jones asserted expertise in this area, declaring, "I think I know how to make hydraulic cylinders." Id.

Key portions of Jones's deposition were read to the jury over Benton Harbor's objection. The district court overruled the objections to the reading of the deposition testimony, allowing Jones to testify as a lay witness expressing an opinion under Rule 701. FED. R. EVID. 701. Benton Harbor argues that Jones's technical deposition testimony is not the type of lay opinion evidence properly admissible under Rule 701. Our review is plenary, since the district [**9] court's ruling turns on an interpretation of Rule 701, which would permit the admission of technical lay opinion evidence in this case. A determination regarding the scope of evidence properly admitted under a Federal Rule of Evidence is a question of law subject to plenary review. See DeLuca v. Merrell Dow Pharm. 911 F.2d 941, 945 (3d Cir. 1990); U.S. v. Furst, 886 F.2d 558, 571 (3d Cir. 1989) ("To the extent that the district court's admission of [evidence] was based on an interpretation of the Federal Rules of Evidence, we exercise plenary review.").

II. The Rule 701 Jurisprudence

A.

In determining whether Jones's opinion testimony was properly admitted by the district court, we must determine the scope of [*1195] Federal Rule of Evidence 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the

determination of a fact in issue.

FED. R. EVID. 701.

Rule 701 represents a movement away from the courts' historically [**10] skeptical view of lay opinion evidence. At common law, witnesses not qualifying as experts were not permitted to draw conclusions which could be characterized as opinion testimony, but rather were required to limit their testimony to facts, those things "they had seen, heard, felt, smelled, tasted, or done." Hon. Charles R. Richey, Proposals To Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules [of] Evidence in Civil and Criminal Jury Trials,154 F.R.D. 537, 542#=F (1994) ("Mere opinions were considered unreliable bases for testimony.").

This rigid distinction between fact and opinion led to numerous appeals and pervasive criticism by commentators. See generally 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE P 701[01] (1994) [hereinafter WEINSTEIN]. Wigmore declared, in the first edition of his treatise, that this distinction "has done more than any one rule of procedure to reduce our litigation towards a sense of legalized gambling." 3 JOHN H. WIGMORE, EVIDENCE @ 1929, at 2563 (1st ed. 1904); see also WILLARD L. KING & DOUGLAS PILLINGER, OPINION OF THE COURT OPINION EVIDENCE IN ILLINOIS 8 (1942) ("The American courts have had a great struggle [**11] with a rule which appeared to require them to admit statements of fact and exclude all inferences of the witness. Such a rule is quite impossible of application: all statements contain inferences."); JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 524 (1898) ("In a sense all testimony to matter of fact is opinion evidence, i.e. it is a conclusion formed from phenomena and mental impressions.").

Characteristically, however, the most eloquent criticism of this common-law restriction on lay testimony was made by Judge Learned Hand:

Every judge of experience in the trial of causes has again and again seen the whole story garbled, because of insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the "facts" in the only way that he knows how, and the result of nagging and checking him is often to choke him altogether, which is, indeed, usually its purpose.

Central R.R. Co. v. Monahan, 11 F.2d 212, 214 (2d Cir. 1926). Judge Hand also stated:

The truth is, as Mr. Wigmore has observed at length, that the exclusion of opinion [**12] evidence has been carried beyond reason in this country, and that it would be a large advance if courts were to admit it with freedom. The line between opinion and fact is at best only one of degree, and ought to depend solely upon practical considerations, as, for example, the saving of time and the mentality of the witness.

Id. (citation omitted).

These concerns about the restrictions on lay opinion testimony, combined with a more general liberalization in those rules of evidence that operated to deprive the fact-finder of relevant evidence, n2 led to the adoption of Rule 701. The Advisory Committee Note to the rule reflects the fact that Rule 701's liberalization of the admissibility of opinion evidence is rooted in the modern trend away from fine distinctions between fact and opinion and toward greater admissibility, tempered with an understanding that the adversary [*1196] process, and more specifically, cross-examination will correct any problems:

----------Footnotes----------

n2 The admissibility of expert opinion testimony was also more limited at common law and liberalized under the Federal Rules. Among other requirements, expert testimony was limited to those areas that were "not within the common knowledge of the average layman." Bridger v. Union Railway Co., 355 F.2d 382, 387 (6th Cir. 1966). With the enactment of the Federal Rules of Evidence the common law restrictions on expert testimony have been liberalized and the permissible content has been broadened.

----------End Footnotes---------- [**13]

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best [**14] advantage. If he fails to do so, cross-examination and argument will point up the weakness. If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

FED. R. EVID. 701 advisory committee's note (citations omitted).

The prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. See Mason Ladd, Expert Testimony, 5 VAND. L. REV. 414, 417 (1952). The more liberal approach to lay opinion testimony of this type gained acceptance as a rule of "convenience," which allowed for "'shorthand renditions' of a total situation, or [for] statements of collective facts." 1 MCCORMICK ON EVIDENCE 44 & n.16 (4th ed. 1992); see also Mark McCormick, Opinion Evidence in Iowa, 19 DRAKE L. REV. 245, 248 (1970) (viewing this rule as allowing for a "shorthand [**15] rendering of the facts").

As recognized by Professor Saltzburg, testimony that a person was "excited" or "angry" is more evocative and understandable than a long physical description of the person's outward manifestations. STEPHEN A. SALTZBURG ET. AL., FEDERAL RULES OF EVIDENCE MANUAL 1032 (6th ed. 1994) [hereinafter SALTZBURG]. For example, a witness who testifies that an individual whom he saw staggering or lurching along the way was drunk is spared the difficulty of describing, with the precision of an orthopedist or choreographer, the person's gait, angle of walk, etc. See, e.g., United States v. Mastberg, 503 F.2d 465 (9th Cir. 1974) (permitting under Rule 701 the testimony of a customs inspector that the defendant appeared nervous); State v. Hall, 353 N.W.2d 37, 43 (S.D. 1984) (permitting police officers to give lay opinion concerning defendant's intoxicated state) n3 ; Kerry Coal Co. v. United Mine Workers, 637 F.2d 957, 967 (3d Cir.) (allowing the admission of testimony that plaintiff's employees were "nervous and afraid" as a shorthand report of witnesses' observations of employee reactions), cert. denied, 454 U.S. 823, 70 L. Ed. 2d 95, 102 S. Ct. 109 (1981).

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n3 All state cases cited herein are decided under state rules of evidence identical or analogous to Rule 701 of the Federal Rules. As of this entry, some 28 states have adopted Federal Rule 701 without change. See WEINSTEIN, supra, P 701[03].

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Perhaps the best judicial description of this type of testimony under Rule 701 is found in United States v. Yazzie, 976 F.2d 1252 (9th Cir. 1992). Yazzie was charged with statutory rape under a federal statute that permitted a defense of reasonable mistake as to the age of the minor. At trial, Yazzie asserted that he reasonably believed that the minor, age fifteen-and-a-half, was over the statutory age of sixteen. In support of this contention, Yazzie called several witnesses [*1197] who offered to testify that, as of the date of the incident, their observations caused them to believe the minor to be between the age of sixteen and twenty. The trial court excluded this testimony as impermissible lay "opinion" and limited the witnesses' testimony to "facts," such as that the minor smoked cigarettes, wore make-up, and drove a car. The Court of Appeals reversed, stating:

We understand Rule 701 to mean that opinions of non-experts may be admitted where the facts could not otherwise be adequately presented or described to the jury in such a way as to enable

the jury to form an opinion or reach an intelligent conclusion. If it is impossible or difficult to reproduce the data observed [**17] by the witnesses, or the facts are difficult of explanation, or complex, or are of a combination of circumstances and appearances which cannot be adequately described and presented with the force and clearness as they appeared to the witness, the witness may state his impressions and opinions based upon what he observed. It is a means of conveying to the jury what the witness has seen or heard.

Id. at 1255 (quoting United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982) (internal quotation marks omitted)). The court concluded that the testimony of the witnesses satisfied Rule 701's requirements:

Here, the opinion testimony not only meets the requirements of sub-part (a) of Rule 701, but of both the alternative sub-parts of (b). The testimony helps in the understanding of the witnesses' descriptive testimony and in determining a critical fact at issue -whether it was reasonable for Yazzie to believe that the minor was sixteen or older.

In the case before us, the jurors could not themselves assess how old the minor looked at the time of the incident: by the time of the trial, the minor was almost seventeen years old, and her appearance was undoubtedly [**18] substantially different than it had been on the night in question, a year and a half earlier. Thus, the jurors were wholly dependent on the testimony of witnesses. Yet the witnesses were permitted to testify only to the minor's describable features and behavior. Their testimony was no substitute for a clear and unequivocal statement of their opinions. It did not tell the jury that these witnesses believed the minor to be at least sixteen years old at the time of the incident.

Id. (footnote omitted).

Other examples of this type of quintessential Rule 701 opinion testimony include identification of an individual, n4 the speed of a vehicle, n5 the mental state or responsibility of another, n6 whether another was healthy, n7 the [*1198] value of one's property, n8 and other situations in which the differences between fact and opinion blur and it is difficult or cumbersome for the examiner to elicit an answer from the witness that will not be expressed in the form of an opinion. n9 See generally SALTZBURG, supra, 1031-36; WEINSTEIN, supra, P 701[02]. These cases, it is important to add, all meet the core definitional terms of Rule 701 -- the opinion is based upon personal [**19] knowledge, is rationally based thereon, and is helpful to the trier of fact.

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n4 United States v. Langford, 802 F.2d 1176, 1178-79 (9th Cir. 1986) (admitting identification testimony with respect to persons depicted in a bank surveillance photograph), cert. denied, 483 U.S. 1008, 97 L. Ed. 2d 740, 107 S. Ct. 3235 (1987); United States v. Allen, 787 F.2d 933, 935-37 (4th Cir. 1986) (same), cert. denied, 488 U.S. 944, 102 L. Ed. 2d 360, 109 S. Ct. 371 (1988); United States v. Farnsworth, 729 F.2d 1158, 1160-61 (8th Cir. 1984) (same); United States v. Jackson, 688 F.2d 1121, 1125 (7th Cir. 1982) (same), cert. denied, 460 U.S. 1043, 75 L. Ed. 2d 797, 103 S. Ct. 1441 (1983).

n5 United States v. Carlock, 806 F.2d 535, 552 (5th Cir. 1986) (recognizing that a "common illustration" of an admissible opinion under Rule 701 is "an expression of opinion by a lay observer of a car's speed"), cert. denied, 480 U.S. 949, 94 L. Ed. 2d 796, 107 S. Ct. 1611 (1987); see also Ernst v. Ace Motor Sales, Inc., 550 F. Supp. 1220, 1222-23 (E.D. Pa. 1982) (admitting opinion testimony as to the point of impact of two vehicles from a police officer who did not observe a car accident, but arrived shortly thereafter), aff'd, 720 F.2d 661 (3d Cir. 1983). [**20]

n6 United States v. Lawson, 653 F.2d 299, 303 (7th Cir. 1981), cert. denied, 454 U.S. 1150, 71 L. Ed. 2d 305, 102 S. Ct. 1017 (1982) (concluding that lay opinion testimony by FBI agents as to defendant's sanity was properly admitted despite fact that the agents had little opportunity to view the defendant); Lewisohn v. State, 433 A.2d 351, 355 (Me. 1981) (concluding, in habeas corpus proceedings, that testimony by witness that a certain juror, prior to having been selected for jury, had preconceived notions that petitioner was guilty was an inference rationally based on the witness's perception and helpful in determining a fact in issue, and therefore properly admitted).

n7 Singletary v. Secretary of HEW, 623 F.2d 217, 219 (2d Cir. 1980) (permitting, in a reversal of a denial of disability benefits, the lay opinion of a claimant's son that his father was an alcoholic and unable to work); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188, 201 (N.C. 1993) (recognizing "the state of a person's health" as "a proper subject[] for lay opinion").

n8 See United States v. Ranney, 719 F.2d 1183, 1189 & n.11 (1st Cir. 1983) (permitting defrauded investors to testify as to the value of their investment); Neff v. Kehoe, 708 F.2d 639, 643-44 (11th Cir. 1983) (reversing, in an action alleging misrepresentations in sale of a coin collection, the exclusion of testimony of the plaintiff/buyer, who was determined competent to give lay

opinion testimony as to the value of the coins, even though such testimony was self-serving and unsupported by other evidence); Garis v. Massey, 270 Ark. 646, 606 S.W.2d 109, 112 (Ark. Ct. App. 1980) (allowing owner of similar property to testify as to value of property in issue). [**21]

n9 United States v. McCullah, 745 F.2d 350, 352 (6th Cir. 1984) (permitting, in a prosecution for conspiracy to steal, transport, conceal, and resell a tractor, the testimony of a government agent describing the location of the tractor as "hidden" under some trees, since it was rationally based on the perception of the witness and helpful to a clear understanding of his testimony);

United States v. Sweeney, 688 F.2d 1131, 1145-46 (7th Cir. 1982) (concluding that a PCP and methamphetamine drug user could testify as to identity of said drugs based on his prior use and knowledge, his sampling of the substance, and the conclusion that the drug affected him in the same manner as it had before); State v. No Heart, 353 N.W.2d 43, 48 (S.D. 1984) (holding that a police officer's opinion that victim's injuries were caused not by a fist but by something sharper was properly admitted, given that distinction between a wound caused by a fist and a wound caused by a sharper object was within realm of an average person's experience).

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B.

While many, if not most, of the cases decided under Rule 701 [**22] are of the genre just described, the jurisprudence has expanded beyond this core area to permit lay persons to express opinions that are not shorthand statements of fact, so long as the personal knowledge, rational basis, and helpfulness standards of Rule 701 are met. In particular, courts have permitted witnesses with firsthand knowledge to offer lay opinion testimony where they have a reasonable basis -- grounded either in experience or specialized knowledge -- for arriving at the opinion expressed. A conclusion by the trial court that the witness possessed sufficient experience or specialized knowledge has thus often been used to determine that the witness's opinion testimony satisfies the requirements that the opinion be both "helpful to a clear understanding . . . of a fact in issue" and "rationally based" upon the witness's perception, as expressed in the text of Rule 701.

Rule 701 cases satisfying these requirements are arrayed along a spectrum, ranging from what might be described as modest departures from the core area of lay opinion testimony, described above, to those which approach the ambit of Rule 702 expert opinion. A good example of the former is our opinion in [**23] Teen-Ed, Inc. v. Kimball International, Inc., 620 F.2d 399 (3d Cir. 1980) in which we held that a lay opinion from the plaintiff's accountant and bookkeeper was proper:

The personal knowledge of appellant's balance sheets acquired by Zeitz as Teen-Ed's accountant was clearly sufficient under Rule 602 to qualify him as a witness eligible under Rule 701 to testify to his opinion of how lost profits could be calculated and to inferences that he could draw from his perception of Teen-Ed's books.

The fact that Zeitz might have been able to qualify as an expert witness on the use of accepted accounting principles in the calculation of business losses should not have prevented his testifying on the basis of his knowledge of appellant's records about how lost profits could be calculated from the data contained therein.

Id. at 403.

Similar to Teen-Ed are our opinions in Joy Manufacturing Co. v. Sola Basic Industries, Inc., 697 F.2d 104, 110-12 (3d Cir. 1982), and Eckert v. Aliquippa & Southern Railroad Co., 828 F.2d 183, 185 n.5 (3d Cir. 1987). In Joy, an action against a manufacturer for [*1199] damages resulting from the failure of two heat treating [**24] furnaces, we held that it was an abuse of discretion for the district court to exclude the testimony of plaintiff's supervisor of production control concerning the percentage of plaintiff's losses resulting from hearth problems. Given that the witness in question had extensive personal knowledge of plaintiff's plants and the furnaces in question, we concluded that the witness's opinion was rationally based on his personal knowledge and that the witness's inability to state precisely why a furnace was inoperable at a particular time was proper material for cross-examination rather than a basis for inadmissibility.

In Eckert, a brakeman sued a railroad under the Federal Employers Liability Act and Safety Appliance Act (SAA) for injuries suffered when the locomotive he was riding on collided with another locomotive and both cars derailed upon failing to couple. In concluding that the district court had improperly held the SAA inapplicable to the case, we noted that the plaintiff, who had offered testimony relevant to establishing SAA violations, was qualified to testify by virtue of his thirty years experience and familiarity with railroad procedures as to whether injuries [**25] would have occurred had the cars been properly coupled. A number of other cases also fit into this category (that is, they represent a modest expansion from the core lay opinion testimony contemplated by the adoption of Rule 701). n10

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n10 See, e.g., State Office Sys., Inc. v. Olivetti Corp. of America, 762 F.2d 843, 845-46 (10th Cir. 1985) (permitting admission of testimony as to lost future profits from company's president/treasurer with personal knowledge of company's operations, sales, and profits); State v. Johnson, 221 Mont. 503, 719 P.2d 1248, 1256-57 (Mont. 1986) (holding that, in a prosecution for driving under the influence of alcohol, a police officer was properly allowed to testify as a lay witness on the basis of his own experience as to what generally happens to a car when its power steering fails, where he had worked on vehicles of all kinds for over ten years and had experienced power steering failure several times); Schmidt v. J.C. Robinson Seed Co., 220 Neb. 344, 370 N.W.2d 103, 106 (Neb. 1985) (holding that the trial court properly admitted, in a breach of contract action against a buyer of seed corn, opinion testimony by the plaintiff/seed grower's witnesses concerning the effect of shattercane on the seed crop, where the opinions, which were helpful in determining the fact in issue, were rationally based on perceptions stemming from extensive field observation and personal farming experience); Hansen v. Skate Ranch, Inc., 97 N.M. 486, 641 P.2d 517, 522-23 (N.M. Ct. App. 1982) (concluding, in a personal injury action arising from a fall at a roller skating rink, that the trial court properly admitted testimony of two lay witnesses, who were experienced skaters present on the night of the accident, regarding safety procedures used by the defendant on the night of the accident); Lee v. State, 661 P.2d 1345, 1354-55 (Okla. Crim. App. 1983) (concluding that an investigating police officer could testify that spots on a carpet were blood, and that a chemist, testifying on other matters, could offer a lay opinion that the type of glass found at a murder location was safety glass); Williamson v. O'Neill, 696 S.W.2d 431 (Tex. Ct. App. 1985) (holding that the driver of a tractor-trailer rig, a co-defendant in a personal injury lawsuit arising from an auto-truck accident, was uniquely qualified, as the experienced driver of the rig involved in the accident, to offer a lay opinion as to the reason the trailer separated from the tractor, since his opinion would be rationally based on his firsthand perceptions of the accident and would help determine causation).

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C.

We recognize, however, that some lay opinion cases have begun to move even further beyond the core area of Rule 701 opinion testimony and have begun, in a subtle gradation, to permit lay

witnesses to express their opinions in areas in which it would ordinarily be expected that only an expert qualified under Rule 702 could give such testimony, such as whether a product design was defective or whether certain factors (e.g., a product defect) caused an accident.

For example, in Soden v. Freightliner Corp., 714 F.2d 498, 510-12 (5th Cir. 1983), the Fifth Circuit permitted a lay witness to opine that the design of a truck was dangerous and defective in a product liability action involving a post-collision truck fire. The plaintiffs in this action claimed that the design of a Freightliner truck's fuel system was unreasonably dangerous and caused a post-collision fuel fire which killed plaintiffs' decedent. Id. at 500. The "thrust" of the plaintiffs' argument was that the Freightliner's fuel tanks, which were mounted on the sides of the truck under the cab doors, were dangerous. Id. As the Soden court explained:

In particular, they [the plaintiffs] [**27] also argued that the brackets securing the steps [*1200] to these fuel tanks had pointed ends which, in the event of a rollover, could puncture the fuel tanks. The resulting hole or holes could release diesel fuel near engine components hot enough to ignite the fuel, causing a fire in the engine-cab area.

Id.

The contested lay witness, Lasere, was a service manager who supervised the preventive maintenance of about 500 trucks and was in charge of the daily maintenance of about sixty trucks, mostly Freightliners, including the truck involved in the accident. Id. at 510. Lasere also was in charge of removing the truck from the scene of the accident and observed firsthand the damage to the fuel tank. Id. At trial, he testified for the plaintiffs regarding the cause of the accident and the dangerousness of the design; specifically, Lasere testified that step brackets had punctured the fuel tank. Id. at 510-11. In particular, he stated that in the case at hand, and in two or three other Freightliner accidents, he had observed "puncture holes in the fuel tanks at the location of the step brackets." Id. at 510. He then gave his opinion that the step brackets were the [**28] cause of the puncture holes. After Soden's accident, Lasere testified that he had modified the step brackets in the remaining Freightliners in his fleet by "sawing off [the] pointed ends;" and he expressed the opinion that the bracket's original design was "dangerous." Id. at 511.

Sustaining the admission of Lasere's opinion testimony, the Fifth Circuit stated:

No great leap of logic or expertise was necessary for one in Lasere's position to move from his observation of holes in Freightliner fuel tanks at the location of the step brackets, and presumably caused by them, to his opinion that the situation was dangerous. . . . Lasere's testimony with respect to the dangerousness of the step brackets was also obvious, given the modification which he testified he made to them after all he had seen.

Id. at 512. The court added, however, that Lasere's testimony on this point "did constitute an opinion which might have been better given by one more formally an expert." Id. And the court subsequently reiterated that "although Lasere's opinion with respect to 'dangerousness' may have been more properly made by one more formally an expert, given the particular [**29] facts of

this case, we conclude that no reversible error occurred in its admission." Id. (emphasis supplied).

In our view, cases like Soden stretch the doctrinal boundaries of Rule 701 opinion testimony. n11 However, we agree with the Fifth Circuit that such testimony does fall within the ambit of Rule 701's requirement that a lay witness's opinion be rationally based on firsthand observations and helpful in determining a fact in issue. Though we agree with Benton Harbor that the admission of lay opinion evidence in these technical areas (e.g., concerning the existence vel non of a product defect or whether an accident was caused by a certain condition) can result in an attenuated form of expert opinion evidence far removed from the considerations, described supra in Part II.A, animating the lay opinion rule, n12 it is not for us to rewrite the rule or reinterpret Rule 701 across the [*1201] board. n13 Accordingly, we refuse to hold, as Benton Harbor requests, that all lay witnesses offering opinions that require special knowledge or experience must qualify under Rule 702. n14

----------Footnotes----------

n11 For example, in United States v. Myers, 972 F.2d 1566, 1577 (11th Cir. 1992), cert. denied, 123 L. Ed. 2d 445, 113 S. Ct. 1813 (1993), lay opinion testimony that burn marks were caused by a stun gun was held admissible based on the witness' personal perception of the burned skin and nineteen years of experience on the police force. The court noted that the opinion's lack of technical/medical basis could be exposed on cross-examination and affected the weight, not the admissibility, of the evidence. [**30]

n12 In particular, we find problematic the views of some courts which would appear to permit the firsthand knowledge of a lay witness in these and other technical areas to entirely diminish the need for the "knowledge, skill, experience, training or education" of a witness qualifying under Rule 702. For example, in United States v. Paiva, 892 F.2d 148, 155-57 (1st Cir. 1989), where a lay witness who had used and tasted cocaine on many occasions testified that a substance tasted like cocaine, the First Circuit affirmed the admission of the evidence by the trial court, rejecting the argument that a lay witness cannot testify to such matters because only qualified experts can give such testimony. While the holding appears unexceptionable, the court unnecessarily declared that Rule 701 "blurred any rigid distinction that may have existed between" lay and expert testimony. Id. at 157. More refinement might have been in order.

n13 This unwillingness to find a strict prohibition on lay opinion testimony in technical matters is motivated, in no small part, by our inability to designate the testimony involved in prior caselaw as properly within the exclusive province of experts. Indeed, in some cases, courts have noted that the witness giving the lay opinion testimony might have qualified as an expert. See, e.g., Teen-Ed, 620 F.2d at 403 (accountant who gave lay opinion testimony might have qualified as expert); see also Williams Enters., Inc. v. Sherman R. Smoot Co., 290 U.S. App. D.C. 411, 938 F.2d 230, 233-34 (D.C. Cir. 1991) (insurance broker, who might have been qualified as an expert, was properly permitted to testify that the construction collapse at issue may have contributed to a substantial increase in the plaintiff's insurance premiums); United States v. Fleishman, 684 F.2d 1329, 1335 (9th Cir.) (whether the testimony was lay or expert opinion, it was permissible for an

undercover agent to testify that a defendant was acting as a lookout), cert. denied, 459 U.S. 1044, 74 L. Ed. 2d 614, 103 S. Ct. 464 (1982). [**31]

n14 We believe, however, that such distinctions can and might well be made by the drafters of the Federal Rules, in that, as our discussion suggests, a better formulation of the lay opinion rule would perhaps eliminate these matters from the ambit of Rule 701. Such an approach has been adopted by some states, including Delaware, which provides:

If a witness is not testifying as an expert, his testimony about what he perceived may be in the form of inference and opinion, when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions, and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience or training.

DEL. UNIFORM RULES OF EVIDENCE RULE 701 (emphasis added). Similar restrictions on lay opinion testimony have been adopted in both Florida and Tennessee. See FLA. STAT. ANN. EVIDENCE CODE @ 90.701; TENN R. EVID. 701.

We take the liberty of commending this issue to the attention of the Judicial Conference Advisory Committee on Rules of Evidence, which monitors developments in evidence jurisprudence. See generally Edward R. Becker & Aviva Orenstein, The Federal Rules of Evidence After Sixteen Years -- The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revisions of the Rules, 60 Geo. Wash. L. Rev. 857, 910 (1992). As the authors observed, state modifications in their adaptations of the Federal Rules can be quite instructive in providing "solutions to identified problems in the drafting or implementation of the Federal Rules." Id. at 862 n.18.

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However, the admissibility of opinion evidence under the strictures of Rule 701 is not without limit. Rule 701's requirement that the opinion be "rationally based on the perception of the witness" demands more than that the witness have perceived something firsthand; rather, it requires that the witness's perception provide a truly rational basis for his or her opinion. Similarly, the second requirement -- that the opinion be "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue" -- demands more than that the opinion have a bearing on the issues in the case; in order to be "helpful," an opinion must be reasonably reliable. In other words, Rule 701 requires that a lay opinion witness have a reasonable basis grounded either in experience or specialized knowledge for arriving at the opinion that he or she expresses. See Paiva, 892 F.2d at 157 ("Individual experience and knowledge of a lay witness may establish his or her competence, without qualification as an expert, to express an opinion on a particular subject outside the realm of common knowledge.").

In sum, for lay opinion as to technical matters such as product defect or [**33] causation to be admissible, it must derive from a sufficiently qualified source as to be reliable and hence helpful to the jury. In order to satisfy these Rule 701 requirements, the trial judge should rigorously examine the reliability of the lay opinion by ensuring that the witness possesses sufficient special knowledge or experience which is germane to the lay opinion offered. Our decision does not, as suggested by the dissent, "limit the application of Rule 701 to human appearance, human conditions, and, perhaps, vehicle speed and property value," dissent infra at 44, nor does it eliminate lay opinion as an aid to the jury in technical matters. Rather, as we have stated, a lay witness with first-hand knowledge can offer an opinion akin to [*1202] expert testimony in most cases, so long as the trial judge determines that the witness possesses sufficient and relevant specialized knowledge or experience to offer the opinion.

The importance of these precepts is reinforced by the recent decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., U.S. , 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Daubert, of course, deals with the evaluation of the scientific testimony of an expert focusing upon the reliability [**34] of the scientific method on which the conclusions of an expert are based. But one of the "Daubert factors" is the expert's knowledge and qualifications, and the centerpiece of the Daubert regime is the gatekeeping role of the trial judge, whose duty it is to screen challenged expert testimony and assure that it is sufficiently reliable to be of assistance to the jury. 113 S. Ct. at 2794-95; In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 748 (3d Cir. 1994) ("Daubert makes clear for the first time at the Supreme Court level that courts have to play a gatekeeping role with regard to experts."). While we are careful not to suggest that Daubert applies to Rule 701, we believe that its spirit also counsels trial judges to carefully exercise a screening function with respect to Rule 701 opinion testimony when the lay opinion offered closely resembles expert testimony. n15

----------Footnotes----------

n15 The dissent's assertion that our decision "is directly contrary to the teaching of Daubert which focused on the language of Rule 702" is simply inaccurate. Our conclusion that the trial judge should rigorously examine the reliability of the opinion, by ensuring that the witness possessed sufficient special knowledge or experience, derives ultimately, as we have stated, from the explicit requirements of Rule 701, which dictate that the lay opinion be "rationally based" on the witness's observations and "helpful" to the jury.

----------End Footnotes---------- [**35]

Though we acknowledge that important differences between lay opinion evidence and expert testimony exist, justifying a greater level of scrutiny of Rule 702 expert opinion evidence, n16 we do not believe such differences effectively vitiate the need for some judicial gatekeeping on the part of the trial judge in the case of lay opinion testimony of a technical nature. Allowing a witness, with first-hand knowledge, to offer a technical opinion which he lacks the necessary knowledge and experience to make, runs afoul of the requirements of Rule 701. It is clear, therefore, that in appropriate circumstances a trial court should exclude proffered evidence,

otherwise admissible as relevant under Fed R. Evid. 401, on grounds that the witness's knowledge and the consequent basis for his or her rational perception are insufficient under the rule.

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n16 Such differences include the following: (1) designation of an opinion as "expert" by the court may cause the jury to give the "witness more attention and credence" then an opinion admitted from a "lay person" under Rule 701, Richey, supra, 154 F.R.D. at 544; and (2) the opinion of a lay witness must be based on his or her personal firsthand perception, while an expert may opine in response to hypothetical questions, see Teen-Ed, 620 F.2d at 404 ("The essential difference [between Rule 701 and 702], however, is that a qualified expert may answer hypothetical questions.").

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The judicial Rule 701 screening that we speak of for cases such as this one is not very different from the screening that attends the ordinary expert qualification ruling. See Paoli, 35 F.3d at 740-46. In determining whether a lay witness has sufficient special knowledge or experience to ensure that the lay opinion is rationally derived from the witness's observation and helpful to the jury, the trial court should focus on the substance of the witness's background and its germaneness to the issue at hand. Though particular educational training is of course not necessary, the court should require the proponent of the testimony to show some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion regarding the disputed factual issues in the case.

The lay opinion testimony held to be admissible in our prior Rule 701 decisions satisfied this standard. In Teen-Ed, Inc. v. Kimball International, Inc., 620 F.2d at 399, the accountant who testified as a lay witness had very particular and quite extensive prior experience with Teen-Ed's books, which allowed him to properly calculate for the court how lost profits should be [**37] determined and to draw inferences from his examination of the [*1203] accounts. n17 Id. at 403. And in Joy Manufacturing Co. v. Sola Basic Industries, Inc., 697 F.2d at 104, the lay witness had "extensive personal knowledge of Joy's [the plaintiff's] plants, its on-going heat treating processes, and the two furnaces in question," and we stated that he had "sufficient personal knowledge of Joy's [the plaintiff's] heat treating facility to make an estimate of what amount of downtime was due to the hearth problems." Id. at 111-12.

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n17 Moreover, Teen-Ed is a case in which the witness would have qualified under Rule 702, but was precluded from testifying as an expert because Teen-Ed failed to list him as required in a pre-trial order. Id. ("We interpret the pre-trial ruling in this case to have required identification of expert witnesses under Rules 702 and 703, but not of lay witnesses under Rule 701.").

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Moreover, in In re Merritt Logan, Inc., 901 F.2d 349 (3d Cir. 1990), an action [**38] by the purchaser of an allegedly defective refrigeration system against the seller, installer, and manufacturer of the system, the principal shareholder of the plaintiff (Logan) was permitted to express an opinion as a lay witness concerning his company's lost profits. In addition, another witness, Gilchrist, who had surveyed the site where the refrigeration system was to be located prior to its installation and had made an estimate of the weekly sales that could be achieved at that site, was permitted to testify concerning his survey. We held that the admission of these lay opinions was proper under Rule 701, stating: "Mr. Logan's personal knowledge of his business and Gilchrist's personal knowledge of how he prepared his survey were sufficient to make these witnesses eligible under Rule 701 to testify as to how lost profits could be calculated." Id. at 360. n18

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n18 See also Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir.) (involving a securities action where the plaintiffs claimed that the offering memoranda for certain limited partnerships were false and misleading), cert. denied, 474 U.S. 946 (1985). In Eisenberg, we held that an attorney had properly been permitted to testify as a lay witness with respect to "what he believed should have been included in one of the private offering memoranda and as to whether the memorandum complied with the applicable disclosure requirements." Id. at 780. We noted that the witness, a partner of one of the individual defendants and a principal in a law firm named as a defendant, had sufficient knowledge and experience as "a lawyer specializing in business litigation, who had also acted as general counsel for banks, trucking companies and brokerage houses." Id.; see also id. ("Although he had represented clients in securities cases, and testified that he was familiar with the disclosure requirements of federal and state securities laws, he did not view himself as expert in the preparation of offering memoranda.").

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Mindful of the need for the proponent of technical lay opinion testimony to show that the witness possesses sufficient knowledge or experience which is germane to the lay opinion offered, we turn to the facts of this case.

III. Application of Rule 701 to Jones's Opinion Testimony To recapitulate, the testimony in question here is Jones's opinion that the accident had resulted from metal fatigue inside a piston rod which he attributed to the faulty design of Benton Harbor's rod end. The district court did not limit Jones's testimony to describing the state of the metal inside the rod-end and the fact that it had broken. Rather, it allowed Jones to offer a lay opinion as to the cause of the break. Specifically, Jones stated that there was a "problem" because Benton Harbor's design called for a hole to be drilled through the rod end at a point where it was threaded. App. at 161 & 167. The district court admitted Jones's testimony pursuant to Rule 701, since it concluded it was within "the ambit of common sense."

Asplundh contends that the district court properly admitted Jones's opinion since the opinion

satisfies Rule 701's requirements in that it was rationally based on Jones's [**40] firsthand observations of the fractured rod and helpful to a determination of a fact in issue. We agree that Jones's testimony satisfied Rule 701's requirement of firsthand knowledge since: (1) he saw the disassembled lift shortly after the accident from a distance of approximately fifteen inches; (2) he observed the colorations of the metal fracture surface; and (3) he saw the break in the threaded area where a hole had been drilled through the rod. But we do not agree that his opinion was rationally based on these observations or helpful to the jury's determination of a fact in issue because in proffering Jones's [*1204] testimony, Asplundh failed to satisfy the standard we articulate today for lay opinion evidence.

In particular, we conclude that the district court applied an incorrect legal standard under Rule 701 to the extent that it failed to require Asplundh to show sufficient knowledge or experience and a sufficient connection between Jones's special knowledge or experience and his opinion regarding the cause of the accident and the design of the hydraulic cylinder. n19 While the district court did summarily conclude at one point in its analysis that Jones's "employment experience" [**41] gave him "substantial knowledge in this area," we do not believe it examined with sufficient rigor the question whether Jones possessed the knowledge or experience necessary to offer an opinion of such a technical nature.

----------Footnotes----------

n19 The dissent contends that the district court did apply a correct legal standard under Rule 701 and would therefore review the district court's decision to admit Jones's testimony for abuse of discretion. We disagree, given that we conclude that the district court violated the "rationally derived" and "helpfulness" standards of Rule 701 in failing to examine with sufficient rigor the question of whether Jones possessed appropriate experience or knowledge to offer an opinion regarding the cause of metal failure and the proper design of hydraulic cylinders.

----------End Footnotes----------

Jones was the fleet maintenance supervisor for the city of Portland for more than ten years, supervising the maintenance of 1385 variegated pieces of equipment and six or seven repair shops. Jones was present when the aerial lift was disassembled [**42] and observed the damage to the rod. Asplundh suggests that, as in Soden, the conclusions and opinions expressed by Jones were those that a normal individual in his position with his experience would have drawn. See Soden, 714 F.2d at 512. But Benton Harbor's response is telling. It points out that Jones lacked formal education; had not taken courses in metallurgy, material failures, or metal fatigue; and had not designed a hydraulic cylinder. He had one year of college studies plus other job-related courses. Moreover, Jones had never conducted any studies of materials or material compositions. Besides having never designed a hydraulic cylinder, he had never personally participated in manufacturing a hydraulic cylinder. Although he worked some seven or eight months as a production control manager for a company which used hydraulic cylinders in their product, in that position he was responsible only for initiating manufacture and had no design responsibilities notwithstanding his bold assertion, "I think I know how to make hydraulic cylinders." App. at

The question we are presented with is whether it was permissible for Jones to express the opinion that the rod end had broken [**43] due to metal fatigue and that the design of the rod end was a "problem." App. at 160-61 ("The reasons [for the accident] are two: one, the hole through the pin caused . . . the rod to be weakened and, two, the threads . . . on the rod itself caused the breaking point. They were sharp, and it broke right at the point where all of those things intersected. That was the problem. There's no doubt in my mind about it . . . ."). In our view these opinions are not ones that an average lay person would be equipped to draw, absent sufficient specialized knowledge or experience. We disagree with the dissent's assertion that "fatigue failure of metal is not unfamiliar" to persons "such" as Jones, and simply do not believe that the average lay person, absent sufficient knowledge or experience with metals, is qualified to offer a meaningful opinion on questions of metal fatigue of this nature. Metal fatigue is a technical concept. There are many reported cases in which experts have testified (and disagreed) as to whether metal fatigue could be detected based on a post-accident examination, n20 but we have not found a single reported case in which a lay [**44] witness has given such testimony. The consistent use of experts to testify regarding [*1205] such questions underscores the technical nature of Jones's opinion.

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n20 See, e.g., Fusco v. General Motors Corp., 11 F.3d 259, 261 (1st Cir. 1993); Marrocco v. General Motors Corp., 966 F.2d 220, 225 (7th Cir. 1992); Salter v. Westra, 904 F.2d 1517, 1520 (11th Cir. 1990); Grover Hill Grain Co. v. Baughman-Oster, Inc., 728 F.2d 784, 789 (6th Cir. 1984); Southwire Co. v. Beloit Eastern Corp., 370 F. Supp. 842 (E.D. Pa. 1974).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In describing this testimony as within the "ambit of common sense," the district court would characterize Jones's testimony as equivalent to the observation that "if you take a piece of metal and put in a vice and bend it back and forth enough times, it fatigues and it breaks." The dissent agrees. But Jones's opinion was far more technical and, in particular, attributed the accident to the manner in which Benton Harbor had chosen to design the rod end. See App. at 167-68 (Jones [**45] attributed the accident to the fact that the "rod was drilled through, and the fact that the rod eye was screwed on on a threaded -- two threaded surfaces," and questioned this design since he "knew how to make hydraulic cylinders" and he "had never seen a cylinder that size configured that way").

While the average lay person -- after examining the rod end and seeing that it had broken in a spot where the rod end was threaded and a hole had been drilled through it -- might well properly conclude under Rule 701 that the rod end had broken at what appeared to be its weakest point, such a person could not reasonably go further and conclude that the rod end was defectively weak at this point. The dissent contends that the admissibility of this testimony was proper since "this is

a nation where many individuals grow up with extensive mechanical experience and capabilities." Dissent infra at page 14. We simply do not believe that the realm of common knowledge extends to such issues as the presence and cause of metal failure and the proper design of hydraulic cylinders. Given the requirements of Rule 701, Asplundh needed to demonstrate that Jones possessed relevant experience or specialized [**46] knowledge germane to his opinion in order to satisfy the rationally derived and helpfulness standards of the rule. While a lay witness may acquire this additional insight either by formal education or practical experience, it appears Jones simply possessed neither. n21

----------Footnotes----------

n21 The dissent asserts, infra at page 13, that "Jones had substantial technical knowledge so as to tell whether metal is fatigued" but then fails to point to any evidence which would demonstrate that Jones had any knowledge or experience in assessing metal fatigue. Absent some evidence of such experience or knowledge, Jones's opinion was inadmissible under Rule 701 since it could not be rationally derived from his observations or helpful to the jury.

----------End Footnotes----------

Jones's experience as Portland's fleet maintenance supervisor, supervising the upkeep of 1385 pieces of equipment and six or seven repair shops, is inapplicable. While these are weighty responsibilities, they do not seem to have anything to do with designing or evaluating the design of machinery. [**47] By way of example, the maintenance supervisor for a fleet of rental cars would hardly be qualified to express an opinion on whether the braking system of a particular model was defectively designed, absent some special qualifying proffer. Moreover, as fleet maintenance supervisor, Jones was involved in supervising the maintenance of numerous types of equipment and had no special experience with metal failure or hydraulic cylinders. Likewise, Jones's prior employment experience as a production control manager does not seem pertinent, since he had no design responsibilities. Equally inapplicable is Jones's previous job as a riveter in the manufacture of blowoff fuel tanks for military aircraft and the fact that he repaired his own automobile. App. at 181. Neither appear to enhance Jones's knowledge or experience to offer an opinion on metal fatigue or the design of hydraulic cylinders.

In support of the admission of Jones's opinion testimony, Asplundh relies principally on the Fifth Circuit's opinion in Soden, discussed supra, which, as we have stated, would likely satisfy the standard we articulate today. While we acknowledge that Jones's testimony bears a certain similarity [**48] to Lasere's opinion regarding the design of the Freightliner fuel tanks, we believe Jones simply lacked the unique experience which allowed Lasere, the witness in Soden, to properly offer his lay opinion.

The Fifth Circuit concluded that the testimony of Lasere was properly admitted under Rule 701 on the grounds that he had eighteen years of experience in repair and maintenance of the particular trucks involved in the accident and, importantly, he had actually [*1206] modified these trucks, which were under his care, so as to prevent the alleged defect in the truck's design

from rupturing the freightliner's fuel tank in future accidents. Lasere actually examined on previous occasions an unknown number of Freightliners that had been involved in serious accidents (presumably, in light of the nature of his job, not a great number), and in two or three of those cases he had observed facts that provided a reasonable basis for inferring that the design of the step brackets had caused holes in one of the fuel tanks, which were located near the engine. Moreover, he had devised a simple means (sawing off the pointed ends) by which the step brackets might be made safer.

More importantly, Lasere's [**49] opinion, regarding the dangerousness of the design of the Freightliner, was rationally derived from his particular experience with the Freightliners' fuel tanks. n22 This experience allowed the Fifth Circuit to conclude that Lasere had "very considerable practical experience and specialized knowledge." Soden, 714 F.2d at 511. Given his unique experience, the court was able to conclude that his conclusion that the design of the step brackets was dangerous required "no great leap in logic or expertise." Id. at 512. While we agree with the dissent that the opinion admitted in Soden went, in a sense, beyond that offered by Jones since Lasere characterized the design of the Freightliner's fuel tanks as "dangerous," we believe, given Lasere's unique knowledge and experience with the truck's fuel tanks, he was qualified to draw such an opinion. In contrast, Jones simply lacked anything resembling Lasere's specialized knowledge or experience. In particular, Jones had never before taken these cylinders apart in association with similar accidents. Moreover, unlike Lasere, Jones had never taken any steps to modify what he perceived to be the faulty design of the rod end.

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n22 As noted, Lasere's bases for his opinion were: (1) the design featured pointed step brackets resting on the fuel tanks; (2) the fuel tanks were near the cab and the engine; (3) the reasonable inference that this design had a tendency to cause punctures of the tanks in roll-over accidents; and (4) and the fact that he found a simple way to make the design safer.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**50]

Asplundh does not respond to the problem of Jones's lack of specialized knowledge and experience. Rather, it suggests that it is enough that Jones observed the rod end firsthand, that his opinion testimony helped the jury to determine the cause of the lift's failure and the role played in it by the rod manufactured by Benton Harbor, and that Jones was subject to cross-examination. We disagree. As we have stated, under Rule 701 the trial judge must play some gatekeeping role so as to ensure that the rationally derived and helpfulness requirements of the rule are met.

To use a simple yet illustrative example, if an issue in a case was whether the sun revolved around the earth, and the proponents of the Ptolemaic system proposed to prove their case by lay opinion testimony, such testimony could satisfy Asplundh's requirement of "firsthand" observation ("I have observed the sun firsthand for many years, and I have seen that each day it moves across the sky from the east to the west."). Such testimony would also be helpful to the jury to the extent that it would tend to suggest a result that the jury should reach. And such testimony could be

subjected to cross-examination by a proponent [**51] of the Copernican system. But it does not follow that this lay opinion testimony meets the rational basis or helpfulness requirements as they are contemplated by Rule 701 or that it would be admissible. Yet nothing in the district court's analysis would have excluded such testimony.

IV. Conclusion

We are convinced that the court's admission of Jones's opinion testimony was not harmless and therefore represents reversible error, since we cannot conclude that "it is highly probable that the error did not contribute to the judgment." Advanced Med. Inc. v. Arden Med. Sys., 955 F.2d 188, 199 (3d Cir. 1992). As we have explained, the district court erred in admitting Jones's testimony under Rule 701 by failing to apply its analysis with the rigor required in this type of case. More particularly, the district court [*1207] needed to determine whether Jones's knowledge or experience qualified him to offer an opinion which attributed the accident to metal failure and the allegedly improper design of Benton Harbor's hydraulic cylinder. There is no indication in the record that Jones possessed sufficient knowledge or experience to allow Asplundh to satisfy the standard articulated today and [**52] obtain admission of Jones's opinion. Nevertheless, we will remand the case to allow the district court to determine, in light of our opinion, whether to permit further proceedings to qualify Jones's opinion. In the absence of such proceedings or the establishment of such qualification, the district court should order a new trial.

The judgment of the district court and its order denying the motion for a new trial will be reversed and the case remanded for further proceedings consistent with this opinion.

DISSENTBY: JOHN R. GIBSON

DISSENT: JOHN R. GIBSON, Senior Circuit Judge, dissenting.

I respectfully dissent.

The Court today painstakingly analyzes the history of Rule 701 and its intended relaxation of the rules regarding opinion evidence. The Court then develops a "core area" of Rule 701 lay opinion testimony and unduly limits the admissibility of testimony outside of that core area. In order to do so, the Court imposes on Rule 701 the language and requirements of Rule 702 that a demonstration of the witness's knowledge and experience support the opinion, and thus abrogates the distinction between Rule 701 and 702 in the area of technical opinion evidence. The Court then determines [**53] that the district court did not use "sufficient rigor" in determining "whether the testimony in question was informed by sufficient experience or specialized knowledge," supra at 4, and utilizes an essentially discretionary rule under the guise of plenary review. In my view, the district court properly applied Rule 701, and did not abuse its discretion in admitting the evidence.

I.

Today the Court argues that the district judge's ruling on the admissibility of Jones's opinion evidence involved interpretation of Rule 701 and, accordingly, should be given plenary review. The authority relied upon simply does not bear the weight which the Court places on it.

In DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990), this Court held that the district court's "cursory" ruling excluding expert testimony erroneously interpreted the Federal Rules in two respects: (1) the court analyzed the expert's qualifications under Rule 703, rather than Rule 702, id. at 953; and (2) the court implicitly required the expert to accept a study's conclusion in order to utilize the underlying data as a basis for testimony, although Rule 703 contains no such requirement. [**54] Id. at 954. Because admissibility depended on the district judge's interpretation of Rule 703, the Court applied a plenary standard of review, id. at 944, and remanded the case for further consideration of the proffered testimony. Id. at 956-57. Most tellingly, the Court instructed that the ruling on remand should display "sensitivity to the relevant policy judgments reflected in the Federal Rules of Evidence," which "embody a strong and undeniable preference for admitting any evidence having some potential for assisting the trier of fact and for dealing with the risk of error through the adversary process." Id. at 956.

The Court also relies on United States v. Furst, 886 F.2d 558 (3d Cir. 1989), cert. denied, 493 U.S. 1062, 107 L. Ed. 2d 961, 110 S. Ct. 878 (1990), which held that there was insufficient foundation for the admission of business records. Id. at 572. In Furst, the Court articulated the rule the Court today espouses, id. at 571, but did not further indicate which standard it used, stating only that "the district court erred" in admitting the evidence. Id. at 573.

Most significantly, however, both DeLuca and Furst rely upon In re Japanese Electronic [**55] Products Antitrust Litigation, 723 F.2d 238, 265 (3d Cir. 1983), rev'd on other grounds sub nom., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). In that case, this Court held:

[*1208] The scope of our review . . . depends on the basis for the [trial court's] ruling. When the trial court makes Rule 104(a) findings of historical fact . . . we review by the clearly erroneous standard of Fed.R.Civ.P. 52. But a determination [by the trial court], if predicated on factors properly extraneous to such a determination, would be an error of law. There is no discretion to rely on improper factors. . . . In weighing factors which we consider proper, the trial court exercises discretion and we review for abuse of discretion.

Id. at 265-66. The Court proceeded to apply all three standards. Most critically relevant for our purposes, the Court held that the district court erred in developing its own standards and in acting as the ultimate arbiter of the reliability of the materials upon which the expert based his opinion. See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1321-30 (E.D. Pa. 1981), rev'd, In re [**56] Japanese Elec. Prods., 723 F.2d 238. This Court held the district court's approach to be "fundamental legal error because, as a matter of law, the district court must make a factual inquiry and finding as to what data experts in the field find reliable." In re Japanese Elec. Prods., 723 F.2d at 277. n23 This Court held that the district court's approach "rejected the decision of the Judicial Conference, the Supreme Court, and Congress" in "adhering to an

unusually restrictive view as to the basis on which an expert's opinion may be laid." Id. at 277. The ruling of the district court, containing legal interpretation of the meaning of the Rule, was correctly subjected to review under a plenary standard. The record before us stands in sharp contrast to that in DeLuca and Furst, and, particularly, to that in In re Japanese Electronic Products. In the case before us, the district court did not involve itself in an interpretation of the Rule as in DeLuca and In re Japanese Electronic Products. Those cases cannot support application of the rule of plenary review in this case.

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evidence in, [*1209] let the jury assess it in view of his umpteen years on the force.

After dismissing the jury, the district judge commented to counsel that:

I don't have any background in metallurgy, but I can take this paper clip and I can bend it for a while. I can give you a pretty good idea when I think it's going to break because of metal fatigue. And all I do is occasionally use paper clips. That is a lay opinion.

After considering whether the rod's weakness required expert opinion, the district judge commented: "That would fall within the ambit of common sense embraced by both sides here." The next morning, the district judge ruled:

Counsel, with respect to the [**59] [Rule] 701 issue, I have been reviewing the transcript. . . . So, under all the circumstances looking at Rule 701, as I must, and finding ample explanation, be it valid or not within the record for the 701, allegedly 701 opinions there adduced, I am going to overrule the objection and permit that testimony to be read. I believe it goes to the weight.

The record before us reveals a painstaking study of the deposition testimony of Jones and the application of Rule 701 in determining that it was admissible. This evidentiary ruling is palpably an exercise of discretion rather than an interpretation of the Rule.

III.

The Court today rewrites Rule 701, holding that the district court misinterpreted Rule 701 by failing to examine with sufficient rigor whether Jones possessed the knowledge or experience necessary to offer an opinion of a technical nature. Supra at 4. When the Court's lengthy analysis and discussion is stripped aside, the holding has two parts: first, the Court has interpreted Rule 701 to incorporate the Rule 702 requirement that there be a demonstration that the witness possesses sufficient experience or specialized knowledge to qualify the witness to express [**60] a technical opinion; second, the Court requires that this Rule be examined with sufficient rigor.

The Court articulates the experience and knowledge requirement after an exercise in ambivalence. The Court first refuses to hold "that all lay witnesses offering opinions that require special knowledge or experience must qualify under Rule 702." Supra at 23. It so states after having found problematic the views of some courts which would permit a lay witness in technical areas to diminish the need for the "knowledge, skill, experience, training or education" of the witness qualifying under Rule 702. Supra at 22 n.14. The Court then states that "the admissibility of opinion evidence under the strictures of Rule 701 is not without limit," and reads the language of the Rule to require that "a lay opinion witness have a reasonable basis grounded either in experience or specialized knowledge for arriving at the opinion he or she expresses." Supra at 24-25. The Court comments: "the judicial Rule 701 screening that we speak of for cases such as this one is not very different from the screening that attends the ordinary expert qualification ruling." Supra at 27. It goes so [**61] far as to commend the rule followed in Delaware which excludes lay opinion requiring special knowledge, skill, experience or training. Supra at 23-24

n.16.

The Court holds that "in order to satisfy these Rule 701 requirements, the trial judge should rigorously examine the reliability of the lay opinion by ensuring that the witness possesses sufficient special knowledge or experience which is germane to the lay opinion offered." Supra at 25. These are not requirements of Rule 701, but rather Rule 702. Thus, as much as the Court protests, it has indeed stitched to the fabric of Rule 701 the language and requirements of Rule 702. This is directly contrary to the teaching of Daubert v. Merrell Dow Pharmaceuticals, Inc., 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), which focused on the language of Rule 702, in issue before it.

If the Court stopped at this point, we could simply observe that the district court made the appropriate findings of experience and knowledge germane to the profferred opinion, based on a lengthy colloquy with counsel and a complete study of the deposition testimony [*1210] overnight, before admitting the testimony under Rule 701.

The Court today, however, does not stop with [**62] incorporating the provisions of Rule 702 into Rule 701. It adds the "sufficient rigor" requirement, which it gives plenary review.

Indeed, the basis of the Court's decision is that the district court made an impermissible interpretation of Rule 701 because it "failed to examine with sufficient rigor" whether the testimony was informed by sufficient experience or specialized knowledge. Interpretation of a rule requires a determination of the meaning of the language of the rule. On the contrary, failure to examine the testimony with sufficient rigor involves a value judgment and a weighing of factors, which inherently relate to the exercise of discretion. Failure to examine with sufficient rigor simply does not equate to interpretation. The rationale of the Court can find support only from Lewis Carroll. n24

----------Footnotes----------

n24 2. Carroll wrote:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

LEWIS CARROLL, THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 269 (Clarkson N. Potter, New York 1960).

----------End Footnotes---------- [**63]

Further, the sufficient rigor test creates no legal yardstick upon which the district court's ruling can be measured. Certainly, with respect to Rule 701 and numerous other evidence questions, the admissibility of evidence involves a determination of where on a spectrum the testimony falls. This is reason for applying an abuse of discretion test to such considerations. It is, however, the trial court's determination of such questions to which we apply the abuse of discretion rule. Here, the Court has simply moved the exercise of discretion from the district court and into the hands of the appellate court. What is sufficient rigor and what is not simply becomes a call for the appellate court, not unlike the decision of a baseball umpire, except there is no definition of the strike zone.

The Court finds it necessary to concede that the district court "did summarily conclude at one point in its analysis that Jones's 'employment experience' gave him 'substantial knowledge in this area,'" but that the court did not examine "with sufficient rigor the question whether Jones possessed the knowledge or experience necessary to offer an opinion of such a technical nature." Supra at 31. [**64] The Court today simply refuses to accept that the district court, with a firm understanding of the requirements of Rule 701, made appropriate and sufficient findings to support the admissibility of the evidence.

The Court's rewritten Rule 701 replaces the district court's discretion on admitting or rejecting evidence with appellate discretion exercised under a formula with no true objective standard and plenary review. The Court effectively switches the roles of the trial and appellate courts.

IV.

This Court has held that a trial court's determination of the admissibility of lay opinion testimony "may be overturned only for clear abuse of discretion." Joy Mfg. Co. v. Sola Basic Indus., Inc., 697 F.2d 104, 111 (3d Cir. 1982). Weinstein's Evidence, citing numerous cases, states succinctly: "Basically, Rule 701 is a rule of discretion." 3 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE P 701[02], at 701-31 (1995). The district court's careful ruling, which we have discussed above, and the record upon which it was based compellingly demonstrate that the court did not abuse its discretion in admitting the testimony of Jones.

Jones testified regarding differentiations [**65] in color at the fracture site and that the rod fatigued and broke. n25 He also testified that [*1211] the stop blocks were not relevant to the accident n26 because the rod eye broke off due to the way the rod end was drilled through, threaded, and, thus, weakened. n27 He concluded that this was the problem which caused the failure of the boom. He further stated that he had not seen a cylinder configured in this way.

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n25 3. ASPLUNDH'S COUNSEL: With respect to the cylinder rod portion, the broken end, what with respect to the color of the broken end did you observe?

JONES: Well, one was oxidized. The one that had been broken prior or earlier on was oxidized.

ASPLUNDH'S COUNSEL: When you say "oxidized" --

JONES: It's a different color. It's duller -- more dull.

. . .

JONES: And the fresh break was simply fresh.

See App. at 162.

ASPLUNDH'S COUNSEL: Can you tell me upon what you base the opinions you just gave on?

. . .

JONES: Well, I saw the rod removed from the eye. I saw where it had fatigued and broke halfway through, and then I saw where it was a fresh break. So one shows something that had been broken for a long period of time and another one breaking recently. And it broke at the thread, and it broke through the place where the pin was installed.

See App. at 160-61. [**66]

n26 4. ASPLUNDH'S COUNSEL: Why do you say that it's your belief that [the stop blocks] have no bearing on the case?

. . .

JONES: Okay. Because the presence of those blocks, whether they're there or not there would not have stopped the breaking of -- off the rod eye. They're not relevant.

ASPLUNDH'S COUNSEL: Why do you say that?

. . .

JONES: Because the rod eye broke off because of the way the end of the rod was drilled to secure a screw on the rod eye.

See App. at 159-60.

n27 5. ASPLUNDH'S COUNSEL: Okay. As fleet maintenance manager for the City of Portland, did you develop a conclusion as to why the accident occurred?

. . .

JONES: The reason that this thing broke and Sackerson was killed is because of the way the rod itself fatigued inside the rod eye. First one half and then the other half went to ultimate at the time it finally eventually broke. The reasons are two: one, the hole through the pin caused the -- yeah, the rod to be weakened and, two, the threads on the eye itself -- on the rod itself caused a breaking point. They were sharp, and it broke right at that point where all of those things intersected. That was the problem. There's no doubt in my mind about it, ...

App. at 160-61.

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Jones's observations were based upon his practical experience. He was fleet maintenance supervisor for the City of Portland at the time of the accident and had held this position for over ten years, supervising between 60 and 100 employees, 6 or 7 city repair shops, and the maintenance of 1,385 pieces of equipment, including the Asplundh aerial lift. In that job, Jones spent 30 percent of his time overseeing the work done and had done mechanical work himself. In a previous job, he riveted blowoff fuel tanks for military aircraft. He stated that he had a high mechanical aptitude and understood the way things worked. Some of the deposition transcript upon which the district court based its ruling is significant, although not introduced into evidence at trial. For example, Jones stated:

Well, even if you work in your own garage, if you take a piece of metal and put it in a vice and bend it back and forth enough times, it fatigues and it breaks. Anyone who's ever dealt with anything solid knows that. You can do it with a paper clip, bend it until it breaks. That's fatigue. I certainly know what metal fatigue is through my own knowledge and discovery of the way life works. [**68]

Given Jones's experience, the district court did not abuse its discretion in concluding that he was qualified to express a lay opinion on metal fatigue.

Indeed, the district court considered the factors the Court today requires, specifically, Jones's substantial knowledge, employment experience, and years on the job. Any interpretation of Rule 701 in this case springs from this Court's own analysis, rather than the application of Rule 701 by the district court. As the district court simply applied Rule 701 to the profferred testimony, we must judge that determination on an abuse of discretion basis.

The Court today simply gives insufficient weight to the district court's articulated reasoning that his opinion was based on his experience and that Jones had substantial technical knowledge so as to tell whether metal is fatigued and whether threads are [*1212] shorn, which goes beyond the ken of a layperson. The Court should not reject the articulated reasoning of the district court so facilely.

The Court today firmly asserts that metal fatigue is a technical concept, and that "the realm of common knowledge [does not extend] to such issues as the presence and cause of metal failure

[**69] and the proper design of hydraulic cylinders." Supra at 34. The Court switches the roles of the trial court and the appellate court. The district court made abundant findings not only on Jones's knowledge and experience, but also on the common knowledge concerning metal fatigue. It is the appropriate role of the district court to make such findings. Today, the Court simply rejects these views and appropriates the factfinding role to itself.

Perhaps the physical process of metal fatigue requires technical knowledge, but the appearance of a metal fracture site demonstrating fatigue failure was described by Jones, and the district court properly concluded this was based on his knowledge, an appropriate subject for lay opinion.

The ruling of the district court and the deference due it must be considered in light of the evident fact that this is a nation where many individuals grow up with extensive mechanical experience and capabilities. Repairing household machinery, automobiles and farm equipment is a central part of life for many individuals, from early to late years, either vocationally or avocationally. Fatigue failure of metal is not unfamiliar to such persons. The testimony [**70] given by Jones explaining his background fits squarely into this pattern as the district judge recognized.

Textual support for Jones's opinions can be found in 8 Am. Jur. Proof of Facts Metal Failure 127 (1960 & Supp. 1994), which states that, after a number of cycles of stress, a small crack may form in the metal where the stress is highest and, under continued stress, grow until the metal fractures from overload. Id. at 129. Proof of Facts outlines the signs of metal fatigue, including the fracture pattern on the broken surfaces and the presence of stress raisers such as threads and holes. Id. at 130-31. Proof of Facts describes the markings on fracture surfaces as follows:

A fatigue fracture will often show a characteristic pattern on the fracture surfaces. Frequently there will be two areas that are markedly different in appearance. This is because only a portion fractured from fatigue, the remainder failing from overload. The fatigue portion will often be shiny and will often contain conchoidal or "clam shell" markings which indicate the position of the crack at the various stages of its progression. The overload portion, on the other hand, will generally [**71] be duller and will show some ductility or plastic deformation.

Id. at 145 (emphasis added). While Jones did not testify about clam shell markings, he did carefully explain the differing colors of the metal, indicating the development of the fracture, the overstressing of the metal, and the final parting at the fracture surface.

The text discusses the use of experts in analyzing fatigue factors, but closes with the following observation:

While the aid of competent professional help is important in explaining the failure from a scientific

standpoint, the assistance that may be given by persons qualified by training and experience in a particular trade or craft should not be overlooked. For example, a knowledge of the properties and characteristics of metals is essential to a blacksmith or welder, and either may have acquired by experience a knowledge as to the dangerous conditions in metals brought about by surface irregularities, notches, tool marks and the like. Similarly, a mechanic experienced in working with trailers would be qualified to testify as to the dangers inherent in a loose trailer hitch, and an elevator repairman may speak authoritatively [**72] concerning experience in the industry with cable failures and the standard practice of periodically cutting off and discarding a length of cable to avoid failures.

Id. at 137. Jones's testimony is just such an example.

The Court's opinion, with its abundance of scholarly reasoning, proves self-defeating. In essence, the Court simply examines Jones's qualifications as an expert, points to [*1213] his experience and opines that Jones's experience has nothing to do with designing or evaluating the design of machinery. Supra at 35. However, design was not the central point of Jones's testimony. Although Jones testified that he "had never seen a cylinder that size configured that way," see App. at 167, the central thrust of his testimony concerned his observations of the fracture itself and his opinion that this caused the collapse of the lift boom. n28

----------Footnotes----------

n28 6. The Court characterizes Jones's opinion as stating that "the fracture was caused by metal fatigue and was attributable to the design of the rod end." Supra at 6. The Court later characterizes the issue in the case as "whether it was permissible for Jones to express the opinion that the rod end had broken due to metal fatigue and that the design of the rod end was a 'problem.'" Supra at 32. The Court then determines that Jones was not qualified to express an opinion on whether the rod end was defectively designed. Supra at 33-35. The Court's characterization carries Jones's testimony beyond that which his spoken words will support. In substance, Jones described a fatigue fracture which occurred at the rod's weakest point, where it was drilled through and threaded. I read Jones's testimony to express an opinion on causation, but not on defective design.

----------End Footnotes---------- [**73]

The Court also points out the deficiencies of Jones's formal education: that he had taken no courses in metallurgy, material failure or metal fatigue, had not designed a hydraulic cylinder, and had but one year of college education with no studies in material compositions. Supra at 32. These comments might bear on the qualification of Jones to give expert opinions under Rule 702, but they do not reach the practical experience and knowledge that qualify Jones to express a lay opinion. Compare FED. R. EVID. 701 and FED. R. EVID. 702.

Rule 701 does not require technical knowledge or expertise but, rather, requires that lay opinion be rationally based on the witness's own perceptions, i.e. "the familiar requirement of first-hand

knowledge or observation." FED. R. EVID. 701 advisory committee's note. Jones's opinion was based on first-hand observation of the fractured rod. From a distance of approximately 15 inches, he observed the differing colorations of the metal fracture surface and saw that the rod broke in a threaded area with a hole in it. He had ample opportunity to observe the fracture and to form his opinion.

In Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 404 [**74] (3d Cir. 1980), the Court observed that the essential difference between lay and expert opinion evidence is that the expert may answer hypothetical questions, whereas the lay witness may testify only from facts perceived by him, not those "made known to him at or before the hearing." Id.; FED. R. EVID. 703. See also In re Merritt Logan, Inc., 901 F.2d 349, 359-60 (3d Cir. 1990). Jones was not asked hypothetical questions, he did not express expert opinions, and his testimony was not admitted on that basis.

When evidence is admitted under Rule 701, "cross-examination and argument will point up the weakness," id., and the jury will weigh the lay opinion testimony in light of any countervailing evidence. Benton Harbor's counsel scrutinized Jones's training and experience on cross-examination and read excerpts to the jury which highlighted those issues. Jones's lack of formal training should not prevent the admission of his opinion. See United States v. Myers, 972 F.2d 1566, 1577 (11th Cir. 1992) (admitting lay opinion testimony that a stun gun caused burn marks based on the witness's perception of the burned skin and 19 years of police experience; holding that [**75] the opinion's lack of a technical/medical basis could be exposed on cross-examination and affected the weight, not the admissibility, of the evidence), cert. denied, 123 L. Ed. 2d 445, 113 S. Ct. 1813 (1993); Joy Mfg., 697 F.2d at 112 (holding that inability to state precisely why product was inoperable did not prevent lay testimony that product was inoperable but, rather, was "proper material for effective cross-examination"). Based upon Jones's experience, the district court could properly conclude that Jones was qualified to express these opinions. Any shortcomings or weaknesses of the testimony could have been developed on cross-examination. As the district judge cogently observed, the issue was not one of possessing a sheepskin, but rather of possessing common experience. Even with flaws in reasoning, a district judge [*1214] may properly conclude that "hearing the . . . testimony and assessing its flaws was an important part of assessing what conclusion was correct and may certainly still believe that a jury attempting to reach an accurate result should consider the evidence." In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994) (discussing Daubert, 125 L. Ed. 2d 469, 113 S. Ct. 2786, [**76] and the requirements for expert testimony), cert. denied, 115 S. Ct. 1253 (1995).

The Court today appears to recognize and generally to limit the application of Rule 701 to human appearance, human conditions, and, perhaps, vehicle speed and property value. This should not be the extent of permissible lay testimony. Jones's testimony that metal fatigue caused the fracture and the accident is more evocative and understandable than a long physical description of the rod's outward appearance, although Jones offered both. The Court quotes the following from United States v. Yazzie, 976 F.2d 1252, 1255 (9th Cir. 1992), a case which involved lay opinion on whether a rape victim appeared to be fifteen or sixteen years old:

"If it is impossible or difficult to reproduce the data observed by the witnesses, or the facts are difficult of explanation, or complex, or are of a combination of circumstances and appearances which cannot be adequately described and presented with the force and clearness as they appeared to the witness, the witness may state his impressions and opinions based upon what he observed."

Id. at 1255 (allowing lay opinion testimony) (quoting [**77] United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982)). These general principles apply equally to Jones's testimony. See also Eckert v. Aliquippa & S. R.R. Co., 828 F.2d 183, 185 n.5 (3d Cir. 1987) (cited with approval by the Court and allowing lay opinion testimony as to whether an accident would have occurred had the railroad cars involved coupled properly).

In determining the propriety of lay opinion, other courts have considered: (1) whether the witness has personal knowledge of the facts from which the opinion was derived; (2) whether the opinion is rationally supported, i.e. "apparent to a 'normal person' in [the witness's] position;" and (3) whether the opinion is helpful to the trier of fact. Soden v. Freightliner Corp., 714 F.2d 498, 511-12 (5th Cir. 1983) (citing Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 263 (5th Cir. 1980)). Jones's testimony is not unlike that at issue in Soden and meets the standards articulated by Soden.

The Court here argues that "cases like Soden stretch the doctrinal boundaries of Rule 701 opinion testimony." Supra at 22. The witness in Soden, Lasere, was a service manager in charge [**78] of the maintenance of trucks, and his qualifications closely parallel those of Jones. n29 Lasere testified that a step bracket located near the fuel tank caused holes in the tank and that this design was dangerous. Id. at 510-11. The Fifth Circuit stated that Lasere's opinion was one that "may have been more properly made by one more formally an expert," id. at 512, but that his opinion was adequately grounded in his own experience and observation. Likewise, Jones based his opinion of causation on his examination of the rod, the different coloration, and the fact that the break occurred near a drilled hole in a threaded area. The court in Soden commented that Lasere's testimony on causation was rationally supported and "would have been apparent to a 'normal person' in his position." Id. This applies equally to Jones's opinion. The court in Soden expressed reservation only as to Lasere's testimony that the situation was dangerous. However, this final step in Lasere's testimony is not matched by a similar opinion of dangerousness by Jones. Thus, rather than this case exceeding the scope of Soden, Jones's observations and opinions are squarely supported by Soden [**79] 's reasoning.

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n29 7. The Court today accepts Lasere's knowledge and qualifications but rejects those of Jones. Certainly, the fact that Lasere had eighteen years experience and Jones ten is not sufficient basis to distinguish the two. This only serves to illustrate that this determination is one of degree, properly decided by the district judge in the exercise of discretion.

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The district court reached a different conclusion on Jones's competence to testify as a lay witness than would this Court. However, [*1215] this should not be dispositive unless there is an abuse of discretion.

Professor Wigmore comments that the true theory of the opinion rule is simply to reject superfluous evidence. 7 JOHN HENRY WIGMORE, EVIDENCE @ 1918, at 11 (James Chadbourn rev. 1978). Wigmore's text quotes from Cornell v. Green, 10 Serge. & Rawle 14, 16 (Pa. 1823), stating that when the facts from which the lay witness "received an impression are too evanescent in their nature to be recollected, or are too complicated to be separated and distinctly [**80] narrated, his impressions from these facts become evidence." Id. at @ 1924, at 33. Wigmore concludes that: "what is chiefly wrong is by no means the test itself, but the illiberal and quibbling application of it." Id.

The Court states that it can find no reported case where a lay witness testified regarding metal fatigue. However, none of the cases cited in footnote 20 of the Court's opinion deal with the admissibility of opinion evidence. n30 Further, Salter v. Westra, 904 F.2d 1517, 1525 (11th Cir. 1990) (cited by the majority in footnote 22), discusses not only expert testimony, but lay testimony of a mechanic describing the fracture surfaces of the lug bolts with the evident corrosion and rust streaks. n31

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n30 8. The fact that "experts have testified (and disagreed) as to whether metal fatigue could be detected," supra at 33, is not relevant here. None of the cases cited by the Court involving expert opinion on metal fatigue remove such testimony from the realm of lay opinion. See Fusco v General Motors Corp., 11 F.3d 259, 261 (1st Cir. 1993) (noting experts' disagreement on whether fatigue or impact caused fracture); Marrocco v. General Motors Corp., 966 F.2d 220, 225 (7th Cir. 1992) (noting experts' agreement that loss of allegedly defective component precluded evaluation of possible defects, including fatigue); Salter v. Westra, 904 F.2d 1517, 1520 (11th Cir. 1990) (noting experts' disagreement as to cause of accident where their opinions "relied heavily upon the mechanic's description of the physical state of the wheels and the tire hub before he repaired them"); Grover Hill Grain Co. v. Baughman-Oster, Inc., 728 F.2d 784, 789 (6th Cir. 1984) (noting expert testimony that metal fatigue caused fracture). Most tellingly, these opinions each deal with issues other than the admissibility of this evidence. [**81]

n31 9. See also Sullivan v. Rowan Companies, Inc., 952 F.2d 141, 145-46 (5th Cir. 1992), where the district court ruled that a witness was not qualified to testify as an expert on metallurgy, but allowed him to testify as a lay witness under Rule 701 on his observations from microscopic examination and testing of a socket which split in half. The court did not allow the witness to opine whether the socket was defective or why it failed, but commented that a contrary decision would not necessarily have required reversal. Id. at 146.

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In distinguishing Rule 701 and Rule 702 evidence, we should recognize that the expert with impressive credentials comes before a jury with an aura unmatched by most lay witnesses. We also must recognize that the jury may weigh either lay opinion testimony or expert testimony and find it wanting. In the case before us however, the district court, after a painstaking study of the deposition testimony, determined that Jones's testimony was properly admissible as lay opinion, and that the jury should be the arbiter of its weight and value.

The district court [**82] did not abuse its discretion in admitting Jones's testimony under Rule 701.

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL FIGUEROA-LOPEZ, aka: RAUL FIGUEROA LOPEZ, Defendant-Appellant.

No. 96-50243

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

125 F.3d 1241; 1997 U.S. App. LEXIS 23610; 47 Fed. R. Evid. Serv. (Callaghan) 939; 97 Cal. Daily Op. Service 7247; 97 Daily Journal DAR 11697

August 7, 1997, Argued, Submitted, Pasadena, California
September 9, 1997, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CR-95-00075-LM(RB)-1. Linda H. McLaughlin, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: Evan A. Jenness, Deputy Federal Public Defender, Los Angeles, California, for the defendant-appellant.

Becky S. Walker, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

JUDGES: Before: James R. Browning, Melvin Brunetti, and Stephen S. Trott, Circuit Judges. Opinion by Judge Trott.

OPINIONBY: STEPHEN S. TROTT

OPINION: [*1242] OPINION

TROTT, Circuit Judge:

OVERVIEW

Raul Figueroa-Lopez ("Lopez") appeals his jury conviction and sentence for possession of

cocaine with intent to distribute, in violation of 21 U.S.C. @ 841(a)(1). Lopez contends that the district court erred by: 1) admitting damaging opinion testimony from law-enforcement officers, who the Government did not qualify as experts, that Lopez's behavior was consistent with that of an experienced drug trafficker; and 2) admitting out-of-court statements of non-witnesses through the Government's informant, in violation of the Confrontation Clause and hearsay rule. Lopez also contends that the Government entrapped [**2] him as a matter of law, because the Government's informant induced him to engage in the narcotics transaction in order to obtain repayment of an overdue debt. Finally, Lopez makes several challenges to his sentence.

Although the district court erred by allowing in evidence as "lay opinion" testimony specialized opinion testimony by law-enforcement officers, we conclude that the error was harmless, and we affirm Lopez's conviction and sentence.

BACKGROUND

I. The Underlying Offense

At the end of May 1994, federal agents arrested Darryl Storm. Storm and others were charged with conspiracy to distribute cocaine and marijuana, and with money laundering.

Storm agreed to cooperate with the government and provided agents with a list of names of narcotics traffickers known to him. This list included Lopez, although at that time Storm only knew him as "Raul." At the instruction of DEA Agent Sam Larsen, Storm contacted Lopez to explore whether Lopez would sell him some narcotics. Storm met with Lopez on February 1, 1995. Agents attempted to record this meeting, but the audiotape malfunctioned. According to Storm, Storm told Lopez that he wanted to buy 5-10 kilograms of cocaine. [**3]

On March 24, 1995, Storm taped a telephone conversation with Lopez, during which Lopez offered to sell Storm ten kilograms of cocaine for $ 170,000. Lopez and Storm used oblique terminology borrowed from the construction industry to refer to the type, quantity, and price of the drugs.

On March 27, 1995, Storm again met with Lopez. This meeting was not recorded because the recording device malfunctioned again. Lopez gave Storm a sample of cocaine.

During the next month, Storm and Lopez spoke by telephone several times about the impending cocaine deal. These conversations were recorded. On May 25, 1995, Storm called Lopez and arranged to meet later that day to complete the cocaine transaction. Before meeting with Storm, Lopez drove in circles around the parking lot in a Monte Carlo. Storm and Lopez then met in the parking lot. Lopez drove away from Storm and parked next to a silver Nissan [*1243] Sentra. Lopez entered the Nissan, bent down for several minutes, and then returned to the Monte Carlo.

Lopez returned to Storm's location and showed Storm a kilogram package of cocaine. Storm

gave the arrest signal, and agents arrested Lopez. In the Monte Carlo, the agents found the keys to the [**4] Nissan and one kilogram of cocaine on the floor below the front seat. In the Nissan, the agents found nine kilograms of cocaine concealed in the car's door panels.

II. The Trial

A. Opinion Testimony

Throughout the trial, the Government presented opinion testimony by law-enforcement witnesses as to how Lopez's conduct, as observed by the agents, conformed to the methods and techniques of experienced drug dealers. Lopez objected to this testimony, claiming that it was "improper opinion testimony," hearsay, lacking foundation, and speculative. He also argued that it was improper expert testimony because the Government had not given prior notice as required by Federal Rule of Criminal Procedure 16(a)(1)(E). The district court overruled all of Lopez's objections and admitted the testimony as lay opinion testimony, presumably pursuant to Federal Rule of Evidence 701. The court ruled that the testimony regarding the way Lopez was driving - from which the agent inferred that Lopez was behaving as an "experienced narcotics trafficker" - was admissible notwithstanding Lopez's objections because the officer was a "percipient witness."

The court also overruled without explanation [**5] Lopez's objections to Agent Larsen's testimony that: 1) Lopez's actions were "countersurveillance" and "a common practice for narcotics dealers"; and 2) the use of a rental car was "indicative of an experienced narcotics trafficker." In response to Lopez's objection to an agent's opinion as to the street value of the cocaine found in the Nissan, the district court stated that "the Court has repeated over and over that the witness is giving testimony relating to matters in which he has participated and which he personally observed, and his testimony may incorporate his knowledge and his observations, so on that basis, it will be admitted." Agents repeatedly referred to Lopez's actions as consistent with an "experienced narcotics trafficker." The prosecution relied on this testimony in its closing arguments.

B. Lopez's Testimony

Lopez testified at trial that, before his arrest on May 25, 1995, he worked as a forklift operator for $ 10 per hour. He had never been arrested or convicted of any offense. He was 26 years old. In late 1993 or early 1994, Lopez was introduced to an "auto salesman," Tony Sagoo, who took Lopez to an auto auction. Later that day, Lopez gave Sagoo $ 5,000 [**6] to purchase a minivan they had seen. Lopez borrowed much of this money from family members.

Sagoo was unable to purchase the minivan, but he failed to return the $ 5,000 over the next several months. Sagoo introduced Lopez to Storm and told Lopez that Storm would re-pay the debt. Lopez was "shocked" by Storm's suggestion that they engage in a narcotics transaction as a way to repay the debt. Initially, Lopez refused Storm's suggestions. Eventually, however, Lopez felt pressured and realized that the only way he would get his $ 5,000 was to complete the drug deal. He therefore agreed to sell cocaine to Storm.

According to Lopez, when Storm asked Lopez for a sample of cocaine, Lopez contacted a friend named "Manny," whom he had met five to six years before in a bar. Lopez got the cocaine from Manny and gave Storm a sample.

Storm continued to pressure Lopez to conduct the transaction, and Lopez acted as a middleman between Storm and Manny. According to Lopez, Manny arranged all the details of the transaction, including the meeting place, the use of two cars, the secret panels, and the price of the ten kilograms.

C. Storm's Testimony

In response to Lopez's entrapment defense, [**7] Storm testified in the Government's rebuttal case that he did not entrap Lopez, [*1244] but rather that Lopez was eager to sell him the cocaine.

He also testified that he and Sagoo were involved in a previous marijuana transaction. Sagoo told Storm that Lopez was the supplier. The marijuana from this previous transaction was seized by DEA agents in North Carolina. After agents seized the marijuana, Sagoo told Storm that Lopez claimed that Sagoo owed him $ 15,000. Storm testified that Sagoo's mother told him Lopez had threatened her concerning payment of the debt. Storm's knowledge concerning Lopez's involvement in the marijuana transaction derived only from these statements.

The district court overruled Lopez's hearsay and relevance objections to the out-of-court statements of Sagoo and his mother. Lopez requested and submitted a limiting instruction to advise the jury that all of this testimony was not admissible for the truth of the matters asserted. The district court refused to give this or any other limiting instruction.

DISCUSSION

I. The Law-Enforcement Opinion Testimony

A. The Error

Lopez contends that the district court abused its discretion by admitting without a [**8] proper foundation opinion testimony of law-enforcement officers that Lopez's actions were consistent with those of an experienced drug trafficker. Specifically, Lopez contends that the testimony improperly "profiled" him as a drug trafficker and was not the proper subject of lay opinion testimony.

As detailed above, at numerous points throughout Lopez's trial, law-enforcement officers testified:

. that Lopez was engaging in countersurveillance driving;

. that certain terms used by Lopez and informant Storm were code words for a drug deal, a common practice of narcotics dealers;

. that Lopez's use of a rental car was consistent with the practices of an experienced drug trafficker;

. that the manner of hiding the cocaine was consistent with the practices of experienced drug traffickers; and

. that the large quantity and high purity of the cocaine indicated that Lopez was close to the source of the cocaine.

Lopez vigorously objected throughout this testimony.

A district court's evidentiary rulings during trial are reviewed for an abuse of discretion. United States v. Sarno, 73 F.3d 1470, 1488 (9th Cir. 1995), cert. denied, 135 L. Ed. 2d 1073, 116 S. Ct. [**9] 2555 (1996).

If "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. The rule recognizes that an intelligent evaluation of the facts by a trier of fact is "often difficult or impossible without the application of some . . . specialized knowledge." Fed. R. Evid. 702 (advisory comm. n.). In this light, we have held that "drug enforcement experts may testify that a defendant's activities were consistent with a common criminal modus operandi." United States v. Webb, 115 F.3d 711, 713-14 (9th Cir. 1997) (emphasis added) (citing cases). This testimony "helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1994). "Further, we even allow modus operandi expert testimony in cases that are not complex." Webb, 115 F.3d at 714 (internal quotation and citation omitted).

The testimony in the instant case is similar to expert testimony properly [**10] admitted in other drug cases. See, e.g., United States v. Cordoba, 104 F.3d 225, 229-30, amended, 1997 WL 54578 (9th Cir. 1997) (allowing expert testimony that a sophisticated drug dealer would not entrust large quantities of cocaine to an unknowing dupe); United States v. Espinosa, 827 F.2d 604, 611-12 (9th Cir. 1987) (allowing expert testimony regarding the use of apartments as "stash pads" for drugs and money); United States v. Patterson, 819 F.2d 1495, 1507 [*1245] (9th Cir. 1987) (allowing expert testimony on how criminal narcotics conspiracies operate); United States v. Maher, 645 F.2d 780, 783 (9th Cir. 1981) (per curiam) (permitting expert testimony that defendant's actions were consistent with the modus operandi of persons transporting drugs and engaging in countersurveillance).

In the above cases, the testimony was necessary to inform the jury of the techniques employed by drug dealers in their illegal trade, techniques with which an ordinary juror would most probably

be unfamiliar. Thus, the testimony in the instant case could have been admitted as expert opinion testimony to inform the jury about the methods and techniques used by experienced drug dealers, [**11] if the law-enforcement agents had been called as experts and properly qualified as such pursuant to Rule 104 of the Federal Rules of Evidence. In fact, Special Agent Larsen began his testimony with a recitation of his extensive training and experience with the DEA. It appears virtually certain that had the Government opted to do so, Larsen could have been formally qualified as an expert witness on the dispositive issue of whether Lopez's behavior suggested that he was an "experienced" - as contrasted with a fledgling - drug trafficker. However, this routine process did not occur. The testimony was neither offered nor admitted as expert testimony, but rather as lay opinion testimony. The Government concedes that it made no effort properly to qualify the witnesses as having the knowledge, experience, training, or education to render their testimony admissible under Rule 702.

The Government contends that "the same analysis applies whether the witness is testifying as an expert or as a lay witness." In support of its argument, the Government relies primarily on two cases, United States v. Fleishman, 684 F.2d 1329, 1335-36 (9th Cir. 1982), and United States v. VonWillie, [**12] 59 F.3d 922, 929 (9th Cir. 1995). The Government's reliance is misplaced.

In Fleishman, a DEA agent testified as a lay witness that the defendant was acting as a "lookout." Fleishman, 684 F.2d at 1335. A thorough foundation was laid that the agent had extensive training and experience in recognizing whether a person was performing countersurveillance. Id. On appeal, the Government argued that the agent's testimony was permissible lay witness testimony under Federal Rule of Evidence 701. n1 The court never directly addressed this argument, stating rather that "whether lay or expert," the testimony was admissible. Id. at 1335.

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n1 Federal Rule of Evidence 701 provides: If a "witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

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In VonWillie, an agent [**13] testified "as a lay witness about the nexus between drug trafficking and the possession of weapons." VonWillie, 59 F.3d at 929.

Specifically, he testified that in his experience with the Drug Enforcement Bureau, (1) it was common for drug traffickers to possess and use weapons in order to protect their drugs and to intimidate buyers; (2) the MK-11, one of the guns found in VonWillie's bedroom, was a particularly intimidating gun and he knew of drug dealers who used that specific weapon; and (3) drug traffickers commonly kept a weapon near their drugs.

Id. The court concluded that "these observations are common enough and require such a limited amount of expertise, if any, that they can, indeed, be deemed lay witness opinion." Id.

Fleishman and VonWillie remain good law, but both are distinguishable from the instant case. First, Lopez's case involved several agents testifying that Lopez's actions "were consistent with those of an experienced narcotics trafficker." In fact, Agent Larsen alone testified more than seven times to this effect as to various aspects of Lopez's activity. In Fleishman and VonWillie, only one agent gave an opinion [**14] on very limited issues.

Second, the agents' observations in the instant case are not "common enough" to "require such a limited amount of expertise." [*1246] VonWillie, 59 F.3d at 929. Here, the agents testified that the following behaviors were consistent with an experienced drug trafficker: 1) countersurveillance driving; 2) use of code words to refer to drug quantities and prices; 3) use of a third-person lookout when attending a narcotics meeting; 4) use of a rental car to make the drug delivery; 5) hiding the cocaine in the door panels of a car; and 6) dealing in large amounts of very pure cocaine. These "observations" require demonstrable expertise; in fact, several times, the Government instructed the witness to answer questions "based upon your training and experience." Additionally, one agent testified that his familiarity with the fact that narcotics traffickers sometimes speak in code is based upon the training that he had at the DEA Academy.

However, part of the testimony in this case does provide us with a clear example of when a witness may give his lay opinion as to the implications of his observations. INS Special Agent Rapp testified that the movements of the Monte [**15] Carlo were "suspicious." Under VonWillie and Fleishman, such testimony related to matters "common enough" to qualify as lay opinion testimony.

The Government's argument simply blurs the distinction between Federal Rules of Evidence 701 and 702. Lay witness testimony is governed by Rule 701, which limits opinions to those "rationally based on the perception of the witness." Rule 702, on the other hand, governs admission of expert opinion testimony concerning "specialized knowledge." The testimony in this case is precisely the type of "specialized knowledge" governed by Rule 702. A holding to the contrary would encourage the Government to offer all kinds of specialized opinions without pausing first properly to establish the required qualifications of their witnesses. The mere percipience of a witness to the facts on which he wishes to tender an opinion does not trump Rule 702. Otherwise, a layperson witnessing the removal of a bullet from a heart during an autopsy could opine as to the cause of the decedent's death. Surely a civilian bystander, or for that matter a raw DEA recruit would not be allowed to interpret for the jury Lopez's behavior in the parking lot on [**16] May 25, 1995 as that of an "experienced" trafficker merely because that person was an eyewitness to the same.

In addition, the Government's argument subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E). Rule 16 requires the Government to "disclose to the defendant a written summary of [expert] testimony the government intends to use . . . during its case in chief." The Rule "is intended to minimize surprise that often results from unexpected testimony, reduce the

need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Evid. 16(a)(1)(E) (advisory committee's note).

In sum, rather than testimony "based on the perceptions of the witness" - as the district court described it when overruling Lopez's objections - the bulk of the above opinion testimony is properly characterized as testimony based on the perceptions, education, training, and experience of the witness. It requires precisely the type of "specialized knowledge" of law enforcement governed by Rule 702. Trial courts must ensure that experts are qualified to render their opinions and that the opinions [**17] will assist the trier of fact. This careful analysis was absent in this case. See also Webb, 115 F.3d at 714 (recognizing that "the expert was particularly qualified" to give his opinion). As judges who have heard such testimony many times, we must not forget that our familiarity with it does not bring it within Rule 701, especially given the purpose of Rule 16(a)(1)(E). n2

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n2 Lopez's claim that the disputed opinion testimony amounts to impermissible and prejudicial "trafficker profile evidence," see United States v. Lim, 984 F.2d 331 (9th Cir. 1993), is unpersuasive.

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B. The Error Was Harmless

Finally, the Government contends that even if the opinion testimony was improperly admitted, it was harmless error. We agree.

We acknowledge that the repeated and extensive testimony that Lopez's actions [*1247] were "consistent with those of an experienced narcotics trafficker" went to the heart of his entrapment defense. This is not a case where expert opinion testimony was relied on to nail a peripheral player, [**18] but a case where the Government had to overcome a defense of entrapment. The Government's burden in this regard was to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. To do so, the Government relied extensively on the opinion testimony in closing arguments. For example, the Government argued that Lopez's use of code words during his conversations with Storm "shows his experience with narcotics trafficking." Similarly, the Government contended that Lopez's use of countersurveillance, use of a rental car, and method of concealing drugs were indicative of an experienced narcotics trafficker.

Nevertheless, we conclude on this record that the error was harmless, and we do so on the basis of United States v. Maher, 645 F.2d 780 (9th Cir. 1981). In Maher, the district court admitted opinion testimony from DEA agents that Maher's activities were similar to the modus operandi of persons conducting countersurveillance while transporting drugs. The trial court ruled that such evidence was admissible "lay opinion" testimony, and it was admitted in evidence without a

determination by the court that the witness was qualified pursuant to Rule 401(a) [**19] of the Federal Rules of Evidence as an expert. Notwithstanding this lapse, we concluded that any error in Maher was harmless because of the "extensive and detailed explanation by one of the DEA agents regarding his experience with surveillance and countersurveillance techniques in narcotics operations." Id. at 784. Based on these manifest qualifications, we said, "We think the witness was qualified to give an expert opinion on modus operandi in view of his testimony and experience. . . . Since the testimony was admissible expert opinion, any alleged error by the trial judge in admitting the evidence under the lay opinion rule was harmless." Id.

The same holds true here. Agent Larsen testified that he had been a special agent with the Drug Enforcement administration for five years. He had been extensively schooled for 16 weeks at the DEA Academy in Quantico, Virginia in all aspects of his profession, including "the means utilized by drug traffickers to detect certain things, . . . and their patterns and other activities." He had over 200 investigations under his belt prior to his testimony in this case which provided him with additional on-the-job training. At any one [**20] time, he was working on seven to eight investigations. Given this background, we are certain he was qualified to deliver the opinion testimony disputed in this case, and the failure formally to go through the usual process - although an error - was clearly harmless.

As for discovery, a violation of Rule 16 does not itself require reversal, or even exclusion of the affected testimony. United States v. Basinger, 60 F.3d 1400, 1407 (9th Cir. 1995); United States v. Baker, 10 F.3d 1374, 1398 (9th Cir. 1993). Figueroa-Lopez must demonstrate prejudice to substantial rights to justify reversal for violations of discovery rules. Baker, 10 F.3d at 1398. "The prejudice that must be shown to justify reversal for a discovery violation is a likelihood that the verdict would have been different had the government complied with the discovery rules, not had the evidence suppressed." Id. at 1398 n.8. Figueroa-Lopez has not demonstrated how or why the verdict would have been different if he had been given notice that Agent Larsen planned to testify about his drug trafficking modus operandi.

Finally, the lay opinion testimony of Detective Jones was largely cumulative to that of Agent [**21] Larsen. As such, any error with respect to its foundation was also harmless.

II. The Out-of-Court Statements of Tony Sagoo and His Mother

Lopez contends that the out-of-court statements of Sagoo and his mother were improperly admitted for the truth of the matter asserted. The Government contends that the statements were properly admitted as evidence to rebut Lopez's claim of entrapment, not for their truth, but to explain Storm's conduct with respect to Lopez.

[*1248] In the Government's rebuttal case, informant Storm testified as to his "understanding" of the source of the debt supposedly owed by Sagoo to Lopez. Over Lopez's numerous objections, Storm testified that Sagoo owed Lopez money "from a prior marijuana deal." The district court overruled Lopez's objections and admitted the testimony for "nonhearsay purposes."

On cross-examination, Storm admitted that he had no personal knowledge of Lopez's involvement in the marijuana deal. In fact, all the information Storm learned concerning Lopez's involvement was "from Tony Sagoo."

On appeal, the Government contends that Sagoo's and his mother's statements were not offered for the truth of the matters asserted, but rather "to show [**22] their effect on Storm." Whether or not such testimony was relevant or admissible as nonhearsay, we recognize that the prejudicial aspect of this testimony is clear, even if it might be outweighed by its probative value. The district court erred in not containing the force of this evidence with a limiting instruction. Nevertheless, given the wealth of evidence against Lopez and his obvious experienced behavior in this patently commercial transaction, we conclude that the failure to give such an instruction was harmless.

III. Entrapment as a Matter of Law

Lopez contends he was entrapped as a matter of law. We review this issue de novo, United States v. Davis, 36 F.3d 1424, 1430 (9th Cir. 1994), cert. denied, 513 U.S. 1171, 115 S. Ct. 1147, 130 L. Ed. 2d 1106 (1995), and we reject Lopez's contention.

There are two elements to the defense of entrapment: (1) government inducement of the crime, and (2) the absence of predisposition on the part of the defendant. Id. "Where the government has induced an individual to break the law and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to first being approached [**23] by government agents." Id.

Generally, "the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." Sherman v. United States, 356 U.S. 369, 377, 2 L. Ed. 2d 848, 78 S. Ct. 819 (1958). "It is inappropriate for an appellate court to determine whether a defendant was entrapped when such a determination would necessarily entail 'choosing between conflicting witnesses' and 'judging credibility.'" Davis, 36 F.3d at 1430 (quoting Sherman, 356 U.S. at 373).

Lopez's entrapment claim rests primarily on his own highly suspect and questionable explanation of the facts, an explanation directly contradicted by the Government's strong evidence. "The resolution of such conflicting assertions of fact relevant to the entrapment issue is a credibility question for the jury." United States v. Griffin, 434 F.2d 978, 981 (9th Cir. 1970). This factual dispute therefore precludes us from determining as a matter of law that the Government entrapped Lopez.

IV. Sentencing Issues

At sentencing, Lopez received a two-level increase for obstruction of justice based on perjury. The district court concluded also that he did not qualify [**24] for the "safety value" provision, see Sentencing Guidelines @ 2D1.1(b)(4), which could have mitigated his sentence. Finally, the district court declined to award Lopez a downward adjustment for acceptance of responsibility,

finding that he "has unequivocally refused to accept blame for his criminal behavior . . . ." We have examined each of these decisions made by the district court and conclude that they are well supported and legally appropriate. Thus, we reject Lopez's challenges to the manner in which he was sentenced.

CONCLUSION

Although Lopez's trial was not free of error, we affirm his conviction and sentence.

AFFIRMED.

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 26, 1998

Honorable Fern M. Smith
United States District Court
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Dear Judge Smith:

We are grateful to the Daubert Subcommittee chaired by Judge Shadur for allowing us to participate in the deliberations leading to the Subcommittee's recommendations regarding amendments to Rules 701, 702 and 703. While we are in general agreement with the Subcommittee as to the latter two rules, we continue to have reservations regarding the proposed changes to Rule 701.

The Subcommittee proposes to amend Rule 701 by adding a new subsection (c) stating in effect that lay opinion testimony must not be "based on scientific, technical or other specialized knowledge." The purpose of the Subcommittee's proposal, as explained in the draft Note, is to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." The Note goes on to cite as generally supportive of this approach Asplundh Mfg. Div. v. Benton Harbor Engineering, 57 F.3d 1190 (3rd Cir. 1995). In our view, the remedy, in the form proposed, may well be worse than the disease.

As an initial matter, we believe that making Rule 701 testimony and Rule 702 expert testimony mutually exclusive in all circumstances would not be merely clarifying; it would be a major change in the law. Except perhaps in the Ninth Circuit, the federal appellate courts have recognized that some testimony may be properly admitted under Rule 701 even though it might also have been admitted under Rule 702 had the witness been qualified as an expert. For example, in United States v. Paiva, 892 F.2d 148 (1st Cir. 1989), the court upheld — as against a challenge that the testimony should only have been admissible under Rule 702 — the admission under Rule 701 of opinion testimony by

a prior user of cocaine that, based upon its looks and taste, the white powdery substance at issue was cocaine. The correctness of this construction of the rules is buttressed by the fact that Rule 701 begins with the phrase "If the witness is not testifying as an expert," which seems to imply that in some cases the witness could so testify. Even the Asplundh case, which narrowed the extent of overlap between the two rules, nevertheless "refuse[d] to hold ... that all lay witnesses offering opinions that require special knowledge or experience must qualify under Rule 702." 57 F.3d at 1201.

Moreover, the proposed change is unrealistic in trying to draw a precise line between those opinions that would be helpful to a jury that are rationally based on the perceptions of a witness but not influenced by technical or specialized knowledge versus those opinions based on the witness' perception and influenced by some technical or specialized knowledge. Indeed, we question whether trying to distinguish between common and specialized knowledge might be as much a morass as, in prior days, trying to differentiate fact from opinion. Reasonable judges could surely differ, for instance, on what side of the Rule 701/702 line would fall testimony that the bird the witness saw plummet to the ground some distance away was a bald eagle. One might further question whether the testimony involved an "opinion" at all or merely a statement of fact.[1] Likewise, perhaps not all would agree with a court holding it error to permit lay opinion (as opposed to expert) testimony that the manner of a defendant's driving was "countersurveillance," although opining that, if the testimony had been merely that the manner of driving was "suspicious" it would have been properly admitted under Rule 701. United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997). The distinction between these two expressions of opinion is far from obvious, though we concede that other aspects of the agent's testimony in Figueroa-Lopez seemed more clearly to cross the line to the side of an expert.

In most instances, under the Subcommittee's proposal, reversal will occur where trial courts have misjudged by allowing evidence to be introduced under Rule 701 that should only have been admissible under Rule 702. But we can also foresee converse challenges, based upon the claim that certain evidence was wrongly accorded enhanced expert status by being introduced under Rule 702 when it should have been admissible only under Rule 701. See, e.g., United States v. Williams, 81 F.3d 1434 (7th Cir. 1996). Nevertheless, because we agree the risk of reversal may be greater when one who should testify as an "expert" testifies pursuant to Rule 701, the natural tendency of litigants will be, when in doubt, to opt for Rule 702.

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[1] In United States v. Williams, 81 F.3d 1434 (7th Cir. 1996), for example, the government qualified cooperating witness Harris, a member of the El Rukn gang, as an "expert" on the code used by the El Rukns. Conceding that "knowledge of the code was specialized," the court nonetheless found that Harris should not have been designated as an expert because he was testifying to his personal knowledge, not offering an opinion.

We believe, from discussions with the Subcommittee, that at least for some members a principal impetus for the Rule 701 change is to provide the opportunity for enhanced discovery, where one party or the other seeks to introduce expert-type testimony masquerading in the guise of lay opinion testimony under Rule 701. While we sympathize with this goal, we question whether the Subcommittee proposal truly accomplishes its purpose without other unintended consequences. In civil cases, Rule 26(a)(2) would not seem to require discovery beyond the identity of the witness for most of the class of Rule 701 lay opinion witnesses who would perforce become "experts" under the Subcommittee's amendment. Rule 26(a)(2)(B), requiring experts to submit reports, is limited to experts who are "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." Because identities of witnesses are already disclosed pursuant to Rule 26, the change in Rule 701 may accomplish little in terms of more expansive discovery in civil cases. On the other hand, if reports were required for all 702 witnesses pursuant to Rule 26(a)(2)(B) and, if as we predict, all of the borderline 701/702 witnesses were now presented as "experts," the litigation costs associated with preparing expert reports would increase greatly. Moreover, at least a portion of the depositions of these witnesses would seem to carry with them the payment of reasonable witness fees, see Fed. R. Civ. P. 26(b)(4)(C).

In its relatively short life, this Committee has been rightly cautious about proposing amendments to the Evidence Rules. In this instance, we do not believe the combined costs, as we predict will ensue, of increased litigation, more frequent reversals, and excessive use of Rule 702 for borderline 701/702 witnesses are justified by the given rationale for the change — to stop end runs around Rule 702's Daubert requirements. Our preferred outcome would be to reject any changes to Rule 701 as unnecessary, recognizing also that this issue is collateral to the main objective (which we support) of providing guidance to litigants and judges about the kind of gatekeeping function required by Daubert itself. However, we have no quarrel with the holding in Asplundh that a gatekeeping function, albeit perhaps of somewhat less rigor than that applicable to expert testimony, is also applicable to Rule 701 lay opinion testimony (see 57 F.3d at 1202), and we would have no objection to an amendment seeking to codify this result.

Finally, although as stated we are in general agreement with the proposed Rule 702, we suggest a few minor changes to the Rule to assure, as is the Subcommittee's intent, that the kind of testimony often offered by law enforcement agents based on their specialized knowledge and experience remains admissible as expert testimony. First, we suggest the term "methodology" be changed to "methods," a term that may be synonymous with methodology but implying a less formalized means or manner of procedure. And second, we recommend the draft Note be augmented to include discussion of the intended broad scope of the phrase "principles and methods" (or "methodology" if that term is retained) and to include illustrations of law enforcement

expert testimony such as an opinion on the meaning of actions or words in a narcotics transaction or a description of the structure and operation of a gang or organized crime family.

We hope that these views are helpful to the Committee and we look forward to seeing everyone soon in New York.

Sincerely,

Mary F. Harkenrider

Mary Frances Harkenrider

Roger A. Pauley

Roger A. Pauley

cc: Honorable Milton I. Shadur
Professor Daniel J. Capra

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

CHAMBERS OF
MILTON I. SHADUR
SENIOR JUDGE

CHICAGO, ILLINOIS 60604

February 27, 1998

VIA FAX

Honorable Fern M. Smith
United States District Judge

Dear Fern:

As indicated at the foot of their letter, Mary Harkenrider and Roger Pauley have sent me a copy of their February 26 statement of concerns regarding our subcommittee's proposals as to Rule 701. Because their letter should certainly form part of the grist for the mill of our full Committee's discussion at the April meeting, I hope that it will be included as part of our agenda package distributed in advance of the meeting. And by the same token, I think that it might be a good idea for Dan (to whom I'm faxing a copy of this letter) to provide a detailed set of comments for inclusion in the same packet.

That being so, I will limit my own response to just two matters. First, I suggest that the inference that the Harkenrider-Pauley letter seeks to draw from the opening condition stated in Rule 701 ("If the witness is not testifying as an expert...") is exactly opposite from the natural reading of that clause. Instead, I think that the clause confirms the approach taken by our subcommittee: that the appropriate line to be drawn is not between one witness and another witness, but rather between one type of testimony and another type of testimony. Even without modification of Rule 701, the fairest reading of that opening condition is that to the extent that anyone "is not testifying as an expert," the limitations that are stated in the balance of that Rule apply. And I think that of course the natural corollary is that those limitations do <u>not</u> apply to the extent that a witness <u>is</u> testifying as an expert, even though the same witness may--as to a portion of his or her testimony--be subject to the Rule 701 constraints.

As for the rest of the concerns expressed in the letter, I haven't troubled to look at each of the authorities that Mary and

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

CHAMBERS OF
MILTON I. SHADUR
SENIOR JUDGE

CHICAGO, ILLINOIS 60604

Roger cite (something that I expect Dan may do in preparing a more detailed response). Instead I will limit myself to United States v. Williams, 81 F.3d 1434 (7th Cir. 1996), which as you might guess is a case with which I have a good deal of familiarity.[1] As I see it, any reading of what Judge Posner said at pages 1441-42 has to recognize that it doesn't really support the kinds of concerns that the letter expresses. Indeed, the only problem with which Judge Posner really dealt directly--the concern that might stem from designating a witness as an "expert" to the jury--is one to which our subcommittee has given particular attention in the proposed advisory note to Rule 702 (and that Judge Posner also suggests is most appropriately dealt with in the jury instructions).

As I indicated at the outset, at this point I'll subside in favor of Dan's anticipated response. And maybe this letter is short enough to be included in the pre-meeting packet too.

Best personal regards.

Sincerely,

Milton I. Shadur

MIS:wb
cc: Mary F. Harkenrider, Esq.
Roger Pauley, Esq.
Professor Daniel J. Capra

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[1] One of my own multidefendant criminal cases also involved the El Rukns and much the same cast of characters.

MEMORANDUM

To: Advisory Committee on Federal Evidence Rules

From: Ken Broun

Re: Redraft of Rule 701

Date: March 4, 1998

At Dan Capra's request, I am jumping into the fray to respond to the well-considered concerns expressed by Mary Harkenrider and Roger Pauley and to add to Milt Shadur's thoughtful response.

Although I do not agree that the subcommittee's redraft of Rule 701 is a major change in the law, I recognize that the redraft would change the analytical approach now taken by many courts, including that taken by Judge Becker in Asplundh Mfg. Div. v. Benton Harbor Engineering, 57 F.3d 1190 (3d Cir. 1995). The result reached would very likely be the same. I suggest that the rule as redrafted would permit a judge faced with the situation like Asplundh to deal with the problem in a more straightforward way, with less risk of error.

In Asplundh, the court dealt with the testimony of a individual who had experience in dealing with the allegedly defective product in that case, an aerial lift. The trial court had permitted the witness to give what was characterized as a lay opinion under Rule 701 concerning an alleged defect in the design of the rod end on the lift's boom assembly. The Court of Appeals analyzed the testimony as Rule 701 testimony, noting that the witness was not an "expert", but rather a lay witness testifying based upon special knowledge or experience germane to the lay opinion. As Mary and Roger accurately point out, the court refused to hold "that all lay

witnesses offering opinions that require special knowledge or experience must qualify under Rule 702."

The court, despite its characterization of the testimony as coming under Rule 701, held that the trial judge must play a gatekeeping role like that required in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993). Some screening is required in the case of lay opinion of a technical nature, although perhaps not at the level of gatekeeping required in the case of Rule 702 testimony. There must be some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion regarding the disputed factual issues in the case. The court held that the demonstrated knowledge and experience of the witness in question were not sufficient under these circumstances. The court distinguished several cases in which lay witnesses with special knowledge were permitted to give opinions with regard to design issues as involving situations in which the opinion was more clearly rationally derived from the witness's experience. See, e.g., Soden v. Freightliner Corp, 714 F.2d 498 (5th Cir. 1983). It noted that cases like Soden "stretch the doctrinal boundaries of Rule 701 opinion testimony."

Judge Becker was obviously not entirely comfortable with his analysis of the testimony in question as Rule 701 testimony. After noting that the court was not holding that lay witness's opinions requiring special knowledge or experience must qualify under Rule 702, he stated (57 F.3d at 1201, n. 14):

> "We believe, however, that such distinctions can and might well be made by the drafters of the Federal rules, in that, as our discussion suggests, a better formulation of the lay opinion rule would perhaps eliminate these matters from the ambit of Rule 701."

The court then referred to Delaware, Florida and Tennessee rules or statutes that specifically carve out opinions requiring special knowledge, skill experience or training from the dictates of Rule 701.

Judge Becker obviously felt constrained by the approach taken by decisions such as Soden to view the witness's testimony as falling under Rule 701. His reference to the rules in Delaware and other states shows his clear reluctance to do so. He virtually asks this committee to take another look at Rule 701 and relieve judges of this problem in the future. We are doing so by our redraft of Rule 701.

In my judgment, Milt Shadur correctly analyzes the problem in his letter to Fern: "the appropriate line to be drawn is not between one witness and another witness, but rather between one type of testimony and another type of testimony." Just because a witness was not called or treated as an "expert" in the common usage of that term, does not mean that they cannot give Rule 702 testimony.

Let's use Mary's example of the game warden who saw a bald eagle plummet to the ground. I think that all of us could identify a male bald eagle if we saw it lying on the ground. If anyone on the committee gave that opinion, I believe it would be a permissible lay opinion under Rule 701. It would be based upon our perception and helpful to the jury -- just as would be our testimony that the car in which the bank robbers fled was a late model Mercedes Benz. However, if the game warden identified the bird based, not upon its white head, but on its flight pattern, shading and distinctive call, she is using special knowledge. If so, we ought to consider whether that knowledge will assist the trier of fact to determine a fact in issue, exactly the inquiry under Rule 702. Furthermore, the inquiry made by Judge Becker in Asplundh needs also to be

made -- does this game warden have enough specialized knowledge to make her opinion helpful to the jury? Is the data, in this case her experience in observing raptors, sufficiently reliable to give her a basis for her opinion?

Yes, the game warden is a fact witness and she will be able to testify to the facts that she observed without reference to Rule 702. Yes, she will also be able to give Rule 701 opinions, such as those dealing with the speed with which the alleged perpetrator fled the crime scene. But if some portion of her testimony calls on specialized knowledge, we must analyze that knowledge the same way that we do all other Rule 702 evidence: is her opinion helpful? Her opinion is only helpful if she is using reliable principles and methodology. The inquiry is simpler than in Daubert or even in Asplundh, but it is the same inquiry.

The game warden does not have to be labeled an "expert." Indeed, as Milt points out, that was the defect in United States v. Williams, 81 F.3d 1434 (7th Cir. 1996). There is good reason not to use such a label in front of the jury for any witness, especially for someone whose expertise is as limited as it is in both the game warden situation or where the witness is testifying to gang language as in the Williams case. Furthermore, there is no need to qualify any witness seeking to testify under Rule 702 by education or special training. Experience is an adequate substitute and Rule 702, both as it exists and as it redrafted, makes that absolutely clear.

The Asplundh decision would have come out exactly as it did under our proposed rule. The difference would have been that, instead of engaging in the awkward analysis of whether a lay witness had special knowledge and experience under Rule 701, the court could simply said that the witness's background was insufficient to permit him to give a helpful opinion under Rule 702.

There would also be no change in the other cases cited by Mary and Roger. United States

v. Paiva 892 F.2d 148 (1st Cir. 1989) involved the testimony of a long-time cocaine user that, based upon its looks and taste, the white powdery substance at issue was cocaine. Although the court admitted the testimony under Rule 701 in that case, a far better analysis would be that the witness had sufficient experience to permit her to give a helpful opinion under Rule 702. She might not have been a cocaine expert in any academic sense; she simply had sufficient expertise to permit her to answer the question asked.

United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997) comes closest to analyzing the question in the way that our proposed rule suggests. There, the court held that the trial court had erred, although harmlessly, in admitting the testimony of law enforcement officers that Lopez's actions were consistent with those of an experienced drug trafficker. The Court found that there was an insufficient showing that the officers had sufficient specialized knowledge to give the opinions they gave. The court treated the testimony as Rule 702 testimony and cited with approval other cases in which similar "expert" testimony from police officers had been admitted. In the cited cases, the government had successfully demonstrated that the officers had the special knowledge that permitted them to give an "expert opinion" on such matters. The court noted that the officer's testimony that the defendant's actions were "suspicious" had properly been admitted because such testimony related to matters "common enough" to qualify as lay opinion testimony. The court adds, in rejecting the Government's argument for analyzing the remainder of the testimony under Rule 701 (125 F.3d at 1246)

> "The Government's argument simply blurs the distinction between Federal Rules of Evidence 701 and 702. Lay witness testimony is governed by Rule 701, which limits opinions to those "rationally based on the perception of the witness." Rule 702, on the

other hand, governs admission of *expert* opinion testimony concerning *"specialized* knowledge." The testimony in this case is precisely the type of "specialized knowledge" governed by Rule 702. A holding to the contrary would encourage the Government to offer all kinds of specialized opinions without pausing first properly to establish the required qualifications of their witnesses." (Emphasis by the court)

Unlike Mary and Roger, I think that we can and should draw "a precise line between those opinions that would be helpful to a jury that are rationally based on the perceptions of a witness but not influenced by technical or specialized knowledge versus those opinions based on the witness' perception and influenced by some technical or specialized knowledge." We do that in our proposed Rule 701.

FORDHAM
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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: *Daubert* Subcommittee
From: Dan Capra
Re: Rule 701 and "specialized" knowledge
Date: February 10, 1998

In a conversation with me last week, Mary Harkenrider expressed some concern about the "specialized knowledge" limitation that is proposed for Rule 701. Her concern was expressed in terms of a hypothetical: what if a Fish and Wildlife official testifies that a bald eagle flew overhead. Would that official have to be qualified as an expert, or would the testimony be admissible under Rule 701, even as amended?

My own reaction is that the bald eagle opinion could be the testimony of a lay witness. Certainly a lay witness could testify that the car fleeing the bank was a late model Pontiac, even without having seen an emblem. Testifying that a bald eagle flew overhead is similar to that, I believe. However, if the Fish and Wildlife person were to testify that he could tell by the way the eagle was flying that it had a disease, this would be the subject of expert testimony; and if the bystander were to testify that the Pontiac had posi-traction, this would be the subject of expert testimony.

At any rate, I thought it might be appropriate to survey the states which have included special (albeit not "specialized") knowledge limitations in their versions of Rule 701, to see if they have had any problems in distinguishing lay and expert testimony. Those states are Delaware, Florida and South Carolina. This memo summarizes the findings.

Delaware has no reported cases on the point, which is at least some indication that no problems have arisen from the Rule.

There are four reported cases in Florida:

1. Alabanza v. Bus Service, Inc., 669 So.2d 338 (Fla.App. 1996): The issue was the condition of a vehicle after it had been repaired. The owner of the motor vehicle was permitted to testify that it did not drive properly and was defective in certain respects. The Court stated that "this type of information can be imparted by anyone who has tried to drive the vehicle, and does not require an expert witness to convey this information."

2. Lewek v. State, 702 So.2d 527 (Fla.App. 1997): In a trial on charges of vehicular homicide, an eyewitness was allowed to give an opinion as to the speed of the defendant's car. The Court held that the witness did not need to be qualified as an expert, because "an estimate of the speed at which a conveyance or other object was moving at a given time is generally viewed as a matter of common observation rather than expert opinion."

3. Florida Bar v. Clement, 662 So.2d 690 (Fla.1995): A lawyer challenged his disbarment on the ground that he had bipolar disorder and that disbarment was therefore precluded under the ADA.(!) The Court held that the lawyer's wife should have been permitted to give her opinion about the lawyer's mental competence, without having to be qualified as an expert. The Court stated that "a nonexpert witness may testify to an opinion about mental condition if the witness had an adequate opportunity to observe the matter or conduct about which the witness is testifying." On the other hand, if the witness had been asked to opine whether the lawyer was a schizophrenic, or had Munchausen's Syndrome, she would have to be qualified as an expert.

4. D.R.C. v. State, 670 So.2d 1183 (Fla.App. 1996):In a juvenile delinquency proceeding, a police officer was permitted to give lay witness testimony that the juvenile was a seller and not a user of rock cocaine. The witness based his lay opinion upon his experience, the amount of cocaine found on the juvenile, and the fact that the juvenile was not carrying drug paraphernalia. The Court held that admitting the testimony was error, because this was a subject matter for expert testimony--the conclusion had to be based on extensive experience beyond that of the ordinary lay person.

There are three reported cases from South Carolina:

1. State v. Williams, 469 S.E.2d 49 (S.C. 1996): The defendant was charged with murder after he chased and shot a person at the conclusion of a narcotics transaction. A witness who knew both the victim and the defendant, and who was at the scene but not a participant in the drug transaction, was permitted to testify that the victim probably ripped the defendant off, and the defendant was probably angry. The court found this to be a proper subject for lay witness testimony.

2. Gulledge v. McLaughlin, 492 S.E.2d 816 (S.C.App. 1997): In an automobile accident case, it was error to permit a police officer to testify that the physical evidence indicated that the defendant was driving improperly. The policeman had not been qualified as an expert in accident reconstruction.

3. Small v. Pioneer Machinery, 1997 WL 722995 (S.C.App.): In a product liability case dependent on whether and why the throttle of a log skidder got stuck, both expert and lay witnesses were properly permitted to testify that the throttle got stuck because debris became lodged in the throttle linkage area. The lay witness was the person who operated the vehicle on a

daily basis.

A final source of background that the subcommittee may wish to consider is the recent case of United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997). In that case, the court found reversible error in the admission of testimony of law enforcement agents who had not been qualified as experts. The agents testified as to how Lopez's conduct, as observed by the agents, conformed to the methods and techniques of experienced drug dealers. The testimony included the following opinions: the defendant was driving like an "experienced narcotics trafficker"; his actions were "countersurveillance" and "a common practice for narcotics dealers"; the use of a rental car was "indicative of an experienced narcotics trafficker"; the terms used by the defendant in a conversation were code words for drugs; the manner of hiding the cocaine was consistent with the practices of experienced drug traffickers; and the large quantity and high purity of the cocaine indicated that the defendant was close to the source of the cocaine.

The Court noted that the testimony could have been admitted under Rule 702, because it involved a subject matter beyond the experience of an average juror. For that reason, these observations were not "common enough" to be deemed the proper subject of lay opinion. For example, a conclusion of "countersurveillance driving" required "demonstrable expertise" beyond the ordinary experience of a layperson.

The *Figueroa* Court noted, however, that some of the experts' testimony did qualify under Rule 701. Specifically cited was an agent's testimony that the movements of the defendant's car were "suspicious". That observation was "common enough" for a lay witness, while a conclusion that the defendant was engaging in "countersurveillance driving" was beyond what a lay witness could provide. The Court concluded as follows:

> In sum, rather than testimony "based on the perceptions of the witness" - as the district court described it when overruling Lopez's objections - the bulk of the above opinion testimony is properly characterized as testimony based on the perceptions, education, training, and experience of the witness. It requires precisely the type of "specialized knowledge" of law enforcement governed by Rule 702. Trial courts must ensure that experts are qualified to render their opinions and that the opinions will assist the trier of fact. This careful analysis was absent in this case. As judges who have heard such testimony many times, we must not forget that our familiarity with it does not bring it within Rule 701, especially given the purpose of Rule 16(a)(1)(E).

Of great concern to the *Figueroa* court was that the agents were essentially being held out as experts, even though they were not qualified as such. The government repeatedly emphasized the witnesses' expertise and training, including at closing argument. The Court seems to be saying, if you are going to hold your witnesses out as having special training, then they have to be

treated as experts.

It seems to me that the proposed amendment to Rule 701 will draw basically the same line drawn in *Figueroa*--interpretations based on common knowledge or widely held experience fall within Rule 701, while interpretations based on extensive experience or special training fall under Rule 702. Of course, line-drawing will be difficult. The line between "suspicious" driving and "countersurveillance driving" is not exactly bright. The question is whether the costs of line-drawing are worth the benefit of precluding end-runs around Rule 702 and the corresponding expert disclosure rules.

One question that perhaps we should consider in our conference call is whether we should address the line-drawing problem in some detail in the Advisory Committee Note to Rule 701.

I look forward to speaking with all of you on Friday.

FORDHAM
University

Agenda Item IIC

School of Law

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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Rule 703
Date: February 16, 1998

Attached is a proposed amendment to Rule 703, and the accompanying Advisory Committee Note, all as drafted by the *Daubert* subcommittee. You will recall that at the October, 1997 Advisory Committee meeting, the Committee agreed in principle to propose an amendment to Rule 703 that would regulate the introduction of otherwise inadmissible information relied upon by an expert. That is the goal of the proposed amendment.

I also enclose the background memorandum on Rule 703 that was prepared and distributed for the last Committee meeting, at which the proposal was tabled so that it could be packaged with proposed amendments to Rules 701 and 702.

Proposed Amendment to Rule 703

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence <u>in order for the opinion or inference to be admissible</u>. <u>The court may apply Rule 403 to exclude or limit the presentation to the jury of otherwise inadmissible underlying facts or data.</u>

Proposed Advisory Committee Comment

The amendment provides a structure for the court to employ when information not otherwise admissible is relied upon by an expert in forming an opinion. Courts have reached different results on how to treat this information. Compare *United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant), with *United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion without a limiting instruction). Commentators have also taken differing views. *See, e.g.,* Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson,* 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is not independently admissible, a trial judge applying this Rule may treat the underlying bases of expert testimony in several different ways, depending on the balance of probative value on the one hand, and the risk of prejudice and confusion on the other. First, the judge may permit the expert to disclose the details of the

inadmissible information to the jury. If this option is chosen, a limiting instruction must be given upon request, to inform the jury that the underlying information may not be used for substantive purposes. See Rule 105. Second, the judge may limit disclosure to a general reference to the source or nature of the inadmissible information. This option presents a compromise between the proponent's interest in educating the jury about the expert's opinion, and the opponent's concern that the evidence will be used improperly as substantive evidence. Finally, the trial court may preclude any mention at all of the inadmissible information, allowing only the expert opinion testimony that is predicated upon it. In determining the appropriate course, the court must consider the effectiveness of a limiting instruction under the particular circumstances.

The amendment governs the use before the jury of inadmissible information reasonably relied on by an expert. It is not intended to affect the admissibility of an expert's opinion, or to deprive an expert of the use of unadmitted hearsay to form and propound an expert opinion. Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705.

Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Rule 703 and the Use of Inadmissible Information by an Expert
Date: September 11, 1997

At the April, 1997 meeting, the Evidence Rules Committee discussed a draft of a proposed amendment to Rule 703 that would regulate the use of that Rule as a "back door" hearsay exception. Suggestions were made to improve the draft, but no closure was reached on whether an amendment to Rule 703 should be recommended to the Standing Committee. It was agreed that discussion on the matter would continue at the November meeting.

This memorandum sets forth the draft amendment as it was left after Committee discussion. Also included is material from the Rule 703 memorandum issued for the April, 1997 meeting. This material includes a short overview of the case law and commentary on the hearsay exception potential of Rule 703. It also includes the extant rules and proposals for amending the Rule to control the use of inadmissible evidence relied upon by the expert.

I draw no conclusions and give no suggestions on whether the Rule should actually be amended.

Draft of Proposed Amendment to Evidence Rule 703 (as Revised by Committee Discussion)

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence <u>in order for the opinion or inference to be admissible</u>. <u>The court may apply the principles of Rule 403 to exclude or limit the presentation to the jury of otherwise inadmissible underlying facts or data. If the facts or data are admitted solely to explain or support the expert's opinion or inference, the court must, on request, so instruct the jury. Nothing in this rule restricts the presentation of underlying expert facts or data when offered by an adverse party.</u>

Proposed Advisory Committee Comment

The amendment provides a structure for the court to employ when information not otherwise admissible is relied upon by an expert in forming an opinion. Courts have reached different results on how to treat this information. Compare *United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant), with *United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion without a limiting instruction). Commentators have also taken different views. *See, e.g.,* Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson,* 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is not independently admissible, a trial judge applying this Rule may treat the underlying bases of expert testimony in several different ways, depending on the

balance of probative value on the one hand, and the risk of prejudice and confusion on the other. First, the judge may permit the expert to disclose the details of the inadmissible information to the jury. If this option is chosen, a limiting instruction must be given upon request, to inform the jury that the underlying data may not be used for substantive purposes. Second, the judge may limit disclosure to a general reference to the source or nature of the inadmissible information. This option presents a compromise between the proponent's interest in educating the jury about the expert's opinion, and the opponent's concern that the evidence will be used improperly as substantive evidence. Finally, the trial court may preclude any mention at all of the inadmissible information, allowing only the expert opinion testimony that is predicated upon it. In determining the appropriate course, the court must consider the effectiveness of a limiting instruction under the particular circumstances.

The amendment governs the use before the jury of inadmissible information reasonably relied on by an expert. It is not intended to affect the admissibility of an expert's opinion, or to deprive an expert of the use of unadmitted hearsay to form and propound an expert opinion.

Use of Rule 703 as a "Back Door" Hearsay Exception

It is very difficult to assess, from a reading of the reported cases, whether Rule 703 is being routinely used as a de facto hearsay exception. Certainly, no court to my knowledge has explicitly stated that Rule 703 establishes an exception to the hearsay rule for information reasonably relied upon by an expert. See Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C.L.Rev. 53 (1994) (noting that while one commentator argues that Rule 703 should be read to establish a hearsay exception, "no located case makes this ruling explicitly").

Still, there seems to be a good deal of concern that courts are allowing juries to consider the basis of an expert's opinion as substantive evidence, even when that basis is not independently admissible. Much of this is from the commentators. See Epps, *supra;* Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand.L.Rev. 577 (1986). The commentary points out that Rule 703 is not explicit as to how the basis of an expert's testimony can be used when that basis is not independently admissible. Many commentators are concerned that Rule 703 can be read to constitute an end-run around the entire remainder of the Federal Rules of Evidence, by the simple expedient of having an expert rely on information that would not otherwise be admissible. These commentators (most notably Professor Carlson) contend that experts should not be permitted to control the exclusionary rules of evidence in this manner.

Other commentators, most notably Professor Rice, contend that Rule 703 *should* be used as a hearsay exception. See Rice, *The Allure of Illogic: A Coherent Solution for Rule 703 Requires More than Redefining "Facts or Data"*, 47 Mercer L.Rev. 495 (1996). Professor Rice argues that if information is good enough to meet the reasonable reliance requirement of Rule 703, it is good enough to qualify for a hearsay exception. He also argues, citing the Advisory Committee Comment to Rule 803(4), that there is no meaningful distinction between evidence used for its truth and evidence used as the basis of a truthful expert's opinion.

There are some cases which, while not explicit on the point, appear to bear out the premise that Rule 703 can be (ab)used as a hearsay exception. That is, cases can be found which appear to admit an expert's underlying information as full substantive evidence. See, e.g., *United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant); *Stevens v. Cessna Aircraft*, 634 F.Supp. 137 (E.D.

Pa. 1986) (holding, as properly admitted under Rule 703, an expert's testimony describing hearsay statements of friends and associates of a deceased pilot, in support of an opinion that the pilot was under a great deal of stress); *Durflinger v. Artiles*, 563 F.Supp. 322 (D.Kan. 1981) (admitting, as "validated by Rule 703 of the Federal Rules of Evidence," the deposition testimony of a psychiatrist containing an expert opinion and the basis of that opinion). The requirement of a limiting instruction does not appear to be applied in these cases.

Other cases can be found which admit only the expert's opinion itself as substantive evidence, while admitting the underlying facts for the limited purpose of explaining or supporting the expert's opinion. *See, e.g., Marsee v. United States Tobacco*, 866 F.2d 319 (10th Cir. 1989) (noting that inadmissible basis could be considered by the jury, but only for the purpose of evaluating the expert's testimony); *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541 (5th Cir. 1978) (citing Rules 703 and 705 as permitting disclosure of otherwise inadmissible hearsay evidence but only for the purpose of illustrating the basis of expert witness opinion).

Finally, there are reported appellate cases indicating that trial courts have sometimes permitted experts to bring inadmissible information before the jury without limitation. *See, e.g., U.S. v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997) (error to allow hearsay to be admitted as the basis of an expert opinion, where no limiting instruction was given); *Hutchinson v. Groskin*, 927 F.2d 722 (2d Cir. 1991) (medical expert allowed to refer to letters from three prominent physicians, and to testify that his conclusion was consistent with those doctors; this was reversible error, since the tactic revealed hearsay to the jury and impermissibly bolstered the expert's testimony); *Boone v. Moore*, 980 F.2d 539 (8th Cir. 1992) (harmless error where trial court allowed a report relied on by a medical expert to be admitted into evidence).

Whether or not there is a prevalent use of Rule 703 as a backdoor hearsay exception, it is clear that there is substantial thought being given to the risk of abuse left by the Rule as written. This is indicated by the extensive commentary on the Rule, the several proposals that have been made to amend the Rule, and the fact that three states have rules which specifically deal with the use of inadmissible information relied upon by the expert. The next section of this memorandum describes these proposals and rules.

State Provisions--Minnesota

Minnesota Rule 703 is in two parts. Subdivision (a) is basically the same as Federal Rule 703. Subdivision (b) deals specifically with the treatment of inadmissible evidence reasonably relied upon by the expert. Subdivision (b) reads as follows:

> (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

The Minnesota Rules Committee commentary to this subdivision is as follows:

> Although an expert may rely on inadmissible facts or data in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis for an expert opinion. In civil cases, upon a showing of good cause, the inadmissible foundation, if trustworthy, can be admitted on direct examination for the limited purpose of establishing the basis for the opinion. See generally Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986); Federal Rules of Evidence: A Fresh Review and Evaluation, ABA Criminal Justice Section, Rule 703 and accompanying comment, 120 F.R.D. 299, at 369 (1987). In criminal cases, the inadmissible foundation should not be admitted. Admitting such evidence might violate the accused's right to confrontation. See State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982).

Reporter's Comment on the Minnesota Rule

This Rule says that inadmissible underlying information cannot be admitted on direct examination, even with a limiting instruction, unless, in a civil case, the data is particularly trustworthy, at which point it could then be admitted for the limited purpose of evaluating the expert opinion. There are several possible objections to the Rule. First, it would mean that in many cases an expert's conclusion could not receive full consideration by the jury; the jury would not know all of the information that the expert relied upon. See Allen and Miller, *The Common Law Theory of Experts: Deference or Education,* 87 Nw.U.L.Rev. 1131 (1993) (arguing that the Minnesota provision requires jurors to defer to an expert's conclusion more than is appropriate). Second, the trustworthiness exception is odd because if the information is trustworthy, it should be admissible anyway under the residual hearsay exception--there would then be no need to admit it for only the limited purpose of illustrating the expert's testimony. If the Rule is attempting to categorize information that is trustworthy enough to be mentioned to the jury as the basis of an expert's opinion, but not trustworthy enough to be admissible as residual hearsay, it is misguided. Any attempt to draft or maintain such a delineation is obviously fraught with practical difficulty.

Perhaps the reference to trustworthiness in the Minnesota rule refers to evidence that would be excluded not because it is hearsay, but because of some other exclusionary principle, such as Rule 407. If that is the case, there seems no reason to treat evidence excluded on one ground from evidence excluded on another, assuming that all such evidence can be reasonably relied upon by the expert.

State Provisions--Kentucky

Kentucky Rule 703 provides as follows:

Rule 703 Bases of opinion testimony by experts.

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

Reporter's Comment on Kentucky Provision

The Kentucky provision is like the Minnesota provision in establishing a category of evidence relied on by an expert which is trustworthy enough to be put before the jury for the limited purpose of evaluating the expert's opinion, yet not trustworthy enough to be admissible as residual hearsay. It thus creates the same practical problems discussed above in the comment on the Minnesota provision--a two-tiered standard that seems too difficult to apply.

The Kentucky provision has some possible advantages, however. First, it mentions that privilege rules remain applicable. Second, it usefully emphasizes that a limiting instruction must be given upon request. Third, it is helpful in that it tells trial judges that the underlying information need not be disclosed in all its details.

State Provisions--Texas

Texas Rule of Criminal Evidence 705 specifically addresses the use at trial of inadmissible information reasonably relied upon by an expert. The Texas Rule provides as follows:

Texas Rule of Criminal Evidence 705(d)

(d) Balancing Test; Limiting Instructions. When the underlying facts or data would be inadmissible in evidence for any other purpose than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Reporter's Comment on the Texas provision:

This Rule takes a different approach from that of Kentucky and Minnesota. Instead of trying to classify information based on various levels of trustworthiness, courts are instructed generally to consider the risk of use for an improper purpose against the importance of explaining the basis of an expert's opinion. Thus, a Rule 403-type balancing process is established--though it is not exactly a Rule 403 balance, because under this provision the danger of an improper purpose need only outweigh, not *substantially* outweigh, the probative value for the information to be excluded.

A flexible balancing process is a far better solution, it would seem, than the complicated trustworthiness-based provisions found in Minnesota and Kentucky--again assuming that an amendment is a worthwhile effort in the first place. However, providing a balancing test that is different from the usual 403 test should only be done in compelling circumstances--it is obviously confusing to have a number of different balancing tests floating around.

It is unclear why the Texas provision applies only to criminal cases. There is no parallel provision in the Texas Civil Rules. Certainly the concerns of misuse of inadmissible information relied upon by an expert arise in civil as well as criminal cases.

Proposed Revision of Rule 703--Wisconsin

The Judicial Council of Wisconsin proposed an amendment to Wisconsin Rule 703 to prescribe how and whether inadmissible information relied upon by an expert can be used before the jury. The proposal was in response to a conflict in the Wisconsin cases. Some cases allowed unrestricted use of the inadmissible information, some allowed limited use with a limiting instruction, and some allowed no use at all. The proposal was withdrawn because the Wisconsin Supreme Court decided a case and in that case set forth standards which were essentially drawn from the proposed rule. See Buratti, *What is the Status of "Inadmissible" Bases of Expert Testimony?*, 77 Marquette L.Rev. 531 (1994).

The proposed Wisconsin Rule would have added a subdivision (2) to Rule 703, providing as follows:

> Where the facts or data underlying the expert opinion of inference are otherwise inadmissible in evidence but are of a type reasonably relied upon by such experts as provided in subdivision (1), the judge, after an analysis of the considerations set forth in Rule 403, may permit some or all of this information to be disclosed to the jury under this subsection or under Rule 705, for the limited purpose of establishing the basis for the expert's opinion or inference.

The Judicial Council Note to the Proposal was quite helpful. It stated as follows:

> *A trial judge may address the underlying bases of expert testimony in several different ways. First, the judge may permit the expert to disclose the details of the inadmissible bases to the jury. If this option is chosen, a limiting instruction must be given to inform the jury that the underlying data may not be used for substantive purposes. Second, the judge may limit disclosure to a general reference to the source or nature of the basis. This option presents a compromise between the proponent's interest in educating the jury about the expert's opinion and the opponent's concern that the evidence will be misused. Finally, the trial court may preclude any mention at all of the inadmissible bases, allowing only the expert opinion testimony that is predicated upon it.*

Reporter's Comment on Wisconsin Proposal:

Assuming without deciding that Rule 703 should be amended, the Wisconsin proposal has much to commend it. It gives the trial judge the necessary flexibility to treat the inadmissible information in a variety of ways, depending on the balance of probative value and prejudicial effect in the specific circumstances. The Council Note is especially helpful in instructing judges as to the appropriate options. The reference in the Rule to the factors discussed in Rule 403 is, at least arguably, an effective shorthand device.

Proposed Revision of Rule 703--ABA Committee

In 1987, the ABA Committee on Rules of Criminal Procedure and Evidence proposed the following amendment to Federal Rule 703:

(a) Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence, in order for the opinion or inference to be admissible.

(b) Admissibility of underlying facts or data.

Except as provided hereinafter in this Rule, the facts and data underlying an expert's opinion or inference must be independently admissible in order to be received in evidence on behalf of the party offering the expert, and the expert's reliance on facts or data that are not independently admissible does not render those facts or data admissible in that party's behalf.

(1) Exception. Facts or data underlying an expert's opinion or inference that are not independently admissible may be admitted in the discretion of the court on behalf of the party offering the expert, if they are trustworthy, necessary to illuminate the testimony, and not privileged. In such instances, upon request, their use ordinarily shall be confined to showing the expert's basis.

(2) Discretion whether or not independently admissible. Whether underlying facts and data are independently admissible or not, the mere fact that the expert witness has relied upon them does not alone require the court to receive them in evidence on request of the party offering the expert.

(3) Opposing party unrestricted. Nothing in this Rule restricts admissibility of an expert's basis when offered by a party opposing the expert.

The ABA Commentary to the proposed amendment states, in pertinent part:

> While some of [the] underlying records will have been offered and received by the time the expert testifies, others will not. In selected cases, counsel may have

formally introduced none of the supporting data, especially where it comes from offices in distant parts of the country. In these circumstances, is the lawyer who calls an expert entitled to read the underlying records into evidence?

Applying strict principles of expert, hearsay and confrontation law, the answer would appear in many cases to be "no." While the underlying records might frequently qualify as business records, and business records are admissible under an exception to the hearsay rule, virtually every formulation ordinarily requires an authenticating witness from the office which generated the record. Such a person knows the regularity of the entries contained in the offered record, their timeliness, and the sort of knowledge possessed by individuals participating in the recordkeeping process. For this reason, business record acts and evidence codes in the usual case require the custodian of the records to testify, or another qualified witness from the office which prepared the record.

Nothing said here is intended to deprive an expert of the use of unadmitted hearsay to form and propound an expert opinion. Rather, the analysis speaks to the impropriety of receiving in wholesale fashion the unauthenticated background data as a substantive exhibit or substantive evidence, received for the truth of the matter, on behalf of the party that offered the expert's courtroom opinion. Once the expert, during direct examination, identifies the sources for his conclusions, the reference to outside material ordinarily should be complete. Especially in criminal cases, to permit the expert to go further and recite extensively from another person's report may do significant damage to the confrontation clause values of the Constitution. The back door introduction of the contents of a nontestifying expert's report, without producing the author of the material, can in many cases, impinge on the defendant's Sixth Amendment rights.

To help protect against litigation unjustifiably based upon unsworn allegations contained in the report or materials of a person not subject to cross-examination, it is timely to consider careful revision of Federal Evidence Rule 703. Such revision would lend a degree of relative consensus to expert witness practice, and help settle the question on whether Rule 703 creates a giant automatic exception to the hearsay rule for otherwise inadmissible hearsay reports and opinions.

Reporter's Comment on ABA Proposal:

The clause added to the end of the current Federal Rule is helpful in distinguishing the opinion--which can be admissible even though the expert relies on inadmissible evidence--from the underlying information itself. The first clause of the new subdivision is odd, however, since it says the same thing twice; one clause or the other would appear to do. The exception to the general rule of exclusion has the same flaw as is found in the Minnesota and Kentucky provisions--it establishes a category of evidence trustworthy enough to be admitted to illustrate the opinion, but not trustworthy enough to be admitted for its truth.

Subdivision (b)(2) is anomalous because it provides that a judge can exclude the underlying information even if it is independently admissible. This is to say the least confusing, and to the extent it is intended to give the judge discretion to exclude evidence which might be admissible but cumulative, the judge has that power independent of this proposal.

Proposed Revision of Rule 703--Professor Carlson

In a series of articles, Professor Carlson has suggested amending Rule 703 to provide that the current rule would be set forth as subdivision (a), and a new subdivision (b) added, to read as follows:

> (b) Nothing in this rule shall require the court to permit the introduction of facts or data into evidence on grounds that the expert relied on them. However, they may be received into evidence when they meet the requirements necessary for admissibility prescribed in other parts of these rules.

See Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony,* 76 Minn.L.Rev. 859 (1992).

Reporter's Comment on Carlson Proposal:

This proposal does not really say what Professor Carlson wants it to say. He wants it to say that inadmissible information relied on by an expert cannot be admitted into evidence. But the proposal says that nothing requires its admission; the Rule provides no ground for exclusion. On the other hand, if the proposal were to say that inadmissible information could never be introduced into evidence, it would have the drawback of depriving the jury of information that it needs to properly assess the weight of the expert's opinion.

Proposed Revision of Rule 703--Evidence Project

The American University School of Law Evidence Project would amend the Federal Rules to provide a new hearsay exception for information reasonably relied upon by an expert in forming her opinion. This would actually be accomplished by two separate amendments. Rule 703 would be amended to add the following provision at the end of the current Rule:

> The facts or data need not have been proven beforehand, however, in the absence of admissible proof, a specific demonstration of reliability must be made of otherwise inadmissible hearsay statements pursuant to Rule [new hearsay exception]. Evidence that is inadmissible on grounds other than reliability, may not be relied upon by an expert witness if disclosure of that evidence would be inconsistent with the purposes of the rule excluding it.

The new hearsay exception would be added to Rule 803 and would provide that the following type of hearsay would not be excluded by the hearsay rule:

> Statement Employed in Expert Testimony. A statement employed by an expert in arriving at a conclusion offered by that expert at trial, to the extent that (a) the statement is of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, and

(b) the expert has demonstrated to the presiding judge a basis for concluding that the statement possesses substantial guarantees of trustworthiness.

Reporter's Comment on Evidence Project Proposal:

Obviously this is the most radical of all the proposals. It is up to the Committee to determine whether providing a hearsay exception for information reasonably relied on by an expert is good policy or not. The proposal has some virtues, however. First, it eliminates the insubstantial distinction, already recognized in the Advisory Committee Comment to Evidence Rule 803(4), between evidence admissible for its truth and evidence admissible only to illustrate the basis of an expert's opinion. Second, it avoids the complications of a two-tiered trustworthiness standard, such as is found in the Kentucky and Minnesota versions of Rule 703.

Reporter's First Draft of Proposed Amendment to Rule 703

Note: This initial draft was subject to several comments at the April meeting. The "working draft" that resulted from Committee discussions is set forth on page 2 of this memo. The initial draft, set forth below, is included for informational purposes.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence, in order for the opinion or inference to be admissible. When the underlying facts or data would be inadmissible in evidence for any other purpose than to explain or support the expert's opinion or inference, the court may exclude, or limit, the use of the underlying facts or data if the danger that they will be used for an improper purpose substantially outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury solely to explain or support the expert's opinion or inference, a limiting instruction by the court must be given upon request. Nothing in this rule restricts admissibility of underlying expert data when offered by an adverse party.

New cases, after memo was submitted

Masayesva on Behalf of Hopi Indian Tribe v. Hale, 118 F.3d 1371 (9th Cir. 1997): In a dispute between Indian tribes over the value of land, the Navajo tribe challenged the Hopi tribe's expert's testimony, as to the value of corn grown on the property. The expert formulated his opinion from what others told him about corn prices. The Court found no error in this reliance, noting that "no statements from third parties were admitted for their truth." The Court held that it was permissible for the expert to rely on information from others concerning corn sales, since "experts in the field, i.e., appraisers, regularly go to third parties for sales figures, as the Hopi expert did here."

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Rules of Attorney Conduct
Date: March 1, 1998

Attached to this memorandum are proposed Federal Rules of Attorney Conduct, that were prepared by Dan Coquillette, the Reporter to the Standing Committee. The proposed rules are designed to address the problems arising from the current rules governing attorney conduct in the federal courts. Under the current system, local rules of court are used to promulgated ethics rules in a haphazard and often conflicting fashion.

Rule 1 of the proposed Rules of Attorney Conduct constitutes a choice of law provision, providing that for conduct in connection with a federal district court proceeding, the applicable ethics rules are generally those of the state in which the court sits; for all other conduct (most importantly for conduct in connection with a court of appeals proceeding), the applicable rules are those of the state in which the attorney principally practices, unless the conduct has a predominant effect in another practice state, in which event the rules of that practice state are controlling.

Rules 2 through 10, if adopted, would provide exceptions to Rule 1. Rules 2 through 10 are intended as "core" rules of attorney conduct that would apply for practice in all federal courts, regardless of any conflict with a state rule. Conforming amendments to FRAP 46 and FRCP 83 are also included.

At the last Standing Committee meeting, the Standing Committee voted to refer the proposed Rules on Attorney Conduct to the Advisory Committees for their consideration. The Advisory Committees were each directed to review the proposals and prepare a preliminary report for the June, 1998 Standing Committee meeting. This history, and a description of what is expected from the Advisory Committees, is discussed in two separate memoranda from Dan Coquillette, which are attached at the end of this memorandum.

The Standing Committee does not contemplate that the Advisory Committees are to act as ethics experts in reviewing these rules. Rather, the Committees are to consider and report on four general questions:

1. Should all of the Rules be adopted as a Code of Attorney Conduct, or should adoption be limited to Proposed Rule 1, which would then incorporate state rules of conduct to determine all questions of lawyers' ethics?

2. If more than Rule 1 is to be adopted, the goal of the proposed rules would be adopt a "narrow core" of ethics rules--rules that would impact directly on the practice of lawyers in the federal courts. Which of the proposed rules, if any, fall within the core? Which, if any, should be left to regulation by state rules?

3. Assuming that a code of conduct is to be adopted (i.e., something beyond a single conflict of laws provision), should it be adopted as an appendix to the existing Civil and Criminal Rules, or should it be adopted as a freestanding body of rules, i.e., "The Federal Rules of Attorney Conduct"?

4. Are there any obvious stylistic or substantive improvements that could be made to the rules as drafted?

I have attached to this memorandum a proposed report from the Evidence Rules Committee to the Standing Committee on these matters. The report is only a draft. It does stake out a position, but it is only intended to spur, and not to limit, discussion. As stated above, a preliminary report from our Committee on the proposed Rules of Attorney Conduct is due to the Standing Committee in time for its consideration at its June meeting.

Please note that Proposed Rule 10, the "no-contact" rule, is a work in progress, dependent on negotiations between the Department of Justice and the Conference of Chief Justices. Proposed Rule 10 will, I am told, track whatever is ultimately agreed upon by these parties. Under the circumstances, I believe that substantive comment upon proposed Rule 10 is not within our charge.

Finally, please note that I have already provided comments on the Rules to Dan Coquillette, and these comments have already resulted in changes. I believe the Evidence Rules Committee deserves to take credit for them (to the extent they are any good), and so I have footnoted them in the draft report.

Report of the Advisory Committee on Evidence Rules Concerning the Proposed Federal Rules of Attorney Conduct

At the request of the Standing Committee, the Advisory Committee on Evidence Rules has reviewed the proposed Federal Rules of Attorney Conduct, as well as the Working Papers concerning those Rules. The Committee claims no special expertise in the area of Professional Responsibility, and we note that the vast majority of the proposed Rules do not bear even indirectly on rules of evidence. Nonetheless, we have reached some general preliminary conclusions on four basic questions. These questions are:

1. Is it preferable to adopt only Rule 1 (the conflicts rule), and establish total "dynamic conformity", or instead to adopt additional Federal Rules to govern the "core" aspects of practice in all federal courts?

2. Do proposed Rules 2 through 10 represent the "core" rules of attorney conduct that address a special need for federal court regulation?

3. Assuming that Rules of Attorney Conduct are adopted, should they be placed in appendices to the Civil and Criminal Rules, or should they be promulgated as freestanding Rules of Attorney Conduct?

4. Should any of the Rules be clarified or revised in any major respect?

A discussion of each of these questions follows:

Dynamic Conformity vs. "Core" Rules

The Committee is if favor of adopting a single federal rule of attorney conduct--a rule incorporating state ethics rules in the manner provided by Proposed Rule 1. This rule will assure that a lawyer will not be whipsawed by conflicting ethics rules within her own state of practice, and defers appropriately to state expertise on questions of professional responsibility. We do not believe that adoption of Rules 2 through 10 is justified at the present time. Those Rules would override state ethical standards that are applicable in the state in which the lawyer practices. Lawyers are, as an initial matter, members of the bar in the state in which they practice; and they have a reasonable expectation that the ethics rules of their state of practice should generally control their practice in that state in all respects. That is what Rule 1 provides. We believe it anomalous that two courts on the same street could have different, and sometimes directly conflicting, rules of attorney conduct. This is what would occur if Rules 2 through 10 are adopted. Vertical disuniformity is justifiable only if some paramount federal interest is at stake that is not taken into account by a state ethics rule. See Moulton, *Federalism and Choice of Law*

in the Regulation of Legal Ethics, 82 Minn. L.Rev. 73, 179 (1997) (arguing that diversity among state ethical rules is "hardly debilitating" and "does not warrant the radical cure of national preemption of conduct standards"). We agree with Professor Moulton that the States, "as decentralized competitors and innovators, are the appropriate vehicles for norm setting in the field of legal ethics."

An argument can be made that a federal court *does* have a paramount interest in certain "core" areas of attorney conduct that directly affect the integrity of a federal court proceeding. The most obvious example is a rule concerning candor toward the tribunal. Yet even in these core areas, it is unclear that state interests are in such significant conflict with the federal interests that promulgation of a separate federal standard is necessary. For example, there is no state code of ethics that permits a lawyer to lie to the tribunal in order to obtain an advantage for the client. Any conflict between federal interests and a particular state rule governing conduct before a tribunal is usually at the margin--it is not significant enough to warrant a separate federal rule that leads to conflicting ethics rules in the lawyer's state of practice.

One possible conflict as to "core" principles is the well-documented controversy over the applicability of state "no-contact" rules (e.g., Model Rule 4.2, Model Code DR 7-104) to federal prosecutors. We believe that this controversy does not in itself support the promulgation of an entire "core" code of attorney conduct for the federal courts. At most, it supports a single rule on contacting adverse parties, that might be passed in addition to the conflicts rule. At any rate, it is a fair question whether the conflict between state ethics codes and federal prosecutors is one that can be resolved through rulemaking rather than legislation.

An important practical concern also cuts against adoption of substantive federal rules of attorney conduct. If the ethics rules of a federal court are different from the rules of a corresponding state, then the federal court will have to have its own disciplinary enforcement mechanism in place, with all of its attendant costs. A federal court could hardly refer a violation of a federal rule of attorney conduct to state disciplinary authorities if the lawyer's conduct would not violate the applicable state rule. Thus, a major advantage of the "dynamic conformity" model set forth in Rule 1 is that the federal court can refer problems of attorney conduct directly to state disciplinary authorities, rather than having to undertake the expense of a separate federal system of investigation and enforcement.

A final and most important consideration cutting against the promulgation of "core" federal rules is that ethics rules are currently in a state of flux. Proposed Rules 2 through 9 are basically restylized versions of the Model Rules of Professional Conduct, which are in effect in most of the states (though with substantial variations in many of the states). But the ABA's "Ethics 2000" project is likely to propose some significant modifications to the Model Rules. It is possible that adoption of the "core" Federal Rules of Attorney Conduct based on the Model Rules would occur at about the same time as the states would be considering substantial changes to their ethics rules as a result of the Ethics 2000 project. Intrastate disuniformity would be exacerbated, creating a trap for the unwary lawyer, and the more disconcerting possibility that a lawyer could

be subject to discipline under state law for following a conflicting Federal Rule of Attorney Conduct. One way to forestall this problem is to promulgate only Rule 1 and await the outcome of the Ethics 2000 project, then to conform substantive rules of attorney conduct to that proposal. Yet even this cautious approach is fraught with peril, since there is no guarantee that the states will adopt the Ethics 2000 proposals in anything like a uniform fashion. Indeed, it is a virtual certainty that the existing diversity among state standards of professional responsibility will continue into the foreseeable future--rendering any attempt at federal uniformity misguided.

We believe that the adoption of "core" federal rules of attorney conduct is a drastic step that is unnecessary to remedy the current proliferation of federal ethics rules. We favor the less drastic step of a single conflicts rule that incorporates the law of the state in which the federal court sits for conduct in connection with a district court proceeding, and that provides a well-known "state of principal practice" presumption for all other conduct. See Moulton, *supra* at 165 (noting that a single federal conflicts rule "would have the virtue of preserving interstate diversity in conduct norms while at the same time providing uniform guidance in the resolution of interstate conflicts").

Proposed Rules 2 through 10 as "Core" Rules

Assuming that "core" ethics rules should be adopted as Federal Rules of Attorney Conduct, the question is whether proposed Rules 2 through 10 fall within the "core." "Core" rules are presumably those governing the attorney conduct that directly affects an important federal interest. In the context of practice before a federal court, the "core" rules should be those, and only those, necessary to protect the integrity of a federal court proceeding.

Applying that definition to proposed Rules 2 through 10, it appears that most of the Rules fall within the "core", but some do not. The rules on confidentiality (Rule 2), candor toward the tribunal and truthfulness (Rules 7 and 9), lawyer as witness (Rule 8), and contacting adverse parties (Rule 10), all deal with conduct that directly affects a court proceeding. Violation of any of these rules clearly affects a substantial federal interest--though as stated above, that federal interest is sufficiently effectuated by adopting the relevant state's rule of ethics.

The proposed rules on conflicts (Rules 3-6) present more of a mixed bag. Rule 3, providing the general rule concerning conflicts of interest, clearly implicates a federal court's interest. If a client in a federal action is represented by a lawyer with conflicting loyalties, "the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." *Wheat v. United States,* 486 U.S. 153 (1988). The same federal interests are implicated in Rules 5 (concerning conflicts arising from representation of a former client) and 6 (concerning the need to disqualify the law firm where a member of the firm is in conflict). However, it is difficult to see how some of the provisions of Rule 4, concerning transactions between a lawyer and a client, will implicate the integrity of the federal court. Rule 4(a), which concerns business transactions between a lawyer and a client, will rarely if ever be

implicated in the context of a federal court proceeding. Rule 4(b), concerning the use of information to the disadvantage of the client's interest, was intended to protect against the lawyer's use of inside information to obtain a *business* advantage. If a lawyer uses information to the client's disadvantage in the context of a federal court proceeding, the lawyer would already be in violation of Rule 2's duty to preserve confidences. Rule 4(c), concerning the drafting of instruments giving gifts to the lawyer, is obviously far removed from a federal court's supervisory interest. In contrast, Rule 4(d), concerning sale of media rights, could be implicated when a lawyer represents a client in a federal court action; for example, a lawyer who has bought the client's media rights might try to prolong the proceedings or present a dramatic defense, to the detriment of the client's interests and the integrity of the proceeding. Rule 4(e), concerning funding of the litigation, by definition implicates the federal court's interest. Rule 4(f), concerning payment of fees by a third party, might be implicated in a federal action where the litigation is funded by someone other than a party to that litigation. Rule 4(g), concerning aggregate settlements, obviously implicates the interest of a federal court. Rule 4(h), concerning prospective limitation of liability, could implicate the core federal interest because such an agreement could effect the lawyer's decisionmaking during a litigation. Rule 4(i), concerning related lawyers, does implicate the federal interest in preserving the adversary system. Finally, Rule 4(j), limiting the acquisition of a proprietary interest in the subject matter of a litigation, is by definition litigation-oriented.

The Evidence Rules Committee therefore recommends that if "core" rules are to be adopted, proposed Rule 4 be amended to delete subdivisions (a), (b) and (c). If these subdivisions are adopted, a lawyer will be subject to discipline by a federal court for conduct that is completely unrelated to any federal court proceeding. A strong argument can be made that it is outside the rulemaking authority to promulgate ethics rules to regulate conduct having no direct impact on federal court proceedings. Even if these subdivisions are within the rulemaking authority, we believe that they are beyond the "core" concerns of the federal courts that arguably support the adoption of rules of attorney conduct.

Structure

The Evidence Rules Committee believes that if Federal Rules of Attorney Conduct are to be adopted, it should be as a freestanding body of rules. The alternative is to add such rules, perhaps as an appendix, to both the Civil and Criminal Rules. That alternative results in unnecessary duplication. Moreover, lawyers are more likely to become aware of the rules if they are promulgated as a freestanding code of ethics, rather than as an appendix that can be found somewhere in a mass of Federal Rules. If, however, only Rule 1 is adopted, it would be more appropriately adopted as an appendix to the other rules. It would be awkward to have a single freestanding "Federal Rule of Attorney Conduct."

Drafting Suggestions

Based on a preliminary review of proposed Rules 1-9, the Evidence Rules Committee sets forth the following drafting suggestions. (We did not review the substance of proposed Rule 10, since our understanding is that Rule 10 is a work in progress, dependent on discussions between the Department of Justice and the Conference of State Chief Justices).

1. *Rule 1:* In subdivisions (a)(2)(A) and (B), the rule refers to the ethics rules as currently adopted by the "highest court" of the relevant state. This language fails to account for the fact that ethics rules in some of the states do not come from the state's highest court. For example, the ethics rules in New York are promulgated by the Appellate Division, which is the intermediate appellate court. We therefore suggest that the reference be changed to refer to the rules of the state "as currently adopted by the state authority responsible for adopting rules of attorney conduct", or language to that effect. We note that such a change has already been made to subdivision (a)(1) of the Rule, which refers to rules of attorney conduct "currently adopted by the state authority responsible for adopting rule of attorney conduct of the state in which the district court sits."[1]

2. *Rules 3, 5, and 6:* Each of these rules permits the client to waive the lawyer's conflict. However, in *Wheat v. United States,* 486 U.S. 153 (1988), the Court held that a criminal defendant's waiver of a conflict does not bind the trial judge, who has an independent obligation to protect the integrity of the federal court proceeding. The inference from the language of each of the Proposed Rules is that the client's waiver is dispositive. Although probably not intended to do so, the rules as written could be interpreted to overrule *Wheat*. We note that the comment to Rule 3 has been amended to address the *Wheat* issue. The Standing Committee might consider, however, whether the excellent language in the Comment should be elevated to the blackletter of the Rule. At a minimum, the Comment in Rule 3 should be restated in Rules 5 and 6 as well, for ease of reference for courts and lawyers.

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[1] This Committee previously recommended that the language in subdivision (a)(1) be amended to preclude a federal district court from opting out of the conflicts Rule. This recommendation was adopted in the current draft of Rule 1. As the Workbook compellingly demonstrates, the current balkanization of ethics rules is due in large part to the diversity of local rulemaking in this area. Allowing district courts to opt out of the conflict of laws provision would defeat the goal of uniformity that is the very reason for having a single federal rule.

This Committee also previously recommended a change in the language to Rule 2 to provide an explicit exception to the duty of confidentiality where the lawyer is required by law or lawful court order to disclose information that is not protected by the evidentiary privilege. That language has been added to the current draft. See, e.g., DR 4-101(C)(2) (permitting disclosure of confidential information where "required by law or court order").

4. Rule 8: The lawyer-witness rule, subdivision (b), states that a disqualified lawyer's law firm may continue in the case, so long as other conflict rules are not violated. Thus, an indirect reference is made to the possibility that a client might waive a conflict, permitting the lawyer to continue the representation. Again, no reference is made in the language of the Rule to the possibility that a trial judge may order disqualification to protect the integrity of the proceedings even though the client waives a conflict and the attorney conduct rules are not technically violated. Without such a reference, it could appear that the rule is designed to reject the Supreme Court's decision in *Wheat*. As stated above, the Comment to Rule 3 addresses the *Wheat* issue, but the questions addressed in *Wheat* are so important to federal practice that the Standing Committee might consider whether the language in the Comment should be included in the Rule itself. At a minimum, the Commentary from Rule 3 should be restated in the Commentary to Rule 8.

Appendix

Federal Rules of Attorney Conduct

RULE 1. GENERAL RULE

(a) **Standards for Attorney Conduct.** Except as provided by subdivision (c) of this rule, or a rule adopted in accordance with 28 U.S.C. §§ 2072, or a rule of the Federal Rules of Attorney Conduct, the standards for attorney conduct for United States district courts and courts of appeals are as follows:

(1) **Conduct in Proceedings Before District Court.** For conduct in connection with a case or proceeding pending in a district court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the standards to be applied must be the standards of attorney conduct currently adopted by the state authority responsible for adopting rules of attorney conduct of the state in which the district court sits; and

(2) **All Other Conduct.** For any other act or omission by an attorney admitted to practice before a district court or court of appeals, the standards for attorney conduct are:

(A) if the attorney is licensed to practice only in one state, the rules of that state as currently adopted by its highest court, or

(B) if the attorney is licensed to practice in more than one state, the rules of the state in which the attorney principally practices as currently adopted by its highest court; but if particular conduct has its predominant effect in another state in which the attorney is licensed to practice, then the rules of that state as currently adopted by its highest court.

(3) **Violation as Misconduct.** If an attorney violates these rules — whether individually or in concert with others, and whether or not the violation occurred in the course of the attorney-client relationship — the violation constitutes misconduct and is grounds for discipline.

(b) **Sanctions.** For misconduct defined in the Federal Rules of Attorney Conduct, for good cause shown, and after notice and opportunity to be heard, an attorney admitted to practice before a district court or court of appeals may be disbarred, suspended, reprimanded, or subjected to any other disciplinary action that the court deems appropriate. The same misconduct may also subject an attorney to the disciplinary authority of the state or states where the attorney is admitted to practice.

(c) **Applicability.** Rules 2-10 of the Federal Rules of Attorney Conduct apply only in a case or proceeding pending in a United States district court or court of appeals. Rule 1(a) and (b) and Rules 2-10 of the Federal Rules of Attorney Conduct do not apply in a case or proceeding pending in the district court within the jurisdiction conferred by 28 U.S.C. §§ 1334 or 158, or in a case or proceeding referred to a bankruptcy judge under 28 U.S.C. § 157(a), unless otherwise provided by the Federal Rules of Bankruptcy Procedure or by local bankruptcy rules promulgated in accordance with F.R. Bankr. P. 9029.

NOTE

This rule is based on Model Local Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management in 1978 and ABA Model Rule of Professional Conduct 8.5 governing choice of law for disciplinary authority. See D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* Appendix V (July 5, 1995) (original version of Rule IV of the Federal Rules of Disciplinary Enforcement), republished in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 1-95. (Hereafter, "Working Papers.")

The words "case or proceeding pending before" a court mean any matter which is actually before such a court, or is certain to be before such a court.

The Federal Rules of Attorney Conduct were not designed to govern bankruptcy cases and proceedings. The Committee on Rules of Practice and Procedure recognizes that there may be situations in which standards for attorney conduct in bankruptcy cases and proceedings should or must differ in some respects from standards applicable in other federal cases. First, there are statutory provisions that govern aspects of attorney conduct in bankruptcy cases, but have no

application in other federal litigation. The Bankruptcy Code contains several provisions that govern attorney conduct, such as the requirement that an attorney for a trustee or committee be "disinterested," limitations on compensation, and a prohibition against sharing compensation. See 11 U.S.C. §§ 327-331, 504. Second, the Federal Rules of Bankruptcy Procedure contain several rules governing aspects of attorney conduct, such as Rule 2014 on disclosures of relationships with parties in interest.

Rule 1(c) renders the Federal Rules of Attorney Conduct generally inapplicable in bankruptcy cases and proceedings. It is anticipated that the Advisory Committee on Bankruptcy Rules will consider formulating additional standards for attorney conduct applicable in bankruptcy cases and proceedings if, by local bankruptcy rule, the attorney conduct standards of the district court are made applicable.

RULE 2. CONFIDENTIALITY OF INFORMATION

(a) A lawyer must not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, for disclosures required by law or court order, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Federal Rules of Attorney Conduct 7 and 9(b) must reveal, such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to another's financial interests or property; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.6 almost in its entirety. There is one significant exception. The rule modifies Rule 1.6 to permit disclosures of confidential information in order to prevent a fraudulent act which would result in substantial injury to the financial interests or property of another. (The ABA Model Rule 1.6 only permits such disclosure in the cases of criminal acts "likely to result in imminent death or substantial bodily harm.") The rule was modified to reflect prevailing state views which permit this type of disclosure. Thirty-six states permit disclosure under these circumstances, and five states mandate disclosure in these circumstances. By permitting disclosure, the federal rule comports with or avoids conflict with forty-one jurisdictions, and follows the trend in the most recent state adoption of the Model Rules, such as in Massachusetts, effective Jan. 1, 1998. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 2 (Jan. 8, 1996). In addition, an exception for disclosures "required by law or court order" has been added. See ABA Code of Professional Responsibility DR-4-101 (C) (2). Finally, the rule

provides a reference to Federal Rules of Attorney Conduct 7 and 9 which are based on the ABA Model Rules of Professional Conduct 3.3 and 4.1 respectively. This reference emphasizes that Federal Rule of Attorney Conduct 2(b) is not the only provision of these rules which deals with disclosure of information and that in some circumstances disclosure of such information may be required and not merely permitted.

Small stylistic changes have been made in all of the ABA Model Rules, even those adopted without substantive changes. For example, in Rule 2 the ABA Model Rule 1.6 (a) uses "shall," and the Federal Rule 2(a) uses "must." This is to comport with uniform federal drafting guidelines. See Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (1997), 29.

While the "Comments" published with the ABA Model Rules have not been formally adopted, even for those federal rules that closely follow the ABA models, they are useful as "guides to interpretation." See ABA Model Rules, "Preamble," Sec. 21, in Model Rules of Professional Conduct (1998 ed.), 8.

RULE 3. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer must not represent a client if that representation will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer must not represent a client if that representation may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation; when representation of multiple clients in a single matter is undertaken, the consultation must include explanation of the implications of the common representation and the advantages and risks involved.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.7 in its entirety, with small stylistic changes. Over the last five years, the largest number of federal disputes involving attorney conduct concerned conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116, 189-210.

This Rule, and Rules 5, 6 and 8, do not prevent a trial judge from disqualifying an attorney when necessary to protect the integrity of a judicial proceeding, despite client consent to the representation. See Wheat v. United States, 486 U.S. 153 (1988).

RULE 4. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing.

(b) A lawyer must not use information relating to representation of a client to the client's disadvantage unless the client consents after consultation, except as permitted or required by Federal Rules of Attorney Conduct 2 or 7.

(c) A lawyer must not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Until the representation of a client ends, a lawyer must not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer must not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on the client's behalf.

(f) A lawyer must not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship; and

(3) information relating to the representation of a client is protected as required by Federal Rules of Attorney Conduct 2, 7, and 9.

(g) A lawyer who represents two or more clients must not participate in making aggregate settlement of claims of or against the clients, or in a criminal case an aggregated agreement on guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer must not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Nor may a lawyer settle a claim for such liability with an unrepresented person or former client without first advising that person in writing to seek independent representation.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse must not represent a client whose interests in that matter are directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client consents after a consultation about the relationship.

(j) A lawyer must not acquire a proprietary interest in a claim or in the subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.8 in its entirety except for small stylistic changes and cross references to these rules. Again, over the last five years, the largest category of federal disputes involving attorney conduct centered on conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116. DR 4-101(B)(2) and (3), DR 5-103, DR 5-104, DR 5-106, DR 5-107(A) and (B), DR 5-108 and DR 6-102 are the corresponding provisions of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 205-210.

RULE 5. CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter must not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests unless the former client consents after consultation.

(b) (1) Except as noted in (b)(2), a lawyer must not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client:

(A) whose interests are materially adverse to that person; and

(B) about whom the lawyer had acquired information protected by Federal Rules of Attorney Conduct 2 and 5(c), that is material to the matter.

(2) The former client may, after consultation, consent to the type of representation described in (b)(1).

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not later:

(1) use information relating to the representation to the disadvantage of the former client except as Federal Rule of Attorney Conduct 2 and 7 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Federal Rule of Attorney Conduct 2 or 7 would permit or require with respect to a client.

NOTE

This rule adopts the substance of ABA Model Rule of Professional Conduct 1.9 in its entirety except for the cross references to these rules. DR 4-101(B) and (C) and DR 5-105(C) are the corresponding provisions of the ABA Code of

Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 6. IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, they must not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Federal Rules of Attorney Conduct 4, 5(c), or 6.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from later representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information that is both protected by Federal Rules of Attorney Conduct 2 and 5(c), and material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Federal Rule of Attorney Conduct 3.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.10 almost in its entirety except for small stylistic changes and cross references to these rules. The rule does not include a federal rule similar to ABA Model Rule 2.2, dealing with the lawyer as an intermediary. No recent federal cases have involved ABA Model Rule 2.2, and the matter should be left to state rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (no reported federal disputes involve Model Rule 2.2). See Working Papers, supra, 189-210. DR 5-105(D) is the corresponding provision of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 7. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer must not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer must take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Federal Rule of Attorney Conduct 2.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer must inform the tribunal of all known material facts that will enable the tribunal to make an informed decision, even if the facts are adverse.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.3 in its entirety except for small stylistic changes and a cross reference to these rules. To preserve the integrity of the court proceedings, candor toward the tribunal is a matter of significant federal interest, and as such, requires a single uniform standard applicable in all federal courts. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 2-3 (Jan. 8, 1996). The rule is also needed in continuing Federal Rules of Attorney Conduct Rule 2 and 4, where it is cross-cited. DR 7-102 and DR 7-106(B) are the corresponding provisions of

the ABA Code of Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 8. LAWYER AS WITNESS

(a) A lawyer must not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer's disqualification would work a substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from so doing by Federal Rules of Attorney Conduct 3 or 5.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.7 in its entirety, except for small stylistic changes and a cross reference to these rules. Between 1990-1995, ten percent of reported federal disputes involve lawyer as witness rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995). See Working Papers, supra, 100-102, 107-116, 189-210. This trend dropped to five percent between July 1, 1995 and March 23, 1996, id., 196, but the 1990-1996 culminated totals are still high at 49 cases, or more than nine percent. Id., 203. Thus, a federal lawyer as witness rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provisions of the ABA Code of Professional Responsibility are DR 5-101(B) and DR 5-102. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 9. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer must not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client, unless disclosure is prohibited by Federal Rule of Attorney Conduct 2.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 4.1 in its entirety except for a small stylistic change and a cross reference to these rules. This rule is rarely invoked in federal court proceedings, but it is a central rule of conduct. See Working Papers, supra, 203. See Roger C. Cramton, Memorandum to Participants of the Special Study Conference (Jan. 8, 1996). It is also needed in applying Rule 2, supra, where it is cross-cited. The corresponding provision of the ABA Model Code of Professional Responsibility is DR 7-102. See Working Papers, supra, pp. 116, 210.

RULE 10. COMMUNICATIONS WITH PERSONS REPRESENTED BY COUNSEL

(a) **General Rule.** A lawyer who is representing a client in a matter must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by:

(1) constitutional law, statute, or an agency regulation having the force of law;

(2) a decision or a rule of a court of competent jurisdiction;

(3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith; or

(4) paragraph (b) of this rule.

(b) **Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement.** A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction, may communicate with a person known by the government lawyer to be represented by a lawyer in the matter if:

(1) the communication occurs prior to the person's having been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication relates to the investigation of criminal activity or other unlawful conduct; or

(2) the communication occurs after the represented person has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication is:

(A) made in the course of any investigation of additional, different, or ongoing criminal activity or other unlawful conduct; or

(B) made to protect against a risk of death or bodily harm that the government lawyer reasonably believes may occur; or

(C) made at the time of the arrest of the represented person and after he or she is advised of his or her rights to remain silent and to counsel and voluntarily and knowingly waives those rights; or

(D) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel for that communication.

(c) Organizations as Represented Persons.

(1) When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual is not seperately represented with respect to the subject matter of the communication, and

(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(i) a current member of the control group of the represented organization; or

(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding

the organization with respect to proof of the matter.

(2) The term "control group" means the following persons (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the organization; and (B) to the extent not encompassed by the foregoing, the chair of the organization's governing body, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a principal business unit, division, or function (such as salaries, administration, or finance) or performs a major policy making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d) **Limitations on Communications.** When communicating with a represented person pursuant to this Rule, a lawyer must not:

(1) inquire about information regarding litigation strategy or legal arguments for counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel; or

(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by paragraph (a) or (b) (2) (D).

NOTE

This rule is based on the tentative outcome of negotiations between the Department of Justice and the Conference of Chief Justices, "Discussion Draft, December 19, 1997," with the addition of some technical stylistic changes. As such, it differs from the comparable ABA rule, ABA Model Rule 4.2, in many respects. See ABA Formal Opinion 97-408 (1997); ABA Formal Opinion 95-396 (1995) and ABA Informal Opinion 1377 (1997). This rule, as negotiated, has an extensive "Comment." See "Discussion Draft, December 19, 1997," "Comment," pp. 1-6.

The Conference of Chief Justices considered this "Discussion Draft" at its regular Midwinter Meeting on January 25-29, 1998. At the request of officials of the American Bar Association and others, the Conference postponed the matter to its next meeting, scheduled for August 2-6, 1998. See Memorandum of February 6, 1998 from Chief Justice Thomas R. Phillips, President, Conference of Chief Justices. Obviously, if the Conference of Chief Justices, the Department of Justice, and the American Bar Association can agree on a draft rule, it will be the presumptive candidate for the final version of Rule 10.

From 1990-1995, twelve percent of reported federal cases involve rules governing communications with represented persons. See Daniel R. Coquillette, *Study of Recent Federal Cases* (1990-95) *Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995). See Working Papers, supra, 99-211. This trend increased between July 1, 1995 and March 23, 1996, to sixteen percent. Id., 196. Thus, a federal rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provision of the ABA Code of Professional Responsibility is DR 7-104. See id., 115-116, 199-200, 209-210.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 46. Attorneys

(a) Admission to the Bar.

(1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) **Application.** An applicant must file an application for admission, on a court-approved form that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I,_____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) **Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) has failed to comply with the court's standards governing attorney conduct. ~~is guilty of conduct unbecoming a member of the court's bar~~.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing (if requested) is held, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it ~~for conduct unbecoming a member of the bar or~~ for *violating* ~~failure to comply with~~ *the court's standards governing attorney conduct or any of these rules.* ~~any court rule~~. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(d) Attorney Conduct. *The court's standards governing attorney conduct are as follows:*

(1) Proceedings Before District or Other Court. The standards of attorney conduct of a district or other court govern any act or omission of an attorney connected with proceedings before that court; and

(2) Any Other Act or Omission by Attorney. The standards of the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. § 2072, govern any other act or omission by an attorney.

NOTE

The changes to Fed. R. App. P. 46(b) (1) (B) and (c) eliminate the vague "conduct unbecoming" text and replace it with the more specific standards of the new section (d). This permanently resolves the concerns about ambiguity voiced by the Supreme Court in In re Snyder, 472 U.S. 634, 645 (1985). See also Matter of Hendrix, 986 F. 2d. 195, 201 (7th Cir. 1993) and In re Bithony, 486 F. 2d 319, 324 (1st Cir. 1973). See the full discussion in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 235-247. (Hereafter, "Working Papers.")

The new Section (d) eliminates the many inconsistent local standards that have previously governed attorney conduct issues in the courts of appeals. See the extensive studies in Working Papers, supra, 10, 73-77, 235-247, 289-291. Section (d) (1) requires that the court of appeal look to the standards of the relevant district or other court when considering an attorney's act or omission before such courts. Otherwise, the court should look to the new Federal Rules of Attorney Conduct, set out as Fed. R. Civ. P. Appendix 1. The standards of all district courts will also be established by the Federal Rules of Attorney Conduct under the new Fed. R. Civ. P. 83(c), but bankruptcy proceedings may be governed by different standards due to the Bankruptcy Code, particularly 11 U.S.C. § 327 (a). See discussion in Working Papers, supra, 293-333.

It should be noted that, by adopting the Federal Rules of Attorney Conduct, the new Fed. R. App. P. 46 (d) incorporates a choice of law rule, Rule 1 (a) of the Federal Rules of Attorney Conduct, closely modeled after Rule 8.5 (b) (1) of the ABA Model Rules.

FEDERAL RULES OF CIVIL PROCEDURE

(Addition of a new Fed. R. Civ. P. 83(c))

RULE 83: RULES BY DISTRICT COURTS

(c) *ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, enacted as an Appendix to these rules, together with other rules adopted under 28 U.S.C. § 2072.*

NOTE

The new part (c) of this rule promotes uniformity in the standards of conduct for all attorneys admitted to practice before federal district courts. In the past, the federal district courts relied upon many different local rules to prescribe standards of attorney conduct. See, D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* 1-3 (July 5, 1995) (Appendices I and II charted the many different attorney conduct rules in the 94 districts). These local rules took many forms. Some were ambiguously drafted. Others adopted conflicting standards of conduct. Still others adopted standards so vague they may have violated constitutional due process principles. See Report, supra, at 11-23, Appendix IV (Appendix IV contains Professor Linda Mullinex's article entitled, *Multiforum Federal Practice: Ethics and Erie,* in 9 Geo. J. Legal Ethics 89 (1995)); Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics,* 29 Geo. L. Rev. 137, 151-58 (1994). Finally, some districts failed to incorporate any standards of conduct in their local rules, leaving attorneys to guess the applicable standards. See Report, supra, at 8-11; Richardson, supra, at 152. This rule, applicable in all districts, seeks to eliminate the confusion. See D.R. Coquillette, *Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct,* Appendix IV (Dec. 1, 1995) (containing: Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created,* 64 Geo. Wash. L. Rev. (1996)); Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 3 (Jan. 8, 1996). See also D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), which contains the reports cited above, among others. (Hereafter, "Working Papers.")

The new part (c) leaves unchanged other uniform federal rules that already govern attorney conduct. See, for example, Fed. R. Civ. P. 11, 26(g), 30(d), and 37(b).

The proposed new Fed. R. App. P. 46 would also institute the Federal Rules of Attorney Conduct in the courts of appeals, but bankruptcy proceedings are not included due to special policy concerns and the provisions of the Bankruptcy Code, especially § 327. See 11 U.S.C. § 327(a). See D.R. Coquillette, Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct, May 11, 1997, set out in Working Papers, supra, 293-333.

TO: Chairs and Reporters, Advisory Committees

FROM: Daniel R. Coquillette
Reporter, Standing Committee

CC: Hon. Alicemarie Stotler, Chair
Standing Committee

DATE: February 11, 1998

RE: Federal Rules of Attorney Conduct

I. Introduction

The Standing Committee is charged by 28 U.S.C. § 2073 (b) "to maintain consistency" among the federal rules and "otherwise promote the interest of justice." Attorney conduct in the federal courts is now governed by literally hundreds of local rules, many of which are inconsistent with each other and with the rules of the relevant state courts. Our studies show a genuine and persistent problem, at least in district and bankruptcy courts. Whether the Congress will subscribe to any additional national rules is an issue to be met in the future, but federal rules regulating attorney conduct already exist in abundance. Moreover, the ABA, through its "Ethics 2000" Project, has expressed initial concern about the relationship between state and federal rules governing attorney conduct, a concern also shared by the Department of Justice and the Conference of Chief Justices, although these three entities may have very different views about appropriate solutions.

II. Status

As you know, the Standing Committee voted at its January 8-9, 1998 meeting to refer the draft Federal Rules of Attorney Conduct to the Advisory Committees for comment. At the suggestion of the Honorable Alicemarie Stotler, Chair, I am writing to indicate what help is expected from the Advisory Committees.

With this memo, you should receive two additional items for circulation to your Committees: 1) a memorandum from me to the Standing Committee of December 1, 1997, describing the fundamental options before the Committees (hereafter "Options Memo") and 2) a draft set of Federal Rules of Attorney Conduct, slightly amended for technical reasons from the set distributed with the Standing Committee Agenda in January (hereafter the "Draft Rules").

You will also recall a discussion about whether such Federal Rules of Attorney Conduct, if adopted through the Rules Enabling Act, would be best enacted as a free

standing set of federal rules, or included as an appendix to the Federal Rules of Civil Procedure. The advice of your committees is being sought on this issue. To aid discussion, a draft of possible amendments to Fed. R. Civ. P. 83 (1) and Fed. R. App. P. 46 is included. In addition, the "Options Memo" includes a possible amendment to Fed. R. Crim. P. 57 (d), at page 3.

Finally, every member of your Committees should have received a copy of the Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (September, 1997). These Working Papers include seven extensive studies prepared by me and by the Federal Judicial Center over a four year period, including studies specially focused on Courts of Appeals (Study V, June 20, 1997) and on Bankruptcy Cases (Study VI, June 20, 1997). The "Options Memo" and the "Draft Rules" are cross-referenced throughout to these Working Papers.

III. What is Expected of the Advisory Committees?

The Standing Committee has been reviewing four different options, and has not yet decided which one to pursue. See Options Memo, pages 1-2. One option is to do nothing. A second is to adopt a single uniform federal rule that adopts the current rules of the relevant state courts as the federal rule in the district courts, with a "choice of law" rule for courts of appeals. This, the so-called "dynamic conformity" option, could be achieved by just adopting Rule 1 of the draft Federal Rules of Attorney Conduct. A third option is to apply state standards to all but a "core" of federal rules narrowly drafted to cover only attorney conduct before federal judges or closely related to federal proceedings. (This could be achieved by adopting all ten of the draft Federal Rules of Attorney Conduct.) A fourth option would be to have even fewer "core" federal rules, and adopt only some of the ten draft rules.

The Standing Committee seeks the advice of your Committees on these fundamental options, set out in the "Options Memo." Further, the Standing Committee requests your Committees to examine the "Draft Rules" in light of the special expertise of your Committee. The purpose is not to ask you to redraft these rules yourself, but rather to point out to the Standing Committee where improvements can be made. My task will then be to coordinate the suggestions from all of the Advisory Committees into new drafts and proposals to be considered at the June, 1998 Standing Committee Meeting.

It is expected that certain Advisory Committees will have much less to do than others. In particular, as Study V (1997) of the Working Papers demonstrates, there are almost no attorney conduct cases in the Courts of Appeals, even though the Courts of Appeals have many inconsistent local rules. Apparently, there is no particular problem with attorney conduct at that level. Thus, the Chair and Reporter of the Appellate Advisory Committee have already suggested that they "wait and see" what is decided

for the district and bankruptcy courts, where the problems are much more serious. This is perfectly reasonable.

Bankruptcy proceedings also present a special situation, as Study VI (1997) of the Working Papers demonstrates. There is much to be said for at least considering separate rules governing attorneys in bankruptcy cases, both because of the importance of the Bankruptcy Code, particularly § 327 (11 U.S.C. § 327 (a)), and because bankruptcy cases can present very different issues for public policy and efficiency. See Study VI (June 20, 1997), Working Papers, 294-332. The Bankruptcy Advisory Committee may prefer to focus on developing their own solutions to balkanized local rules in bankruptcy proceedings, rather than comment extensively on the "Draft Rules" included in the memorandum.

The Evidence Advisory Committee also has a relatively specialized frame of reference. Thus, the Standing Committee will be looking to the Civil and Criminal Rules Advisory Committees for the bulk of the assistance. I will be attending all three of these meetings, and will be available to help in any way.

IV. Specific Requests to Individual Committees

In addition to the general advice sought above, there are some specific areas where specialized help would be welcome.

A. Civil Rules Advisory Committee

Should Fed. R. Civ. P. 83 (c) be amended as proposed by the "Draft Rules," or should the Federal Rules of Attorney Conduct be adopted as a new "free standing" set of federal rules? Are there additional changes in the Fed. R. Civ. P. that should be considered in either case? What if the decision is to adopt only Rule 1 of the "Draft Rules," the so-called state "dynamic conformity" approach? Should that one rule be incorporated within the Fed. R. Civ. P., and, if so, where?

B. Criminal Rules Advisory Committee

Should Fed. R. Crim. P. 57 (d) be amended as suggested by Professor Schlueter at pages 2-3 of the "Options Memo"? Does the Committee have comments on "Draft Rule 10," which is based on the most recent discussion draft of a revised ABA Model Rule 4.2, resulting from extensive negotiation between the Conference of Chief Justices and the Department of Justice? Are there other Draft Rules which should get special attention because of their application in criminal matters? Finally, should any new Federal Rules of Attorney Conduct be "free standing," or incorporated within the Fed. R. Civ. P. as an appendix to Fed. R. Civ. P. 83, or as an appendix to Fed. R. Crim. P. 57 (d), or both? What if only Draft Rule 1 is adopted, the so-called state "dynamic conformity" approach?

C. Appellate Rules Advisory Committee

It is understood that this Committee may take a "wait and see" approach on the fundamental policy issues, as discussed above. Nevertheless, it would be appreciated if the proposed new draft of Fed. R. App. P. 46 be reviewed for technical errors and drafting suggestions.

D. Evidence Rules Advisory Committee

I am already indebted to Professor Capra for several most useful suggestions. It is understood that the expertise of this Advisory Committee is not directly involved with these proposals, although suggestions relating to unwanted or unforeseen effects by the Draft Rules on evidentiary privileges or other evidence matters would be gratefully received.

E. Bankruptcy Rules Advisory Committee

As suggested before, the Bankruptcy Committee may wish to consider a separate system of rules governing bankruptcy proceeding. Such a system is discussed at length in Study VI (June 20, 1997), Working Papers, 294-332. The Federal Judicial Center has volunteered to assist by conducting an empirical study of bankruptcy proceedings similar to that completed for district courts generally last June. See Study VII (June, 1997), Working Papers, 335-410.

Two specific questions remain. First, Study VI indicates that most bankruptcy proceedings are, at least technically, governed by the local rules of the relevant district courts, although those rules are often ignored. Should any adoption of a Federal Rules of Attorney Conduct replacing such district court local rules await resolution of the problems in bankruptcy proceedings? Second, bankruptcy policy is currently under review in a number of forums. Will these reviews impact rules governing attorney conduct?

V. Next Steps

At the meeting on June 18-19 in Santa Fe, the Standing Committee will consider all suggestions and criticism from the Advisory Committees. It may then issue the Federal Rules of Attorney Conduct for public comment, which does not imply ultimate approval, or it may amend the Draft Rules and resubmit them to the Advisory Committees for further work. It could also hold the Draft Rules and await a coordinated package of rules governing attorney conduct in bankruptcy procedures, or input from the ABA's "Ethics 2000" Project (chaired by Chief Justice Norman Veasey), or both.

In any case, the Standing Committee is most grateful for all the help it has already received from you and your Committees, and greatly appreciates your further efforts and suggestions.

TO: Standing Committee

FROM: Daniel R. Coquillette, Reporter

DATE: December 1, 1997

RE: Federal Rules of Attorney Conduct

1. Charge

At our last meeting, I was asked by the Committee to draft uniform federal rules that would supersede the complex thicket of local rules now governing attorney conduct in the federal courts. This follows two invitational conferences of experts, on January 9-10, 1996 in Los Angeles and on June 18-19, 1996 in Washington, which focused on this problem. There were also seven special reports, five by this reporter and two by Marie Leary of the Federal Judicial Center. These are now available printed together as Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), hereafter "Working Papers." (I strongly recommend that you keep this useful volume at hand in reviewing what follows. If you need an extra copy, please call.)

In drafting the attached rules, I had important assistance from Bryan A. Garner, John K. Rabiej, and Alan N. Resnick, Reporter to the Bankruptcy Advisory Committee. I am most grateful. Errors are my own.

These rules are now being reviewed by the Style Sub-Committee, under the regular procedures. If the Standing Committee approves of a version of this draft, the rules will be sent next to the relevant advisory committees for review at their spring meetings. The final draft would then come back to this Committee at its June meeting for a vote on publication.

2. Basic Structure

I have attached just one "rule system," but it does, in fact, offer the Committee four options:

1. To accept the complete package, which establishes a narrow core of uniform federal rules, the ten "The Federal Rules of Attorney Conduct." All other matters would be governed by current state standards, the so-called "dynamic conformity" model;

2. To adopt only some of the ten proposed uniform Federal Rules of Attorney Conduct, i.e. only the conflict of interest rules;

3. To accept only the new uniform rule that establishes a state standard, with no core of uniform federal standards at all. (This would mean adopting only Rule 1 of the Federal Rules of Attorney Conduct);

4. To adopt none of the above, and leave the matter to the present system of local rules.

There is one option I have not included. Based on my extensive studies and discussions with the Advisory Committees on Appellate Rules and Bankruptcy Rules, I would strongly recommend that district courts and appeals courts be treated alike, and that bankruptcy courts, and other special courts, be treated separately. See Working Papers, supra, 235-292 (appeals courts); 293-334 (bankruptcy courts). Thus, these proposed new rules cover just district courts and appeals courts.

3. New Fed. R. Civ. P. 83 (c)

At the moment, attorney conduct in the district courts is governed by local rules promulgated pursuant to Fed. R. Civ. P. 83. It is thus logical to start there. I have drafted a new subdivision (c) which would provide that the standards of attorney conduct in the district courts are established by the ten Federal Rules of Attorney Conduct, together with other uniform rules. (Such as Fed. R. Civ. P. 11.) This supersedes the existing local rules. The ten Federal Rules of Attorney Conduct are incorporated by Rule 83 (c) as Fed. R. Civ. P. Appendix 1, just as the Appendix of Forms is incorporated by Rule 84. Like the Appendix of Forms, the Federal Rules of Attorney Conduct would go through the full Rules Enabling Act process established by 28 U.S.C. § 2072 (b).

There is also a practical advantage with this structure. On being admitted to the bar of a federal district court or appeals court, a lawyer would be handed a small pamphlet containing the ten Federal Rules of Attorney Conduct. These rules would always govern where relevant. Otherwise, Rule 1 of the Federal Rules of Attorney Conduct directs the attorney to the current standards for the state where the district court is located or, as in the case of a court of appeals, to a choice of law rule selecting the appropriate state standard.

It has been suggested by the Reporter to the Criminal Rules Advisory Committee, Professor David Schlueter, that a parallel change should be made to the Federal Rules of Criminal Procedure. This would assure that identical rules should govern civil and criminal proceedings-- a fundamental assumption of the ABA Model Rules. (There are certain exceptions. See ABA Model Rule 3.8: "Special Responsibilities of a Prosecutor") Professor Schlueter suggests that:

> "A possible candidate for that new provision might be existing Rule 57, Rules by District Courts, which in some respects already parallels Civil Rule 83. I would recommend that the new language already proposed for

Civil Rule 83 simply be added to what would become a new subdivision (d) in Criminal Rule 57, as follows:

Rule 57. Rules by District Courts

* * * * *

(d) ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. §§ 2072 and 2075."

As Professor Schlueter correctly observes, this would be a matter for the Advisory Committee on Criminal Rules.

4. New Fed. R. App. P. 46

Of course, the courts of appeals already have a uniform rule governing attorney conduct, Fed. R. App. P. 46. This rule establishes the notoriously vague "conduct unbecoming a member of the bar" standard. After In re Snyder, 472 U.S. 634 (1985), courts of appeals have adopted many different local rules to give Rule 46 some specificity of content. See Working Papers 239-240, and cases cited. (In re Snyder is set out in full at Working Papers 265-271.) Thus the advantages of uniformity have been lost.

The new Fed. R. App. P. 46 would adopt the Federal Rules of Attorney Conduct, except for matters arising before other courts. There the standards of the other court will be applied. (Of course, under the new Fed. R. Civ. P. 83 (c) district courts will also follow the Federal Rules of Attorney Conduct, but not necessarily bankruptcy courts.) Under Rule 1 of the Federal Rules of Attorney Conduct, the appeals court will have a choice of law rule selecting an appropriate state standard, unless the conduct falls within the ambit of the other Federal Rules of Attorney Conduct. See Fed. R. Attny. Conduct 1 (a) (2).

There are in fact very few cases involving attorney conduct in the courts of appeals, and most of those involve matters arising in the district courts. There is every reason to amend Fed. R. App. P. 46 to track the district court rule. See Working Papers, supra, 237-247.

5. The Federal Rules of Attorney Conduct (Fed. R. Attny. Conduct)

Eight of the ten Federal Rules of Attorney Conduct closely follow the substance of the ABA Model Rules, which have already been adopted in the majority of state and federal courts. (Some stylistic changes have been made by Bryan Garner to conform these rules with the Guidelines for Drafting and Editing Court Rules (1996). See Working Papers, supra, 45-77. The exceptions are Rule 1 and Rule 10. Rule 1 sets up

the "dynamic conformity" with state standards, and is closely modeled on Model Local Rule 4 of the Federal Rules of Disciplinary Enforcement, first recommended by the Committee on Court Administration and Case Management in 1978. It also contains a choice of law rule, which closely follows ABA Model Rule 8.5.

Rule 10 is based on the most recent negotiations between the Department of Justice and the Conference of Chief Justices relating to "Communication with Persons Represented By Counsel," Tentative Working Draft, July 1, 1997. It is different from ABA Model Rule 4.2. Nearly 12% of all controversies between 1990 and 1996 in federal court relating to attorney conduct concerned communications with represented parties. See Working Papers, supra, 201-205.

Four of the other rules relate solely to conflict of interest standards. See Rules 3, 4, 5 and 6, tracking ABA Model Rules 1.7, 1.8, 1.9 and 1.10. These rules together account for 44% of all attorney conduct controversies in the federal courts. See Working Papers, supra, 100-102, 107-116, 189-210. They are also closely cross-referenced to each other. The Committee may wish to add provisions to Rule 6 permitting some "screening." Otherwise state standards will apply, which usually limit any screening to former public officers or employees. See ABA Model Rule 1.11.

Three of the remaining rules concern the related subjects of confidentiality, candor toward the tribunal, and truthfulness in statements to others. See Rules 2, 7, and 9, tracking ABA Model Rules 1.6, 3.3, and 4.1. These rules are also cross-referenced to each other. While there rules together account for only 6% of all attorney conduct controversies in federal courts, they all relate to issues that are central to the judicial process. See Roger C. Cramton, Memorandum to Participants of the Special Conference, 2 (Jan. 8, 1996).

The last rule, Rule 8, is the "Lawyer as Witness" rule. It tracks ABA Rule 3.7, and cross-references Rules 3 and 5. This rule accounts for a surprising share of federal court attorney controversies between 1990 and 1996-- over 9.5%. See Working Papers, 203. It is also an issue which directly confronts the tribunal.

Altogether, Rules 2-10 account for nearly 72% of the attorney conduct issues raised in federal courts from 1990-1996. See Working Papers, supra, 201-205. This leaves only 28% of the issues previously governed by local rules for determination by reference to state standards under Rule 1. Of course, since many of the state standards are also based on the ABA Model Rules, the actual uniformity would be even greater.

6. Conclusion

The Standing Committee is mandated by Congress to "maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073 (b). These rule changes replace nearly one hundred differing local rules with a single set of ten rules. These follow the standards already adopted in a majority of state and federal courts. The new rules are also limited to matters particularly concerning the federal courts and, indeed,

account for nearly 72% of all federal attorney controversies from 1990-1996. For all the rest, Rule 1 refers the court to dynamic conformity with appropriate state standards. If you have any questions, do not hesitate to call me at 617-552-8650 or FAX 617-576-1933.

FORDHAM Agenda Item IIE
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Parent-Child Privilege Report
Date: March 1, 1998

I have been informed by John Rabiej that Senator Leahy is introducing legislation that would require the Judicial Conference to report to Congress on whether the Federal Rules of Evidence should be amended to include a parent-child privilege. The bill is similar in nature to the bill requiring a report on the advisability of a rape counselor privilege--a report this Committee prepared last year. I do not yet have a copy of the proposed legislation. However, I am told that it will give the Judicial Conference 180 days in which to prepare a report. Because time is of the essence, it might be advisable if we could agree on a report during the April meeting. Therefore, I have prepared a proposed draft report, which follows. I also include this Committee's report on the rape counselor privilege, and a recent case from the Third Circuit rejecting the parent-child privilege.

The proposed report is simply a draft. It stakes out a position, but the Committee must make an independent decision on whether legislation adopting a parent-child privilege is desirable. Obviously, if the Committee decides that such legislation is desirable, the report will have to be changed accordingly. Moreover, the Report will have to be changed in any event to adapt to the request by Congress as to what specific kind of privilege they are interested in. The question is whether the envisioned "parent-child privilege" is intended to be confidentiality-based, or whether it is intended to protect against the giving of any adverse testimony. Given the Lewinsky matter, which appears to have spurred the Congressional interest in the issue, it appears that the envisioned privilege is one that would protect against adverse testimony.

Note that the Report is written as coming from the Judicial Conference. If this Committee approves the Report, it will be referred to the Standing Committee with the recommendation that the Standing Committee recommend adoption by the Judicial Conference.

Proposed Report on Parent-Child Privilege

The Federal Rules of Evidence should not be amended to include a parent-child privilege. An amendment would lead to uncertain application and inconsistent treatment of privileges, and would be costly to the search for truth.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Congress rejected a detailed list of privileges in favor of a common law, case-by-case approach. Given this background, it is not advisable to single out a parent-child privilege for legislative enactment. Amending the Federal Rules to include a parent-child privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. The Judicial Conference believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving testimony by parents against their children or children against their parents. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar.

The adoption of a parent-child privilege would be contrary to both state and federal common law. All nine federal courts of appeals to consider the issue have rejected the parent-child privilege. See the cases collected in *In re Grand Jury,* 103 F.3d 1140 (3d Cir.), *cert. denied,* 117 S.Ct. 2412 (1997). Moreover, every state supreme court that has addressed the issue has rejected the privilege, and only four states have protected parent-child communications in some manner. Id. at 103 F.3d 1147-48. No state or federal law supports a privilege that would give a witness a right to refuse to give any adverse testimony against their parent or child. Such uniform authority counsels heavily against the legislative adoption of a parent-child privilege.

The Conference also notes that it would be difficult to define the appropriate contours of a parent-child privilege. Questions necessarily arise as to whether such a privilege should apply to protect adult children; grandparents; caretakers who have a "parental" relationship with a child; adoptive parents; or siblings. The difficulty in limiting the privilege counsels caution in adopting it.

For these reasons, the Judicial Conference recommends that the Federal Rules of Evidence not be amended to include a parent-child privilege. Sympathy alone is not enough to justify an unprecedented privilege that would, in many cases, prevent parties and the courts from reaching the truth.

Report on Rape Counselor Privilege
(Approved and Submitted by the Judicial Conference)

The Federal Rules of Evidence should not be amended to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. An amendment is not necessary to guarantee that the confidentiality of these communications will be fairly and adequately protected in federal court proceedings.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Recently the Supreme Court, operating under the common law approach mandated by Rule 501, recognized the existence of a privilege under federal law for confidential statements made in psychological therapy sessions. The Court specifically held that this privilege protected confidential statements made to a licensed clinical social worker in a therapy session. *Jaffee v. Redmond*, 116 S.Ct. 812 (1996). The *Jaffee* Court further held that the privilege was absolute rather than qualified.

While the exact contours of the privilege recognized in *Jaffee* remain to be developed, the Court's generous view of the therapeutic privilege can be adequately applied to protect confidential communications from sexual assault victims to licensed therapists or counselors. In light of the recency of *Jaffee*, and the well-entrenched common law approach to privileges set forth in the Federal Rules, the Committee concludes that legislative intervention at this time is neither necessary nor advisable. There is every reason to believe that confidential communications from victims of sexual assault to licensed therapists and counselors are and will be adequately protected by the common law approach mandated by Rule 501. At the very least, the federal courts should be given the chance to apply and develop the *Jaffee* principle before legislative intervention is considered.

Most importantly, it is not advisable to single out a sexual assault counselor privilege for legislative enactment. Amending the Federal Rules to include a sexual assault counselor privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. The Committee believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving sexual assault in the federal courts. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar.

For these reasons, the Committee recommends that the Federal Rules of Evidence not be amended to include a specific privilege for confidential communications from sexual assault victims to their therapists or counselors.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
103 F.3d 1140; 1997

JUDGES: BEFORE: MANSMANN, SAROKIN, * and GARTH, Circuit Judges. BEFORE: MANSMANN, GREENBERG, and GARTH, Circuit Judges. MANSMANN, J., concurring and dissenting.

* Judge Sarokin retired from office prior to the filing of our opinion.
OPINIONBY: GARTH

OPINION: [*1142] OPINION OF THE COURT

GARTH, Circuit Judge:

Three appeals presenting the same critical issue are before us. One appeal originated in the District Court of the Virgin Islands at docket number 95-7354. The other two appeals pertaining to the same Delaware defendant originated in the District Court of Delaware at docket numbers 96-7529 and 96-7530. n1

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n1 Throughout this opinion, where separate identification of the appeals is appropriate, we will refer to the appeal which came from the District Court of the Virgin Islands as the "Virgin Islands appeal" and the appeals from the District of Delaware as the "Delaware appeals".

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We scheduled oral argument in all three appeals on the same day inasmuch [**3] as they raised the same question - should this court recognize a parent-child privilege? The Delaware appeals also challenge the adequacy of a Schofield affidavit and charge that the in camera ex parte proceeding permitted by the district court constituted a deprivation of due process. We answer the questions presented by holding that a parent-child privilege should not be recognized, and we affirm the district court's rulings which rejected the appellants' objections to the Schofield affidavit and in camera ex parte proceeding.

I.

The facts and procedure of the Virgin Islands case giving rise to one appeal, and of the Delaware case giving rise to two appeals, will be stated separately. n2

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n2 Due to the nature of the proceedings, the district courts in both matters impounded the entire record in each case to protect the privacy interests of the parties. Consequently, we do not identify by name either the father or the son who is the target of the grand jury investigation in the Virgin Islands case; nor the daughter or the father who is the target of the grand jury investigation in the Delaware case.

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Docket Number 95-7354: In the Virgin Islands case, the grand jury sitting in St. Croix subpoenaed the father of the target of the grand jury investigation as a witness. n3 The target of the grand jury proceeding was the son of the subpoenaed witness. The son became the target of a government investigation as a result of "certain transactions that [he] was allegedly involved in." Tr. at 11. [*1143] At the time of the alleged transactions, the son was eighteen years old.

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n3 The term of the grand jury in the Virgin Islands case was to have ended on September 17, 1996. However, by Order of the District Court of the Virgin Islands entered on September 3, 1996, the term was extended until March 17, 1997.

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The grand jury subpoenaed the target's father to testify on April 18, 1995. The father, a former FBI agent, lived with his wife and son in St. Croix. On April 17, 1995, based on his belief that the grand jury intended to question him about conversations that he had had with his son, the father moved to quash the subpoena, [**5] asserting that those conversations were privileged from disclosure under Fed. R. Evid. 501.

The father testified, at a hearing before the district court, that he and his son "had an excellent relationship, very close, very loving relationship." Tr. at 4. He further testified that if he were coerced into testifying against his son, "[their] relationship would dramatically change and the closeness that [they] have would end . . . ." Id. at 5. The father further explained that the subpoena would impact negatively upon his relationship with his son:

I will be living under a cloud in which if my son comes to me or talks to me, I've got to be very careful what he says, what I allow him to say. I would have to stop him and say, "you can't talk to me about that. You've got to talk to your attorney." It's no way for anybody to live in this country.

Id. at 6.

On June 19, 1995, the district court entered its order denying the father's motion to quash. On the same day, the district court granted the targeted son's motion to intervene and then stayed its order which denied the quashing of the father's subpoena pending any appeal. The court's memorandum opinion and [**6] order, although clearly sympathetic with the plight of the subpoenaed father, "regretfully declined to recognize [a parent-child] privilege" because the Third Circuit had yet to address the issue and "every United States Court of Appeals that has confronted this question has declined to recognize the parent-child privilege." In re Grand Jury Proceeding, Misc. No. 95-0009, at 14 (D.V.I. June 19, 1995). Appeal of the June 19, 1995 order was promptly taken by the targeted son on June 22, 1995. n4

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n4 The original appeal in the Virgin Islands case was heard in St. Thomas by a panel of this court of which Judge Sarokin was a member. Prior to the filing of an opinion, Judge Sarokin retired from office and Judge Greenberg replaced him on the panel. Panel rehearing was ordered.

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Docket Numbers 96-7529 & 96-7530: In the Delaware case, a sixteen year old minor daughter was subpoenaed to testify before the grand jury, as part of an investigation into her father's participation in an alleged interstate kidnapping [**7] of a woman who had disappeared. The daughter was scheduled to testify on September 10, 1996. However, on September 9, 1996, a motion to quash subpoena was made by counsel for the daughter and her mother, as well as by separate counsel for the father. n5

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n5 It appears that although the mother and father of the minor witness have taken similar positions in this litigation, albeit by different counsel, at the time of these proceedings, they were separated.

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The motion sought to bar the testimony of the daughter claiming a parent-child privilege which would cover testimony and confidential communications. "The privilege [was] claimed for confidential communications as well as for protection against being compelled to testify in a criminal proceeding". Joint Motion to Quash Subpoena at P 5.

The district court held a hearing during the morning of September 10, 1996; ordered further briefing due that afternoon n6; and issued a ruling in the late afternoon denying the motion to quash and ordering the minor daughter [**8] to testify before the grand jury that evening.

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n6 The additional briefing was on the issue of whether the daughter's testimony would be material and non-duplicative. During the hearing, the district court placed the burden on the government to make a substantial showing that this threshold was met. The government filed a Schofield affidavit, see infra, and volunteered to furnish further particulars at an in camera ex parte hearing. The parents and daughter opposed the in camera ex parte proceeding, arguing that if they were foreclosed from listening to the government's proffer, there would be no basis upon which they could rebut the evidence presented.

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In the order, the district court reasoned that, because there is "no recognized familial [*1144] privilege", the appropriate process for determining whether to grant the motion to quash was "to weigh the competing interests of the parties in order to determine whether the anticipated testimony of the minor child is material and nonduplicative, thus tipping [**9] the scales toward requiring the testimony". In re Grand Jury, 96-cv-51, at 1 (D. Del. September 10, 1996). The district court concluded that, based on the government's in camera ex parte proffer, "the government's interests in compelling the testimony outweigh the privacy interests asserted by the moving parties" and denied the motion to quash on those grounds. See id. at 2.

Pursuant to the court order, the daughter appeared at court (in an ante-room to the grand jury courtroom) in the evening of September 10, 1995. She refused to testify and was found in

contempt. The district court then stayed the imposition of sanctions during the pendency of these appeals. Appeal of the September 10, 1996 order was promptly made in joint motions by mother and daughter, and father on September 13, 1996. n7

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n7 The appeals in the Delaware case were expedited by this court so that the common issue of parent-child privilege could be heard and resolved in the Delaware and Virgin Island cases at the same time.

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The [**10] district courts had jurisdiction over both the Virgin Islands case and Delaware case under 18 U.S.C. @ 3231. We have appellate jurisdiction over the appeals taken by the intervenors pursuant to 28 U.S.C. @ 1291. See Perlman v. United States, 247 U.S. 7, 12-13, 62 L. Ed. 950, 38 S. Ct. 417 (1918); In re Grand Jury Proceedings (C. Schmidt & Sons, Inc.), 619 F.2d 1022, 1024 (3d Cir. 1980). In addition, in the Delaware case, the daughter appealed on her own behalf after being cited for contempt, providing separate grounds for jurisdiction. See Cobbledick v. United States, 309 U.S. 323, 84 L. Ed. 783, 60 S. Ct. 540 (1940); Alexander v. United States, 201 U.S. 117, 50 L. Ed. 686, 26 S. Ct. 356 (1906); In re Grand Jury Proceedings, 619 F.2d at 1024.

Our review as to all issues, is plenary.

II.

* * *

III.

The central question in these appeals is one of first impression in this court: should we recognize a parent-child testimonial privilege? Appellants argue that recognition is necessary in order to advance important public policy interests such as the protection of strong and trusting parent-child relationships; the preservation of the family; safeguarding of privacy interests and protection from harmful government intrusion; and the promotion of healthy psychological development of children. See Brief of Appellant in Virgin Islands case at 8-9; Brief of Appellant Doe # 1 at 9-14; Brief of Appellant Doe # 2 at 10-20. These public policy arguments echo those advanced by academicians and other legal commentators in the myriad of law review articles discussing the parent-child testimonial privilege. n12

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n12 See, e.g., Yolanda L. Ayala & Thomas C. Martyn, To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter Privileges, 9 St. John's J. Legal Comment. 163 (1993); Daniel R. Coburn, Child-Parent Communications: Spare the Privilege and Spoil the Child, 74 Dick. L. Rev. 599 (1970); David A. Schlueter, The Parent-Child Privilege: A Response to Calls for Adoption, 19 St. Mary's L.J. 35 (1987); Ann M. Stanton, Child-Parent Privilege for

Confidential Communications: An Examination and Proposal, 16 Fam. L.Q. 1 (1982); Larry M. Bauer, Note, Recognition of a Parent-Child Testimonial Privilege, 23 St. Louis U. L.J. 676 (1979); Jeffrey Begens, Comment, Parent-Child Testimonial Privilege: An Absolute Right or an Absolute Privilege?, 11 U. Dayton L. Rev. 709 (1986); Betsy Booth, Comment, Under-Privileged Communications: The Rationale for a Parent-Child Privilege, 36 Sw. L.J. 1175 (1983); J. Tyson Covey, Note, Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege, 1990 U. Ill. L. Rev. 879; Gregory W. Franklin, Note, The Judicial Development of the Parent-Child Testimonial Privilege: Too Big For Its Britches?, 26 Wm. & Mary L. Rev. 145 (1984); Patrick Koepp, Comment, A Parent-Child Testimonial Privilege: Its Present Existence, Whether It Should Exist, and To What Extent, 13 Cap. U. L. Rev. 555 (1984); Bruce N. Lemons, Comment, From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?, 1978 B.Y.U. L. Rev. 1002 (1978); Comment, The Child-Parent Privilege: A Proposal, 47 Fordham L. Rev. 771 (1979); Comment, Confidential Communication Between Parent and Child: A Constitutional Right, 16 San Diego L. Rev. 811 (1979); Note, Questioning the Recognition of a Parent-Child Testimonial Privilege, 45 Alb. L. Rev. 142 (1980); Note, Parent-Child Loyalty and Testimonial Privilege, 100 Harv. L. Rev. 910 (1987); Note, Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy, 52 U. Cin. L. Rev. 901 (1983).

----------End Footnotes---------- [**18]

Although legal academicians appear to favor adoption of a parent-child testimonial privilege, no federal Court of Appeals and no state supreme court has recognized such a privilege. We too decline to recognize such a privilege for the following reasons:

(1)

The overwhelming majority of all courts--federal or state--have rejected such a privilege.
(a) Eight federal Courts of Appeals have rejected such a privilege and none of the remaining Courts of Appeals have recognized such a privilege.
(b) Every state supreme court that has addressed the issue has rejected the privilege, and only four states have protected parent-child communications in some manner. n13

(c) No state within the Third Circuit has recognized a parent-child privilege.

[*1147] (2) No reasoned analysis of Federal Rule of Evidence 501 or of the standards established by the Supreme Court or by this court supports the creation of a privilege.

(3) Creation of such a privilege would have no impact on the parental relationship and hence would neither benefit that relationship nor serve any social policy.

(4) Although we have the authority to recognize a new privilege, we believe the recognition [**19] of such a privilege, if one is to be recognized, should be left to Congress.

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n13 New York is the only state which has a judicially-recognized parent-child privilege; however, the privilege has only been recognized by inferior New York courts.

Idaho and Minnesota are the only states which have recognized a variant of the parent-child privilege through statute. See Idaho Code @ 9-203(7) (1990 & Supp. 1995); Minn. Stat. @ 595.02(1)(j) (1988 & Supp. 1996). It is important to note that neither statute is rooted in the common law.

Massachusetts law prevents a minor child from testifying against a parent in a criminal proceeding. However, the statute does not go so far as to recognize a parent-child testimonial privilege. First, the Massachusetts statute does not create a testimonial privilege; rather it is best described as a witness-disqualification rule. Second, the testimonial bar is not of common-law origin but is statutory. Finally, the statute only bars a minor child, under certain circumstances, from testifying against a parent, and does not extend to children of all ages in all circumstances. See Mass. Gen. L. ch. 233, @ 20 (1986 & Supp. 1996).

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A. FEDERAL AND STATE COURTS HAVE DECLINED TO RECOGNIZE A PARENT-CHILD PRIVILEGE.

1. Eight Federal Courts of Appeals Have Explicitly Rejected the Privilege and None of the Remaining Courts of Appeals Have Recognized the Privilege.

The appellants rely primarily upon law review articles rather than case law authority to support the position that a parent-child testimonial privilege should be recognized. No case law recognizing such a privilege exists. On the other hand, the eight federal Courts of Appeals that have addressed the issue have uniformly declined to recognize a parent-child privilege. See In re Erato, 2 F.3d 11 (2d Cir. 1993); In re Grand Jury Proceedings (John Doe), 842 F.2d 244 (10th Cir.), cert. denied, 488 U.S. 894, 109 S. Ct. 233, 102 L. Ed. 2d 223 (1988); United States v. Davies, 768 F.2d 893 (7th Cir.), cert. denied sub nom. Kaprelian v. United States, 474 U.S. 1008, 88 L. Ed. 2d 464, 106 S. Ct. 533 (1985); Port v. Heard, 764 F.2d 423 (5th Cir. 1985); United States v. Ismail, 756 F.2d 1253 (6th Cir. 1985); In re Grand Jury Subpoena (Santarelli), 740 F.2d 816 (11th Cir.) (per curiam), reh'g denied, 749 F.2d 733 (11th Cir. 1984); United States v. Jones, 683 F.2d 817 (4th Cir. [**21] 1982); In re Grand Jury Proceedings (Starr), 647 F.2d 511 (5th Cir. Unit A May 1981) (per curiam); United States v. Penn, 647 F.2d 876 (9th Cir.) (en banc), cert. denied, 449 U.S. 903, 66 L. Ed. 2d 134, 101 S. Ct. 276 (1980). Moreover, the remaining federal Courts of Appeals that have not explicitly rejected the privilege have not chosen to recognize the privilege either.

Additional federal case law rejecting the privilege can be found in district court cases and in related contexts where the privilege was disapproved. See United States v. Duran, 884 F. Supp. 537, 541 (D.D.C. 1995) ("The general rule in most federal courts is that there is no parent-child privilege."); In re Kinoy, 326 F. Supp. 400, 406 (S.D.N.Y. 1970) ("There is no such thing [as a parent-child privilege]."). Cf. In Re Grand Jury Subpoena (Matthews), 714 F.2d 223, 224-25 (2d Cir. 1983) (holding that grand jury witness was not entitled to assert a "family privilege" to avoid

answering questions that might incriminate his in-laws); United States v. (Under Seal), 714 F.2d 347, 349 n.4 (4th Cir.) (refusing to recognize privilege not to testify against brother and cousin), cert. dismissed sub nom. Doe v. United States, [**22] 464 U.S. 978, 78 L. Ed. 2d 354, 104 S. Ct. 1019 (1983); United States ex rel. Riley v. Franzen, 653 F.2d 1153, 1160 (7th Cir.) (declining to recognize parent-child privilege under Illinois law), cert. denied, 454 U.S. 1067, 70 L. Ed. 2d 602, 102 S. Ct. 617 (1981).

2. State Courts Have Overwhelmingly Rejected the Privilege.

The overwhelming majority of state courts, like their federal counterparts, have also declined to recognize a common-law parent-child privilege. See, e.g., In re Inquest Proceedings, 676 A.2d 790 (Vt. 1996) n14; In re Terry W., 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (Cal. Ct. App. 1976); Marshall v. Anderson, 459 So. 2d 384 (Fla. Dist. Ct. App. 1984); People v. Sanders, 99 Ill. 2d 262, 457 N.E.2d 1241, 75 Ill. Dec. 682 (Ill. 1983); Gibbs v. State, 426 N.E.2d 1150 [*1148] (Ind. Ct. App. 1981); Cissna v. State, 170 Ind. App. 437, 352 N.E.2d 793 (Ind. Ct. App. 1976); State v. Gilroy, 313 N.W.2d 513 (Iowa 1981); State v. Willoughby, 532 A.2d 1020, 1022 (Me. 1987); State v. Delong, 456 A.2d 877 (Me. 1983); Three Juveniles v. Commonwealth, 390 Mass. 357, 455 N.E.2d 1203 (Mass. 1983), cert. denied sub nom. Keefe v. Massachusetts, 465 U.S. 1068, 79 L. Ed. 2d 746, 104 S. Ct. 1421 (1984); State v. Amos, 163 Mich. App. 50, 414 N.W.2d 147 (Mich. Ct. App. 1987) (per curiam); Cabello v. State, 471 So. 2d 332 (Miss. 1985), [**23] cert. denied, 476 U.S. 1164, 90 L. Ed. 2d 732, 106 S. Ct. 2291 (1986); State v. Bruce, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983); State ex rel. Juvenile Dept. of Lane County v. Gibson, 79 Ore. App. 154, 718 P.2d 759 (Ore. Ct. App. 1986); In re Gail D., 217 N.J. Super. 226, 525 A.2d 337 (N.J. Super. Ct. App. Div. 1987); In re Frances J., 456 A.2d 1174 (R.I. 1983); De Leon v. State, 684 S.W.2d 778 (Tex. Ct. App. 1984); State v. Maxon, 110 Wash. 2d 564, 756 P.2d 1297 (Wash. 1988). Cf. Stewart v. Superior Court, 163 Ariz. 227, 787 P.2d 126 (Ariz. 1989). n15

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n14 The appellants in In re Inquest Proceedings, 676 A.2d 790 (Vt. 1996) cited the cases of In re Grand Jury Proceedings (Agosto), 553 F. Supp. 1298 (D. Nev. 1983) and People v. Fitzgerald, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979), in support of their argument that a parent-child privilege should be recognized. The Vermont Supreme Court declined to follow either case: it declined to follow Agosto for much the same reasons as we discuss infra in text, and it declined to follow Fitzgerald which was limited by People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501 (N.Y. App. Div. 1982), aff'd, 59 N.Y.2d 620, 463 N.Y.S.2d 185, 449 N.E.2d 1263 (N.Y. 1983). See infra note 15. [**24]

n15 New York's inferior courts are the only state courts which have judicially recognized a parent-child privilege. See In re Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464 (N.Y. App. Div. 1978); In re A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (N.Y. App. Div. 1978); In re Ryan, 123 Misc. 2d 854, 474 N.Y.S.2d 931 (N.Y. Fam. Ct. 1984); People v. Fitzgerald, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979). The privilege so-recognized is essentially derived from New York's constitution. The New York Appellate Division explained that the privilege it recognized was rooted in the constitutional right to privacy:

Notwithstanding the absence of a statutory privilege, we may, nevertheless, draw from the principles of privileged communications in determining in what manner the protection of the Constitution should be extended to the child-parent communication. . . . We conclude . . . that communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the 'private realm of family life which the state cannot enter.'"

In re A & M, 403 N.Y.S.2d at 381 (quoting Prince v. Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944)) (emphasis added); see also People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501, 504 (N.Y. App. Civ. 1982) (privilege is not rooted in common law, statute, or the 6th amendment).
New York courts apply the parent-child privilege sparingly. For example, New York's Court of Appeals declined to apply the parent-child privilege to a murder confession made by a 28 year old defendant to his mother, due to defendant's age; lack of confidentiality; subject of conversation; and the fact that the mother had already testified in front of grand jury proceeding. See People v. Johnson, 84 N.Y.2d 956, 644 N.E.2d 1378, 1378, 620 N.Y.S.2d 822 (N.Y. 1994).
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3. Only Two Federal District Court Cases Recognize the Privilege, and These Cases are Distinguishable and Not Authoritative.

The parent-child privilege has not been recognized by any federal or state court with the exception of two federal district court cases which are readily distinguishable: In re Grand Jury Proceedings (Agosto), 553 F. Supp. 1298 (D. Nev. 1983) and In re Grand Jury Proceedings (Greenberg), 11 Fed. R. Serv. (Callaghan) 579 (D. Conn. 1982).

In Agosto, the thirty-two-year-old son of an alleged tax evader moved to quash a subpoena ad testificandum requiring him to testify against his father. See Agosto, 553 F. Supp. at 1299. Although the district court recognized a common-law privilege, it did so in derogation of the prevailing jurisprudence of the Ninth Circuit, which, in an en banc decision, had expressly rejected a parent-child privilege. See United States v. Penn, 647 F.2d 876 (9th Cir.) (en banc), cert. denied, 449 U.S. 903, 66 L. Ed. 2d 134, 101 S. Ct. 276 (1980). Agosto therefore conflicts squarely with its own circuit's en banc precedent. It is not surprising that in her dissent, Judge Mansmann, although apparently approving of the reasoning in [**26] Agosto and citing to it on pages 11 and 18 n.17, is no more persuaded by Agosto than we are.

In Greenberg, a mother sought relief from a civil contempt charge when she refused to testify before a federal grand jury in order to protect her adult daughter, who had been [*1149] indicted by a Florida grand jury for importation of marijuana. See Greenberg, 11 Fed. R. Serv. at 580. The district court recognized a limited testimonial privilege grounded in the First Amendment free exercise clause; however, the court declined to recognize a general common-law parent-child privilege.

Observing that the daughter, as an adult, did not require the same degree of guidance and support as a young child, the court reasoned that although compelled disclosure of

nonincriminating confidences might damage the relationship between the mother and her daughter, the harm would be less severe than if an unemancipated minor were involved. See id. at 586-87. Concluding that this lesser degree of harm did not outweigh the state's need for the testimony, the district court held that the facts did not justify the creation of a common-law parent-child privilege. See id. at 587. Greenberg therefore [**27] does not support the creation of a general testimonial parent-child privilege; furthermore, its limited holding does not extend to the present matter since religious principles are not implicated here.

B. THE STANDARDS PRESCRIBED BY FEDERAL RULE OF EVIDENCE 501 DO NOT SUPPORT THE CREATION OF A PRIVILEGE.

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." No such principle, interpretation, reason or experience has been drawn upon here.

It is true that Congress, in enacting Fed. R. Evid. 501, "manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change." Trammel v. United States, 445 U.S. 40, 47, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980) (quoting 102 Cong. Rec. 40,891 (1974) (statement of Rep. William Hungate)). In doing so, however, we are admonished that privileges are generally disfavored; n16 that "'the public . . . has a right to every man's evidence'"; [**28] n17 and that privileges are tolerable "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." n18

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n16 See, e.g., In re Dinnan, 661 F.2d 426, 427 (5th Cir. 1981) ("The basis of justice is truth and our system frowns upon impediments to ascertaining that truth."), cert. denied sub nom. Dinnan v. Blaubergs, 457 U.S. 1106, 73 L. Ed. 2d 1314, 102 S. Ct. 2904 (1982).

n17 Trammel, 445 U.S. at 50 (quoting United States v. Bryan, 339 U.S. 323, 331, 94 L. Ed. 884, 70 S. Ct. 724 (1950)).

n18 Trammel, 445 U.S. at 47 (internal quotation omitted).

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In keeping with these principles, the Supreme Court has rarely expanded common-law testimonial privileges. n19 Following the Supreme Court's teachings, other federal courts, including this court, have likewise declined to exercise their power under Rule 501 expansively. See, e.g., United States v. Schoenheinz, 548 F.2d 1389, 1390 (9th Cir. [**29] 1977) (declining to recognize an employer-stenographer privilege); In re Grand Jury Impaneled on January 21, 1975, 541 F.2d 373, 382 (3d Cir. 1976) (declining to recognize a required-reports privilege).

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n19 See, e.g., Trammel, 445 U.S. at 53 (narrowing husband-wife privilege and holding that

witness spouse may testify over the objections of the other spouse); University of Pa. v. EEOC, 493 U.S. 182, 189, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990) (declining to recognize a privilege for academic peer review proceedings); United States v. Arthur Young & Co., 465 U.S. 805, 817-19, 79 L. Ed. 2d 826, 104 S. Ct. 1495 (1984) (rejecting an accountant work-product privilege); United States v. Gillock, 445 U.S. 360, 367-68, 63 L. Ed. 2d 454, 100 S. Ct. 1185 (1980) (expressly refusing to recognize a privilege for state legislators in federal court); United States v. Nixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) (rejecting a privilege for confidential communications between the President and the President's high-level advisors); Couch v. United States, 409 U.S. 322, 335, 34 L. Ed. 2d 548, 93 S. Ct. 611 (1973) (rejecting an accountant-client testimonial privilege).
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[*1150] Neither the appellants nor the dissent has identified any principle of common law, and hence have proved no interpretation of such a principle. Nor has the dissent or the appellants discussed any common-law principle in light of reason and experience. Accordingly, no basis has been demonstrated for this court to adopt a parent-child privilege.

C. CREATING A PARENT-CHILD PRIVILEGE WOULD BE INCONSISTENT WITH THE TEACHINGS OF THE SUPREME COURT AND OF THIS COURT.

1. Supreme Court

The Supreme Court's most recent pronouncement in the law of privileges, Jaffee v. Redmond, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996), which recognized a psychotherapist-patient privilege, supports the conclusion that a privilege should not, and cannot, be created here. In Jaffee, the Supreme Court reemphasized that the predominant common-law principle which guides a federal court's determination of whether a privilege applies is the maxim that testimonial privileges are disfavored:

The common-law principles underlying the recognition of testimonial privileges can be stated simply. "'For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right [**31] to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'"

Id. at 1928 (quoting United States v. Bryan, 339 U.S. 323, 331, 94 L. Ed. 884, 70 S. Ct. 724 (1950) (quoting 8 John H. Wigmore, Evidence @ 2192, at 64 (3d ed. 1940))). An exception to this general rule is justified only when recognition of a privilege would promote a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" Id. (quoting Trammel, 445 U.S. at 50 (quoting Elkins v. United States, 364 U.S. 206, 234, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960) (Frankfurter, J., dissenting))).

The Jaffee Court emphasized that a court, in determining whether a particular privilege "'promotes sufficiently important interests to outweigh the need for probative evidence,'" Id. (quoting Trammel, 445 U.S. at 51), must be guided by "reason and experience." Specifically, the

Jaffee Court instructed that a federal court should look [**32] to the "experience" of state courts: "The policy decision of the States bear on the question [of] whether federal courts should recognize a new privilege or amend the coverage of an existing one." 116 S. Ct. at 1929-30.

Notably, in recognizing a psychotherapist-patient privilege, the Supreme Court relied on the fact that all fifty states had enacted some form of a psychotherapist privilege. Id. at 1929 & n.11 (listing state statutes). The Jaffee Court explained that "it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" Id. at 1930.

Here, by contrast, only four states have deemed it necessary to protect from disclosure, in any manner, confidential communications between children and their parents. As previously noted, New York state courts have recognized a limited parent-child privilege, and Idaho and Minnesota have enacted limited statutory privileges protecting confidential communications by minors to their parents. See supra notes 13 & 15. In Massachusetts, as we have noted, minor children are statutorily disqualified from testifying against their parents in criminal proceedings. [**33] See id. No state within the Third Circuit has adopted a parent-child privilege.

The policy determinations of these four states do not constitute a "consistent body of policy determinations by states" supporting recognition of a parent-child privilege. Indeed, if anything, the fact that the overwhelming majority of states have chosen not to create a parent-child privilege supports the opposite conclusion: "reason and experience" [*1151] dictate that federal courts should refuse to recognize a privilege rejected by the vast majority of jurisdictions.

The Jaffee Court also relied on the fact that the psychotherapist-patient privilege was among the nine specific privileges recommended by the Advisory Committee on Rules of Evidence in 1972. See Jaffee, 116 S. Ct. at 1928-30 & n.7; see also Proposed Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183, 230-61 (1973). Additionally, the Jaffee Court noted: "Our holding [United States v. Gillock, 445 U.S. 360, 63 L. Ed. 2d 454, 100 S. Ct. 1185 (1980)] that Rule 501 did not include a state legislative privilege relied, in part, on the fact that no such privilege was included in the Advisory Committee's draft [of the proposed privilege [**34] rules]." Jaffee, 116 S. Ct. at 1930.

In the instant cases, in contrast to the psychotherapist-patient privilege recognized in Jaffee, the parent-child privilege, like the state legislative privilege rejected in Gillock, was not among the enumerated privileges submitted by the Advisory Committee. Although this fact, in and of itself, is not dispositive with respect to the question as to whether this court should create a privilege, it strongly suggests that the Advisory Committee, like the majority of state legislatures, did not regard confidential parent-child communications sufficiently important to warrant "privilege" protection.

A federal court should give due consideration, and accord proper weight, to the judgment of the Advisory Committee and of state legislatures on this issue when it evaluates whether it is appropriate to create a new privilege pursuant to Rule 501.

2. Third Circuit

Under the analytic framework set forth in this court's precedents, creating a parent-child privilege would be ill-advised. In In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990) (Becker, J.), we adopted a clergy-communicant privilege. We did so, however, only after [**35] examining the state and federal precedents addressing the issue of a clergy-communicant privilege and after determining that these precedents, on balance, weighed in favor of recognizing such a privilege. Id. at 379-84. Indeed, we instructed that an examination of such precedents was mandatory:

Both the history and the language of Rule 501, therefore, provide us with a mandate to develop evidentiary privileges in accordance with common law principles. This mandate, in turn, requires us to examine federal and state case law and impels us to consult treatises and commentaries on the law of evidence that elucidate the development of the common law.

Id. at 379.

Moreover, like the Jaffee Court and perhaps in anticipation of Jaffee's instructions, Judge Becker considered the "reason and experience" of the state legislatures and of the Advisory Committee. First, Judge Becker, writing for a unanimous panel, noted that "virtually every state has recognized some form of a clergy-communicant privilege." Id. at 381 & n.10 (listing state statutes).

In addition, Judge Becker posited that "the proposed rules prove a useful reference point and offer guidance [**36] in defining the existence and scope of evidentiary privileges in the federal courts." Id. at 380. Judge Becker further explained:

"In many instances, the proposed rules, [used as] standards, remain a convenient and useful starting point for examining questions of privilege. The standards are the culmination of three drafts prepared by an Advisory Committee consisting of judges, practicing lawyers and academicians. . . . Finally, they were adopted by the Supreme Court. . . .

. . . .

. . . The Advisory Committee in drafting the Standards was for the most part restating the law currently applied in the federal courts.

Id. at 380-81 (quoting J. Weinstein & M. Berger, Weinstein's Evidence P 501[03] (1987)). Judge Becker then concluded that "the inclusion of the clergy-communicant privilege in the proposed rules, taken together with its uncontroversial nature, strongly suggests that [that] privilege is, in the words [*1152] of the Supreme Court, 'indelibly ensconced' in the American common law." Id. at 381 (quoting Gillock, 445 U.S. at 368). Judge Becker also provided a detailed exegesis of the historical development of the clergy-communicant privilege, [**37] stressing that common-law tradition, as reflected in practice and case law, supported recognition of such a privilege.

In contrast, the parent-child privilege sought to be recognized here is of relatively recent vintage, see Ismail, 756 F.2d at 1257-58 ("The parent-child privilege did not exist at common

law"), and is virtually no more than the product of legal academicians. See supra note 12. Unlike, for example, the attorney-client privilege, which is "the oldest" common-law privilege, see United States v. Zolin, 491 U.S. 554, 562, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989); Upjohn Co. v. United States, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981), the parent-child privilege lacks historical antecedents.

Furthermore, an analysis of the four Wigmore factors, which Judge Becker used to buttress this court's disposition in In re Grand Jury Investigation, does not support the creation of a privilege. Dean Wigmore's four-factor formula requires satisfaction of all four factors in order to establish a privilege:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the [**38] relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

In re Grand Jury Investigation, 918 F.2d at 384 (quoting 8 John H. Wigmore, Evidence @ 2285 (J. McNaughton rev. ed. 1961)) (emphasis in original) (footnote omitted).

At least two of Wigmore's prerequisite conditions for creation of a federal common-law privilege are not met under the facts of these cases. We refer to the second and fourth elements of the Wigmore test. n20

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n20 The most recent case addressing a parent-child privilege analyzed the privilege under the Wigmore four-factor test, and declined to adopt the privilege after determining that the privilege failed to satisfy two of the four factors - the same factors which are not satisfied here. See In re Inquest Proceedings, 676 A.2d 790 (Vt. 1996).

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First, confidentiality--in the form of a testimonial privilege--is not essential to a successful parent-child relationship, as required by the second factor. A privilege should be recognized only where such a privilege would be indispensable to the survival of the relationship that society deems should be fostered. For instance, because complete candor and full disclosure by the client is absolutely necessary in order for the attorney to function effectively, society recognizes an attorney-client privilege. Without a guarantee of secrecy, clients would be unwilling to reveal damaging information. As a corollary, clients would disclose negative information, which an attorney must know to prove effective representation, only if they were assured that such disclosures are privileged.

In contrast, it is not clear whether children would be more likely to discuss private matters with

their parents if a parent-child privilege were recognized than if one were not. It is not likely that children, or even their parents, would typically be aware of the existence or non-existence of a testimonial privilege covering parent-child communications. On the other hand, professionals such as attorneys, [**40] doctors and members of the clergy would know of the privilege that attends their respective profession, and their clients, patients or parishioners would also be aware that their confidential conversations are protected from compelled disclosure. n21

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n21 Notably, the Advisory Committee on the Rules of Evidence reached a similar conclusion with respect to a marital communications privilege. The Advisory Committee explained:

[Proposed Rule 505] recognizes no privilege for confidential communications [between spouses]. . . . [It cannot] be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware. The other communication privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege.

Proposed Fed. R. Evid. 505 advisory committee's note, 56 F.R.D. at 245-46.

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[*1153] Moreover, even assuming arguendo that children and [**41] their parents generally are aware of whether or not their communications are protected from disclosure, it is not certain that the existence of a privilege enters into whatever thought processes are performed by children in deciding whether or not to confide in their parents. Indeed, the existence or nonexistence of a parent-child privilege is probably one of the least important considerations in any child's decision as to whether to reveal some indiscretion, legal or illegal, to a parent. Moreover, it is unlikely that any parent would choose to deter a child from revealing a confidence to the parent solely because a federal court has refused to recognize a privilege protecting such communications from disclosure.

Finally, the proposed parent-child privilege fails to satisfy the fourth condition of the Wigmore test. As explained above, any injury to the parent-child relationship resulting from non-recognition of such a privilege would be relatively insignificant. In contrast, the cost of recognizing such a privilege is substantial: the impairment of the truth-seeking function of the judicial system and the increased likelihood of injustice resulting from the concealment of relevant [**42] information. See United States v. Nixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) (stating that "the need to develop all relevant facts in the adversary system is both fundamental and comprehensive").

Moreover, because no clear benefit flows from the recognition of a parent-child privilege, any injury to the parent-child relationship caused by compelled testimony as to confidential communications is necessarily and substantially outweighed by the benefit to society of obtaining all relevant evidence in a criminal case. See, e.g., In re Inquest Proceedings, 676 A.2d 790, 793 (Vt. 1996) (finding that although harm may result from disclosure of a child's confidence, such harm does not outweigh "the public interest in seeking the truth within the context of a criminal investigation"); State v. Maxon, 110 Wash. 2d 564, 756 P.2d 1297, 1301 (Wash. 1988) (stating that the loss of relevant evidence outweighs the public policy favoring a parent-child privilege). In

short, the public good derived from maintaining the confidentiality of parent-child communications transcends the value of effective and efficient judicial truth-finding.

An even more compelling reason for rejecting a parent-child privilege stems [**43] from the fact that the parent-child relationship differs dramatically from other relationships. This is due to the unique duty owing to the child from the parent. A parent owes the duty to the child to nurture and guide the child. This duty is unusual because it inheres in the relationship and the relationship arises automatically at the child's birth.

If, for example, a fifteen year old unemancipated child informs her parent that she has committed a crime or has been using or distributing narcotics, and this disclosure has been made in confidence while the child is seeking guidance, it is evident to us that, regardless of whether the child consents or not, the parent must have the right to take such action as the parent deems appropriate in the interest of the child. That action could be commitment to a drug rehabilitation center or a report of the crime to the juvenile authorities. This is so because, in theory at least, juvenile proceedings are undertaken solely in the interest of the child. We would regard it intolerable in such a situation if the law intruded in the guise of a privilege, and silenced the parent because the child had a privilege to prevent disclosure.

This [**44] results in the analysis that any privilege, if recognized, must be dependent upon both the parent and child asserting it. However, in such a case, the privilege would disappear if the parent can waive it. It follows therefore that, if a child is able to communicate openly with a parent and seeks guidance from that parent, the entire basis for the privilege is destroyed if the [*1154] child is required to recognize that confidence will be maintained only so long as the parent wants the conversation to be confidential. If, however, the parent can waive the privilege unilaterally, the goal of the privilege is destroyed. When the Supreme Court authorized a psychotherapist-patient privilege in Jaffee, it told us as much in stating,

We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in Upjohn, if the purpose of the [**45] privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'

Jaffee v. Redmond, 135 L. Ed. 2d 337, 116 S. Ct. 1923, 1932 (1996) (quoting Upjohn Co. v. United States, 449 U.S. 383, 393, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)).

It follows then that an effective parent-child privilege requires that the parent's lips be sealed but such a sealing would be inexcusable in the parent-child relationship. No government should have that power.

Indeed the obligation on the parent to act goes far beyond the parent's obligation to raise and nurture the child. Thus a parent-child privilege implicates considerations which are vastly different from the traditional privileges to which resort is had as analogues.

In sum, neither historical tradition, nor common-law principles, nor Wigmore formulations, nor the logic of privileges, nor the "reason and experience" of the various states supports creation of a parent-child privilege.

D. RECOGNITION [**46] OF A PARENT-CHILD PRIVILEGE SHOULD BE LEFT TO CONGRESS.

Although we, and our sister courts, obviously have authority to develop and modify the common law of privileges, we should be circumspect about creating new privileges based upon perceived public policy considerations. This is particularly so where there exist policy concerns which the legislative branch is better equipped to evaluate. To paraphrase Justice Scalia, writing in dissent in Jaffee, and referring to the psycho-therapist privilege:

The question before us today is not whether there should be an evidentiary privilege for [parent-child communications]. Perhaps there should. But the question before us is whether (1) the need for that privilege is so clear, and (2) the desirable contours of that privilege are so evident, that it is appropriate for this court to craft it in common law fashion, under Rule 501. Jaffee v. Redmond, 135 L. Ed. 2d 337, 116 S. Ct. 1923, 1940 (1996) (Scalia, J. dissenting).

The legislature, not the judiciary, is institutionally better equipped to perform the balancing of the competing policy issues required in deciding whether the recognition of a parent-child privilege is in the [**47] best interests of society. Congress, through its legislative mechanisms, is also better suited for the task of defining the scope of any prospective privilege. n22 Congress, is able to consider, for example, society's moral, sociological, economic, [*1155] religious and other values without being confined to the evidentiary record in any particular case. Thus, in determining whether a parent-child privilege should obtain, Congress can take into consideration a host of facts and factors which the judiciary may be unable to consider. These considerations are also relevant to determining whether the privilege, if it is to be recognized, should extend to adult children, adopted children or unemancipated minors. n23

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n22 In a state context, in In re: A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 at 381 (App. Div. 1978), the New York Appellate Division expressly declined to adopt a common-law privilege, explaining: "Although there are persuasive arguments to apply a privilege in these circumstances, we believe that the creation of a privilege devolves exclusively on the Legislature." Id. (footnotes omitted).

We recognize, of course, that the Advisory Committee Notes to the Federal Rules of Evidence provide that privileges shall continue to be developed by the courts of the United States. See Fed. R. Evid. 501 advisory committee's notes. [**48]

n23 Should the privilege be restricted to unemancipated minors or should it extend to all children, regardless of age, unemancipated and emancipated? No apposite case, state or federal, provides a parent-child privilege for adults or emancipated children. See, e.g., In re Erato, 2 F.3d 11 (2d Cir. 1993); State v. Willoughby, 532 A.2d 1020 (Me. 1987); In re Gail D., 217 N.J. Super. 226, 525 A.2d 337 (N.J. Super. Ct. App. Div. 1987); State v. Maxon, 110 Wash. 2d 564, 756 P.2d 1297 (Wash. 1988). Nor do any state statutes provide a privilege for emancipated children.

Indeed, both Idaho and Minnesota, by statute, limit their variants of the parent-child privilege to children under age 18. See Idaho Code @@ 9-203(7), 32-101 (1990 & Supp. 1995); Minn. Stat. @@ 595.02(1)(j), 645.451 (1988 & Supp. 1996). In the present case, of course, the daughter in the Delaware appeals is 16 years old and unemancipated. Hence, the issue of extending the privilege to an adult or an emancipated child is not relevant insofar as the Delaware target is concerned. However, the appellant-son in the Virgin Islands case, who was 18 years old at the time of the relevant communication, and, therefore, no longer a minor nor unemancipated, urges that the privilege be unrestricted with regard to age. Under Virgin Islands law, the son would be deemed emancipated. See V.I. Code Ann. tit. 16, @ 261 (providing that the age of majority in the Virgin Islands is 18 years old); V.I. Code Ann. tit. 16, @ 221(4) (minor becomes "emancipated" by reason of having attained the age of majority"); see also In Re Guardianship of Penn, 15 F.3d 292, 295 (3d Cir. 1994) (noting that Virgin Islands legislature, in 1972, lowered the age of majority from 21 to 18); Galvan v. Hess Oil Virgin Islands Corp., 549 F.2d 281, 288 (3d Cir. 1977)(same).

Similarly, federal law would indicate that an individual attains adulthood at the age of 18 years. See 18 U.S.C. @ 2255 (1984) (defining "minor" as "any person under the age of 18 years"); 18 U.S.C. @ 5031 (Supp. 1996) (defining "juvenile" as a person who has not attained his eighteenth birthday).

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Among additional factors that Congress could consider are other parameters of familial relationships. Does "parent" include step-parent or grand-parent? Does "child" include an adopted child, or a step-child? Should the privilege extend to siblings? Furthermore, if another family member is present at the time of the relevant communication, is the privilege automatically barred or destroyed? See, e.g., In re Grand Jury Subpoena (Matthews), 714 F.2d at 224-25 (in-laws); United States v. (Under Seal), 714 F.2d at 349 n.4 (brother and cousin).

Hence, as a court without the ability to consider matters beyond the evidentiary record presented, we should be chary about creating new privileges and ordinarily should defer to the legislature to do so. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 706, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972) (plurality) (suggesting that courts should yield to legislatures in creating and defining privileges); People v. Dixon, 161 Mich. App. 388, 411 N.W.2d 760, 763 (Mich. Ct. App. 1987) (stating that creation of parent-child testimonial privilege is best left to legislature); In re Parkway Manor Healthcare Ctr., 448 N.W.2d 116, 121 (Minn. Ct. App. 1989) (deferring to legislature to create [**50] a privilege for self-evaluation data); Cook v. King County, 9 Wash. App. 50, 510 P.2d 659, 661 (Wash. Ct. App. 1973) ("Although 'privilege' is a common-law concept, the granting of a testimonial privilege is a recognized function of legislative power."). Indeed, the Supreme Court has explained that one basis for its disinclination to recognize new privileges is deference to the legislature:

We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.

University of Pennsylvania v. EEOC, 493 U.S. at 189.

Congress too has recognized the importance of privilege rules insofar as the truth-seeking process is concerned. Congress specifically addressed that subject when it delegated rule-making

authority to the Supreme Court as to rules of procedure and evidence. It did so by identifying and designating the law of privileges as a special area meriting greater legislative oversight. Congress expressly provided that "any . . . rule creating, abolishing, or modifying an [*1156] evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 [**51] U.S.C. @ 2074(b) (1994). In contrast, all other evidentiary rules promulgated by the Supreme Court and transmitted to Congress automatically take effect unless Congress enacts a statute to the contrary. See 28 U.S.C. @ 2074(a) (1994). n24

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n24 The preferred method by which any Rule of Evidence would be proposed and ultimately promulgated would be by proceeding: first, through the Advisory Committee on Rules of Evidence, then to the Judicial Conference Standing Committee on Practice and Procedure (with public notice and comment at both these stages), then to the Judicial Conference of the United States, and then, of course, to the Supreme Court, which, if the proposed Rule was approved, would then transmit the proposed Rule to Congress for its consideration. See 28 U.S.C. @ 2072, et seq.; 18 U.S.C. @@ 3402, 3771, 3772.

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IV.

A few further observations about the dissent and why it does not persuade us that the parent-child privilege outweighs the government's interest in disclosure:

First, [**52] in her dissenting and concurring opinion, Judge Mansmann attempts to distinguish the Virgin Islands appeal (where a father has been subpoenaed to testify about communications made to him by his son who is over the age of eighteen n25), from the Delaware appeal (where a teenage daughter has been subpoenaed to give testimony against her father). The record of the Delaware appeal, however, does not inform us as to the nature of the testimony being sought or the nature of the daughter's knowledge. Does it arise from observations, overheard statements, communications with her father, or some other source? If indeed it arises from confidential communications, does the privilege advocated by Judge Mansmann in the Virgin Islands case then apply? If so, is the alleged distinction a valid one, or do both appeals suffer from the same deficiencies we have identified with respect to any parent-child privilege?

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n25 Because the son is over eighteen years of age, under Judge Mansmann's formulation of the privilege, we assume there would have to be a hearing by the district court to assess various factors to determine whether a privilege would lie (since Judge Mansmann declines to adopt a bright-line rule with regard to age). These "factors" would include such variables as age, maturity, the child's residence and the precise nature of the communication. See Dissenting Opinion at 7.

We have already discussed the limitation of such a privilege to minors, (see note 23 supra) and know of no case where an adult child and his or her parent have been able to invoke the privilege.

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Secondly, we note that the Virgin Islands privilege which Judge Mansmann would recognize,

while characterized as a limited one, would only come into play where a child has made a confidential communication to a parent in the course of seeking parental advice. See Dissenting Opinion at 7. n26 Both of these qualifications -- (1) a confidential communication, spoken or written, and (2) arising in the course of seeking parental advice n27 -- would have to be determined by a hearing - a mini-trial - which would have the effect of destroying the confidential nature of the communication (since the communication would have to be divulged so that the district court could determine its precise nature). It would also endow the district court with virtually unlimited discretion in granting or denying the privilege (since the dissent provides little guidance to the district court for making such a determination). The exercise of this discretion would undermine the very essence of a privilege that "the participants in the confidential conversation" can predict "with some degree of certainty" that their conversation will be [*1157] protected. See Jaffee v. Redmond, 135 L. Ed. 2d 337, 116 S. Ct. 1923, 1932 (1996). [**54]

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n26 We note that, although Judge Mansmann urges that we recognize a privilege in the Virgin Islands case, the record in the Virgin Islands case does not disclose the content of the communication at issue, and reveals no evidence that the son sought advice from his father -- even if one may infer that the son's communication was otherwise confidential in nature. Therefore, although the dissent advocates applying the privilege in the Virgin Islands case, Judge Mansmann fails to identify and thus satisfy her threshold qualification of the child seeking advice from a parent -- a requirement that she identifies as essential for such a privilege.

n27 As the dissent frames the privilege, if a child divulges to his parent that he is the Unabomber, a sex offender or an abuser of drugs, and does so without seeking guidance or advice, the privilege would be unavailable.

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Thirdly, the crafting of the privilege as a jointly-held privilege (by both parent and child) undermines the dissent's goal of encouraging a child [**55] to seek the advice of a parent and protecting the parent-child relationship. The entire thrust of the dissent's opinion is that a child should feel confident, in communicating with a parent to seek advice and guidance, that the communication will remain inviolate. However, the dissent, then straddling the fence, also argues that the parent can choose to violate such a confidence and report a confidential communication to others (presumably the authorities) in the interest of parental judgment. See Dissenting Opinion at 8 n.6. We know of no privilege that can operate in such a two-way fashion and still remain effective.

The few observations made above do no more than highlight the stark difference between the dissent's view of the public good which subordinates the government's interest in disclosure to a parent-child privilege, and the position we have taken which recognizes justice and disclosure as the predominant principles for ascertaining truth. See Trammel v. United States, 445 U.S. 40, 47, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980).

Finally, we observe that implicit in the various discussions by courts (both federal and state) of the parent-child privilege is the fact that the "strong and trusting parent-child [**56] relationships" which the dissent would preserve, see Dissenting Opinion at 2, have existed throughout the years without the concomitant existence of a privilege protecting that relationship.

V.

In short, if a new privilege is deemed worthy of recognition, the wiser course in our opinion is to leave the adoption of such a privilege to Congress.
Although we are not reluctant to chart a new legal course, such an action should not be premised upon unsound legal principles or emotion. The instant appeals furnish us with neither reason, nor analysis, nor a basis upon which to fashion such a privilege.

All that we have been told by the appellants and by the dissent is: we should look to the healthy, psychological development of children; and that compelling the testimony of a parent is repugnant and indecent; that it is more important that a child communicate with a parent than it is to compel a parent's testimony; and that the preservation of the family and the protection of a strong and trusting parent-child relationship trumps all other interests. These conclusions, as well as the criteria which the dissent would require as to the nature of the communications and [**57] whether they were imparted in an effort to seek advice and counseling, cannot be satisfied without the benefit of evidence, expert testimony, hearings or recognized authority. If a new privilege were to be engraved in the concrete of our jurisprudence as the dissent argues, then it should be framed so that its contours are clear and unambiguous, and it should be capable of being applied precisely, without the need for multiple pretrial hearings, in addition to the privilege's existence being known to the participants. Sympathy alone cannot justify the creation of a new and unprecedented privilege which does not meet the standards set by Congress, the Supreme Court and this court.

Accordingly, we will affirm the district court's order of June 19, 1995, which denied the father's motion to quash the grand jury subpoena in the Virgin Islands case (95-7354). We will also affirm the district court's order of September 10, 1996 in the Delaware cases (96-7529 and 96-7530), denying the joint motion to quash the grand jury subpoena and rejecting appellants' claims concerning the Schofield affidavit and in camera review.

CONCURBY: MANSMANN

DISSENTBY: MANSMANN

DISSENT:
MANSMANN, J., concurring and [**58] dissenting.

I write separately because I am convinced that the testimonial privilege issue raised by the Virgin Islands appeal is substantially different from that presented in the Delaware [*1158] appeals n28 and should be resolved in favor of the targeted son. The Virgin Islands appeal, which challenges the denial of a motion to quash a grand jury subpoena, requires that we confront an issue of first impression in our circuit: should we make available to a parent and child an evidentiary privilege which could be invoked to prevent compelling that parent to testify regarding confidential communications made to the parent by his child in the course of seeking parental advice and guidance? n29 It appears that this precise question is one of first impression in the federal courts.

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n28 In the Virgin Islands appeal, a father has been subpoenaed to testify regarding communications made to him by his teenaged son. In the Delaware appeals, on the other hand, a teenaged daughter has been subpoenaed to give testimony, based on her own knowledge, which could implicate her father in a crime; confidential communications between parent and child are not alleged in the Delaware appeals. As I will explain, the privilege question to be resolved in the Virgin Islands appeal focuses on the confidential communication made by a child in the course of seeking parental advice. Consequently, it is more narrow and more compelling than that presented in the Delaware appeals. [**59]

n29 The majority contends that the record in the Virgin Islands matter "reveals no evidence that the son sought advice from his father." (Typescript at 40 n.25.) This is incorrect. In the Motion to Quash filed by the son, the son refers to the fact that he "spoke privately with his father, seeking his father's counsel about the matters which are the subject of the Grand Jury's investigation."

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Because I conclude that the public good at issue, the protection of strong and trusting parent-child relationships, outweighs the government's interest in disclosure, I would exercise the authority granted to the federal courts by Congress under Rule 501 of the Federal Rules of Evidence and would recognize a limited privilege. Accordingly, I respectfully dissent.

I.

This case, unlike most which we consider, does not require that we apply the law as it exists with respect to testimonial privilege. Instead, we are asked to determine what the law in this area ought to be. While most courts have declined to recognize a parent-child testimonial privilege, they have done so in contexts far different from [**60] the one presented here. I am convinced that this is an appropriate case in which to recognize and set parameters for a limited privilege. Doing so is critical to several important public policy interests such as the "protection of strong and trusting parent-child relationships and the preservation of the sanctity of the family. . . ." Appellant's Brief at 8. The recognition of a parent-child privilege is essential to "the healthy psychological development of children and to the development of society as a whole"; compelling a parent to testify adversely to a child is "'repugnant to social sensibilities' and contrary to a democratic view of decency." Wendy Meredith Watts, The Parent-Child Privilege: Hardly a New or Revolutionary Concept, 28 Wm. & Mary L. Rev. 583, 611-13 (1987).

These and other related public policy arguments have been advanced in a spate of articles by academicians and other legal commentators who, virtually uniformly, favor incorporating a parent-child testimonial privilege into the fabric of the law. n30 The courts, however, federal and state, have been reluctant to make these policy arguments the foundation for a "new" privilege. In the circumstances presented [**61] here, I do not share that reluctance and am convinced that where compelled testimony by a parent concerns confidential statements made to the parent by his child in the course of seeking parental advice and guidance, it is time to chart a new legal course.

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n30 See Maj. Op. (Typescript at 13 n.11).

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II.

A.

Any inquiry concerning the federal court's extension of testimonial privilege necessarily begins with Rule 501 of the Federal Rules of Evidence. n31 Under this Rule, as interpreted [*1159] by the Supreme Court in United States v. Trammel, 445 U.S. 40, 47, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980), the federal courts are authorized to "develop[] . . . testimonial privileges in federal criminal trials governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." In enacting Rule 501, Congress specifically declined to restrict development in the law of privilege to the legislative realm and declined to limit the range of possible privileges. Congress instead crafted Rule 501 in order to "provide [**62] the courts with the flexibility to develop rules of privilege on a case-by-case basis." It was Congress' intent "to leave the door open to change." Id.

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n31 Rule 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principle of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of witness, person, government, state or political subdivision thereof shall be determined in accordance with state law.

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The courts' role in fostering evolution in the area of testimonial privilege was reinforced recently by the Supreme Court in Jaffee [**63] v. Redmond, 135 L. Ed. 2d 337, 116 S. Ct. 1923, 1996 U.S. LEXIS 3879, 1996 WL 315841 at * 4 (U.S.) (footnote omitted):

The Senate Report accompanying the 1974 adoption of the [Federal Rules of Evidence] indicates that Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship should be determined on a case-by-case basis." S. Rep. No. 93-1277, p. 13 (1974). The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges." Trammel v. United States, 445 U.S. 40, 47, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980); see also University of Pennsylvania v. EEOC, 493 U.S. 182, 189, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990).

According to the Court, "the common-law principles underlying the recognition of testimonial privileges can be stated simply." Id. Evidentiary privileges are "exceptions to the demand for every man's evidence" and should "not be lightly created nor expansively construed, for they are in derogation of the search for the truth." United States v. Nixon, 418 U.S. 683, 709-10, 41 L. Ed.

2d 1039, 94 S. Ct. 3090 (1974). Despite the strictures of this general rule, the federal [**64] courts may be justified in recognizing a testimonial privilege where that privilege "promotes sufficiently important interests to outweigh the need for probative evidence." University of Pennsylvania v. EEOC, 493 U.S. 182, 189, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990) (quoting Trammel, 445 U.S. at 51). This is especially appropriate where, as here, there is no indication that Congress, in enacting Rule 501 -- or in any other context -- has evaluated the competing concerns associated with a particular privilege and has rejected that privilege. See University of Pennsylvania v. EEOC, 493 U.S. 182, 189, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990). It is abundantly clear that under Rule 501 and the interpretive caselaw federal courts have authority in appropriate circumstances to modify the availability and scope of testimonial privileges and to recognize new common law privileges.

B.

When a federal court considers extending the scope of a testimonial privilege or recognizing a new privilege, Rule 501 requires that the court engage in a balancing process, weighing the need for confidentiality in a particular communication against the need for relevant evidence in a criminal proceeding. Trammel, 445 U.S. at 50. I am convinced that the [**65] public good derived from a child's ability to communicate openly with and to seek guidance from his or her parents is of sufficient magnitude to transcend the judicial system's interest in compelled parental testimony. n32 Recognizing [*1160] that "our authority is narrow in scope and [to] be exercised only after careful consideration in the face of a strong showing of need for the privilege," In re Grand Jury Proceedings, 918 F.2d 374, 383 (3d Cir. 1990), I stress that the privilege which I would recognize is a limited one, applying only to compelled testimony concerning confidential communications made to a parent by his child in the course of seeking parental advice. Although this case might have been more compelling had the son been a minor at the time of his statements to his father, I would not adopt a bright-line rule applicable only to those who have not reached legal majority. In order to advance the policy interests which the targeted son articulated, I would prefer to leave the particular factors to be considered in determining application of the privilege to development on a case-by-case basis. I expect that these factors would include such variables as age, maturity, [**66] whether or not the child resides with the parents, and the precise nature of the communications for which the privilege is claimed.

The privilege would apply to situations in which it is invoked by both parent and child; this case does not require that we confront applicability of the privilege where it is invoked by the parent or the child alone.

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n32 In addition to the balancing test laid out in Trammel, Dean Wigmore has suggested a four-part test for determining whether or not a particular testimonial privilege should be recognized. In order for a privilege to obtain: (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which, in the opinion of society, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. 8 John Henry Wigmore, Evidence @

2285 (J. McNaughton rev. ed. 1961); see also In re Grand Jury Investigation, 918 F.2d 374, 383-84 (3d Cir. 1990) (weighing Dean Wigmore's four prerequisites). I part company with the majority in the application of this test and am convinced that the factors analyzed under the Rule 501 balancing test are sufficient to satisfy the Wigmore test as well. The first condition of the Wigmore test is satisfied in that the parent-child relationship is one which naturally gives rise to confidential communication. Second, confidentiality underlies the parent child relationship; mutual trust encourages children to consult parents for guidance with the expectation that the parent will, in appropriate circumstances, honor the confidentiality of those statements. Third, the family unit is the building block of our society and the parent-child relationship is at the core of that family unit. Finally, although the majority disputes this point, I am convinced that the damage resulting from compelling a parent to testify against his child, in most if not all cases, outweighs the benefit associated with correct disposal of the litigation.

----------End Footnotes---------- [**67]

The goal in recognizing this limited privilege would not be to guarantee confidentiality per se but to shield parent-child relationships from the devastating effects likely to be associated with compelled testimony. As one commentator has written:

To conceive of . . . privileges merely as exclusionary rules, is to start out on the wrong road and, except by happy accident, to reach the wrong destination. They are, or rather by chance of litigation may become, exclusionary rules; but this is incidental and secondary. Primarily they are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers. . . .

Louisell, Confidentiality, Conformity, and Confusions: Privileges in Federal Court Today, 31 Tul. L. Rev. 101, 110-11 (1956). An effective parent-child relationship is one deserving of protection. It rests upon a relationship of mutual trust where the child has the right to expect that the parent will act in accordance with the child's best interest. n33 If the state is permitted to interfere in that relationship by compelling parents to divulge information conveyed to them [**68] in confidence by their children, mutual trust, and ultimately the family, are threatened.

----------Footnotes----------

n33 While it is true, as the majority says, that few children are likely to be aware of a privilege per se, there is, in any event, a certain expectation that this information will not be disclosed.

As the majority points out, there may be circumstances in which a parent, having heard communications from a child, decides that it is in the child's best interest that those communications be divulged. The privilege which I advocate would not interfere with that parental judgment. Presumably, if the parent is indeed acting in the child's best interest, disclosure will not ultimately threaten the family relationship which I seek to protect. Furthermore, if the parent is willing to disclose information which may harm the child, the relationship is already beyond the need for protection.

----------End Footnotes----------

While I am aware that the availability of even this limited parent-child privilege may, in some rare circumstances, complicate a criminal [**69] fact-finding proceeding, I am convinced that the risk is one well worth bearing. " [*1161] To reach the truth at the cost of the parent-child relationship would be to win the battle and lose the war." Wendy Meredith Watts, The Parent-Child Privileges: Hardly a New or Revolutionary Concept, 28 Wm. & Mary L. Rev. 583, 609 (1987). This is especially true where, as here in the Virgin Islands case, the parent is not a co-defendant or a co-witness to a criminal act, and is not alleged to be hiding the instrumentality or the fruits of a criminal act.

I cannot agree with the majority that testimonial privileges must be regarded as automatic impediments to the effectiveness of the judicial system. In limited circumstances these privileges are critical to important policy interests. I am convinced, as was the district court, that "youngsters today are increasingly faced with excruciatingly dangerous and difficult situations" and that "the law ought to do everything possible to encourage children to confide in their parents and turn to [them] in times of trouble." In re Grand Jury Proceeding, Misc. No. 95-009, at 9, 10 (D.V.I. June 19, 1995).

C.

The spousal privilege is the only testimonial [**70] privilege based on a familial relationship to have received general acceptance in the federal courts. n34 See In re Erato, 2 F.3d 11, 16 (2d Cir. 1993). In arguing that we should uphold the father's claim of privilege in this case, I am motivated by many of the same concerns which underlie the spousal privilege. n35 The policy advanced by the spousal privilege "is the protection of the marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." Wolfle v. United States, 291 U.S. 7, 14, 78 L. Ed. 617, 54 S. Ct. 279 (1934). Similar concerns are present here:

Ideally, the child-parent relationship encompasses aspects of the marital relationship -- mutual love, affection, and intimacy . . . the parent providing emotional guidance and the child relying on him for help and support. . . . As in the marital . . . relationship, this optimal child-parent relationship cannot exist without a great deal of communication between the two. . . . Manifestly, the parent's disclosure of such information to a third party, . . . would deter continued communication between child and parent. [**71]

Comment, The Child-Parent Privilege: A Proposal, 47 Fordham L. Rev. 771, 781 (1979). The reasoning of the district court in In Re Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983), is also instructive:

There is no reasonable basis for extending a testimonial privilege for confidential communications to spouses, who enjoy a dissoluble legal contract, yet denying a parent . . . the right to claim such a privilege to protect communications made within an indissoluble family unit, bonded by blood, affection, loyalty, and tradition. And further, if the rationale behind the privilege of a witness-spouse to refuse to testify adversely against his or her spouse in a criminal proceeding serves to prevent the [*1162] invasion of the harmony and privacy of the marriage relationship

itself, then affording the same protection to the parent-child relationship is even more compelling.

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n34 Four relationship-based privileges have received federal court recognition: those between penitent and priest, attorney and client, physician and patient, and, most recently, the privilege between therapist and patient. See Trammel v. United States, 445 U.S. 40, 51, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980), and Jaffee v. Redmond, 135 L. Ed. 2d 337, 116 S. Ct. 1923, 1996 U.S. LEXIS 3879, 1996 WL 315841 (U.S.). [**72]

n35 Some commentators have sought to analogize the parent-child privilege to the more widely recognized professional testimonial privileges such as that between attorney and client, priest and penitent, and physician and patient:

The parent-child relationship is analogous to the privileged professional relationships in many respects. As the professional exercises his skill in the delicate relationship with his client, the parent plays a unique and sensitive role in the life of his "client," the child. In fulfilling this role, the parent must assume many of the same responsibilities as professionals. The parent, for example, often must serve as the child's legal advisor, spiritual counselor, and physical and emotional health expert. The necessity for confidentiality is comparable to that within the professional relationships. Like the attorney, priest, or psychiatrist, parents must establish an atmosphere of trust to facilitate free and open communication.

Gregory W. Franklin, Note, The Judicial Development of the Parent-Child Testimonial Privilege: Too Big for its Britches? 26 Wm. & Mary L. Rev. 145, 151 (1984).

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The Court in Trammel also recognized that privileges "affecting marriage, home and family relationships," 445 U.S. at 48, are especially worthy of consideration. n36 Within the family structure but beyond the marital partners, I can think of no relationship more fundamental than that between parent and child. Society has an interest in protecting the family structure; the parent-child relationship is amenable to identification and segregation for special treatment.

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n36 While the majority opinion distinguishes the privilege which I would recognize from those involving professional relationships, it does not address the parallels which exist between a parent-child privilege and the spousal privilege. In Trammel v. United States, 445 U.S. 40, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980), the Supreme Court held that in federal courts, the spousal privilege belongs solely to the spouse who is a witness. "The court concluded that the justification for the privilege -- prevention of marital discord -- was not served by allowing the defendant spouse to prevent the voluntary testimony of the witness spouse . . . . The court noted that state law was moving toward granting the privilege solely to the witness. . . ." Developments in the Law -Privileged Communications, 98 Harv. L. Rev. 1450, 1568 (1985). The goal of protecting family relationships is paramount in the case now before us; the privilege which I would recognize is based on concerns broader than the guarantee of confidentiality. As the caselaw with respect to spousal privilege establishes, a privilege may indeed advance these broader familial interests

without requiring that the child be allowed to silence a parent who is willing to testify.

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D.

The parent-child privilege is not a novel or radical concept. "Both ancient Jewish law and Roman law entirely barred family members from testifying against one another based on a desire to promote the solidarity and trust that support the family unit. The Napoleonic Code also prevented the disclosure of confidences between family members." J. Tyson Covey, Note, Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege, 1990 U. Ill. L. Rev. 879, 883. The civil law countries of Western Europe including France, Sweden, and the former West Germany also recognize a privilege covering compelled testimony from family members. Id. Three states (Idaho, Massachusetts and Minnesota) have adopted some variant of the parent-child privilege by statute, n37 and one state, New York, has judicially recognized the privilege. In re A&M, 403 N.Y.S.2d 375, 61 A.2d 426 (1978). n38 Furthermore, our review of the caselaw convinces us that although a number of courts have declined to recognize a parent-child privilege in one form or another, the vast majority of those cases, indeed all of the federal cases, are distinguishable, on significant [**75] grounds, from the case before us.

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n37 The Idaho statute limits the privilege to communications by minors to their parents. It provides in relevant part:

Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected against disclosure . . . .

Idaho Code @ 9-203(7) (1990 & Supp. 1995).

In Massachusetts, a minor child is deemed incompetent to testify against her parent in a criminal proceeding:

An unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent's family and who does not reside in the said parent's household.

Mass. Gen. L. ch. 233, @ 20 (1986 & Supp. 1996).

Minnesota also recognizes a limited parent-child (minor) privilege:

A parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent. A communication is confidential if made out of the presence of persons not members of the child's immediate family living in the same household.

Minn. Stat. @ 595.02(1)(i) (1988 & Supp. 1996). [**76]

n38 The decision in this case rested on constitutional grounds. See also People v. Fitzgerald, 101 Misc. 2d 712, 422 N.Y.S.2d 309, 314 (Westchester County Ct. 1979) (parent-child privilege flows from U.S. and New York State Constitutions).

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Most cases discussing the availability of a parent-child privilege have done so in the context of whether a child should be compelled [*1163] to testify against a parent. n39 As the court of appeals acknowledged in In re Grand Jury Proceedings (Starr), 647 F.2d 511, 513 n.4 (5th Cir. 1981), cases involving testimony by a child regarding activities of or communications by a parent are not as compelling as cases "involving confidential communications from the chid to the parent" because the former do not implicate "the desire to avoid discouraging a child from confiding in his parents." A similar theme is echoed in Three Juveniles v. Commonwealth, 390 Mass. 357, 455 N.E.2d 1203, 1206 (Mass. 1983), cert. denied sub nom Keefe v. Massachusetts, 465 U.S. 1068, 79 L. Ed. 2d 746, 104 S. Ct. 1421 (1984): "Because a parent does not need the advice of a minor child in the same sense that a child may need the advice of a parent, [**77] the case for a testimonial privilege as to confidential communications from parent to child seems weaker than the case as to such a communication from child to parent." This distinction separates the Virgin Islands and Delaware appeals.

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n39 See, e.g., Grand Jury Proceedings of John Doe v. United States, 842 F.2d 244 (10th Cir.), cert. denied, 488 U.S. 894, 102 L. Ed. 2d 223, 109 S. Ct. 233 (1988); United States v. Davies, 768 F.2d 893 (7th Cir.), cert. denied sub nom. Kaprelian v. United States, 474 U.S. 1008, 88 L. Ed. 2d 464, 106 S. Ct. 533 (1985); United States v. Ismail, 756 F.2d 1253 (6th Cir. 1985); In re Grand Jury Subpoena of Santarelli, 740 F.2d 816 (11th Cir. 1984); In re Matthews, 714 F.2d 223 (2d Cir. 1983) (defendant compelled to testify against in-laws); United States v. (Under Seal), 714 F.2d 347 (4th Cir.), cert. denied, 464 U.S. 978, 104 S. Ct. 1019, 78 L. Ed. 2d 354 (1983); United States v. Jones, 683 F.2d 817 (4th Cir. 1982); In re Grand Jury Proceedings (Starr), 647 F.2d 511 (5th Cir. Unit A 1981); United States v. Penn, 647 F.2d 876 (9th Cir.), cert. denied, 449 U.S. 903, 66 L. Ed. 2d 134, 101 S. Ct. 276 (1980); Gibbs v. State, 426 N.E.2d 1150 (Ind. App. 1981); State v. Gilroy, 313 N.W.2d 513 (Iowa 1981); Three Juveniles v. Commonwealth, 390 Mass. 357, 455 N.E.2d 1203 (Mass. 1983), cert. denied sub nom. Keefe v. Massachusetts, 465 U.S. 1068, 79 L. Ed. 2d 746, 104 S. Ct. 1421 (1984); People v. Amos, 163 Mich. App. 50, 414 N.W.2d 147 (Mich. Ct. App. 1987); Cabello v. State, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 90 L. Ed. 2d 732, 106 S. Ct. 2291 (1986); De Leon v. State, 684 S.W.2d 778 (Tex. Ct. App. 1984). This is, of course, also the situation presented by the Delaware appeals.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**78]

A second set of cases refusing to recognize a parent-child privilege involve children who were significantly older than the son in this case and did not implicate communications seeking parental advice and guidance. n40 As the Court of Appeals for the Second Circuit has recognized, these cases, too, "present[] a weaker claim for recognition of a parent child privilege. . . ." In re Erato, 2 F.3d 11, 16 (2d Cir. 1993).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n40 See In re Erato, 2 F.3d 11, 12 (2d Cir. 1993) (child is 52); State v. Willoughby, 532 A.2d 1020, 1021 (Me. 1987) ("At the time of the murder [the son] was in his early twenties and was no longer living at the family home . . . ."); In re Gail D., 217 N.J. Super. 226, 525 A.2d 337, 337 (N.J. Super. A.D. 1987) (defendant's father is 84 years old); State v. Maxon, 110 Wash. 2d 564, 756 P.2d 1297 (Wash. 1988) (en banc).

While I recognize that the son in this case was 18 and, therefore, under Virgin Island law had reached the "age of majority" at the time of the confidential communication, 16 V.I.C. @ 261 ("All persons are deemed to have arrived at the age of majority at the age of 18 years, and thereafter shall have control of their own actions and businesses and have all the rights and be subject to all the liabilities of persons of full age."), I find it significant that the son was living at home when the communications were made. I also find critical the district court's statement that, "It is apparent . . . that the confidential communications which ensued were in the nature of a child seeking advice from his father with whom he shared a close and trusting relationship. In re Grand Jury Proceeding, Misc. No. 95-0009, at 10 n.5

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**79]

Several cases evaluating a claim of privilege did not have the benefit of the balancing process embodied in Rule 501 of the Federal Rules of Evidence n41 and others did not involve confidential communications made by a [*1164] child to a parent. n42 Finally, a number of cases rejecting the parent-child privilege involved defendants who sought to bar voluntary testimony offered by their parents. n43 These cases do not present the threat to the family relationship posed in the case before us. The importance of this distinction was summarized by the Illinois Supreme Court in People v. Sanders, 99 Ill. 2d 262, 457 N.E.2d 1241, 1246, 75 Ill. Dec. 682 (Ill. 1983). The court in Sanders wrote that cases in which the parent-child privilege has been upheld have

relied heavily upon conjecture that a family member who is forced to testify against her will would face the unpleasant choice of aiding the criminal conviction of a loved one, perjuring herself on the stand, or risking a citation for contempt of court for refusing to testify and the belief that the harshness of this choice has the effect of undermining the family relationship. Such a fear is without foundation where, as in this case, the witness who is a family [**80] member volunteers her testimony. The voluntariness of the act is strong evidence that the choice the witness faced was an easy one for her to make.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n41 See Port v. Heard, 764 F.2d 423, 428 (5th Cir. 1985) (Parties "do not rely on Fed. R. Evid. 501; were this a Rule 501 case our holding might be different since, in terms of the interests at stake, this case presents a compelling argument in favor of recognition."); In re Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971) (decision issued four years before enactment of Fed. R. Evid. 501); In re Terry W., 59 Cal. App. 3d 745, 130 Cal. Rptr. 913, 915 (power to recognize parent-child privilege did not belong to the court under express provision of state statute); Marshall v. Anderson, 459 So. 2d 384, 386 (Fla. Dist. Ct. App. 1984) ("Directly unlike the federal courts, which under Rule 501 of the Federal Rules of Evidence are granted 'the flexibility to develop rules

of privilege on a case-by-case basis . . . and to leave the door open to change,' the courts of Florida are statutorily forbidden to do so.") (citation omitted).

n42 See Penn, 647 F.2d at 879 (defendant sought suppression of drug evidence after police officer offered 5-year-old child five dollars to show where drugs were concealed); United States v. Duran, 884 F. Supp. 537, 541 (D.D.C. 1995) (defendant sought exclusion of letter written to his son under parent-chid privilege); People v. Sanders, 99 Ill. 2d 262, 457 N.E.2d 1241, 1243, 75 Ill. Dec. 682 (Ill. 1983) (defendant sought exclusion of communication with his wife in front of their children), rev'd on other grounds, 99 Ill. 2d 262, 457 N.E.2d 1241, 75 Ill. Dec. 682 (Ill. 1983); State v. Gilroy, 313 N.W.2d 513, 518 (Iowa 1981) (defendant objected when his daughter was called as a witness on behalf of the state); People v. Amos, 414 N.W.2d at 148 (privilege invoked by defendant mother to prevent son's adverse testimony); State v. Bruce, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983) (defendant sought to bar testimony by prison guard about conversation between defendant and his mother in front of the guard). [**81]

n43 See, e.g., In re Terry W., 130 Cal. Rptr. at 914 n.1 ("The mother did not claim a 'parent-child privilege.'"); Cissna v. State, 170 Ind. App. 437, 352 N.E.2d 793, 795 (Ind. Ct. App. 1976); In re Frances J., 456 A.2d 1174, 1177 (R.I. 1983) (noting that "in all of the cases in which the privilege has been recognized, the proponent of the privilege has sought to preclude the compulsion of testimony by a parent. In the case before us, on the other hand, respondent has sought to inhibit or truncate the cross-examination of her mother who had proposed to testify voluntarily").

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

III.

While there is a substantial body of authority in which courts have declined to recognize a parent-child privilege, none of the cases addresses under Rule 501 of the Federal Rules of Evidence the issue of a parent's compelled testimony with respect to confidential advice-seeking statements made to the parent by his teenage son . n44 The facts [*1165] underlying the Virgin Islands appeal are critical to my conclusion that we should recognize a narrowly circumscribed parent-child privilege. The interests involved in [**82] protecting the communications at issue here are far stronger than those involved in previous cases. Consequently, the result which I would reach is not as radical as it might initially appear.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n44 This case is also distinguishable from the only two federal decisions to have recognized some form of parent-child privilege. In In re Grand Jury Proceedings (Greenberg), 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982), a mother asserted a testimonial privilege to prevent being compelled to testify before a grand jury against her adult daughter. The privilege asserted was based on the mother's First Amendment free exercise claim. Specifically, the mother claimed that as a conservative Jew, she could not testify against her daughter without violating a basic tenet of her religion which forbids a parent to testify against a child. The district court recognized a parent-child privilege grounded in the First Amendment, holding that "requiring Mrs. Greenberg to testify would interfere with her free exercise of religion, though only to the extent that her answers would incriminate her daughter." Id. at 582. The court declined to recognize a

common-law privilege protecting confidential parent-child communications in general, however, noting that although compelled disclosure of non-incriminating confidences might damage the relationship between the mother and her daughter, the harm would be less severe than if an unemancipated minor were involved. Id. at 586-87.

In In re Grand Jury Proceedings (Agosto), 553 F. Supp. 1298 (D. Nev. 1983), the district court considered the motion of a thirty-two year old son to quash a subpoena requiring him to testify against his father. In granting the son's motion, the court recognized an expansive common-law testimonial privilege, holding that the government's interest in presenting all relevant evidence does not outweigh "an individual's right of privacy in his communications within the family unit, nor does it outweigh the family's interest in its integrity and inviolability." Id. at 1325. The court supported its decision in part by reference to constitutional law affording protection for the family right of privacy, id. at 1310, and the "expansive posture taken by Congress in enacting Federal Rule of Evidence 501." Id. at 1325. While I am in accord with the Agosto court with respect to the importance of parent-child relationships, I am not prepared to say that I would reach a similar result on similar facts. The case presented in Agosto, involving as it did an adult child's testimony against a parent, is far less compelling than the case now before us. Furthermore, I would decline to adopt a broad rule of privilege and, recognizing the need for caution and restraint, have narrowly drawn the privilege which I would recognize.
- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**83]

IV.

I am convinced that the public good to be derived from a circumscribed parent-child testimonial privilege outweighs the judicial system's interest in compelled parental testimony. I would, therefore, recognize a privilege which could be invoked by a parent and child together to bar compelled testimony concerning confidential communications made to that parent by his child in the course of seeking parental advice and guidance. I would reverse the district court's order in the Virgin Islands matter denying the motion to quash the grand jury subpoena.

FORDHAM Agenda Item III F
University School of Law

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Philip Reed Professor of Law

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

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

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

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

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

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

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

Rule 801. Definitions

The following definitions apply under this article:

* * *

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

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

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

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

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

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

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

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

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

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

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

the trial * * * shift to the out-of-court statements, not the in-court ones." *Tome v. United States,* 513 U.S. 150, 163 (1995).

United States District Court

Middle District of North Carolina
Post Office Box 3223
Greensboro, North Carolina 27402

Chambers of
Frank W. Bullock, Jr.
Chief Judge

January 21, 1998

(336) 332-6070

PLEASE NOTE THAT ABOVE IS NEW TELEPHONE AREA CODE

The Honorable Fern M. Smith
United States District Judge
Northern District of California
Post Office Box 36060
San Francisco, California 94102-3489

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

Dear Judge Smith and Professor Capra:

I appreciate the opportunity to attend your committee meeting in Charleston in October as the liaison member from the Standing Committee. I was greatly impressed by the dedication and expertise of your Committee.

Prior to even being named a member of the Standing Committee, I had been considering bringing to the attention of the Advisory Committee on Evidence what I perceive to be a problem with prior consistent statements and the pre-motive rule (Rule 801(d)(1)(B)). I have been troubled by the differing views of the circuits and by inconsistent opinions even within my own Fourth Circuit. As a result of the Supreme Court's decision in Tome v. United States, 115 S. Ct. 696 (1995), I was finally promptly to express my concern in a law review article which was published in the spring 1997 issue of the Florida State University Law Review. My view of this issue is not that of an expert on evidence, which I clearly am not, but as a district

judge with fifteen years experience observing and instructing juries.

I am a strong supporter of the jury system. However, distinctions between the substantive and non-substantive use of prior consistent statements are normally distinctions without practical meaning. In my experience, juries have a very difficult time understanding an instruction about the difference between substantive and non-substantive use. In my opinion, it makes little sense to differentiate prior consistent statements with a cumbersome time-line rule in regard to the statement's admission as substantive evidence while also allowing the admission of statements rejected by such a rule when jurors themselves do not make such differentiations. However, in my experience, jurors are adept at determining the weight to be given to a witness's testimony and can easily recognize the interest a witness has in the matter about which he or she testified, including any motive that could affect the witness's credibility. Therefore, I would support providing that all prior consistent statements when admissible to rehabilitate are admissible as substantive evidence. The weight to be given to these statements would be for the jury to determine. This is the premise of my law review article.

I recognize that this is certainly not the most troublesome area under the current rules. In most cases post-motive prior consistent statements will be inadmissible under the relevancy rule for the reasons originally noted by courts developing common law evidentiary rules. My suggestion will not change the result in the vast majority of situations, but will refocus the inquiry regarding the admission of prior consistent statements where it belongs--on relevancy. It will also eliminate any necessity for an instruction to juries concerning the difference between substantive and non-substantive use of the prior consistent statement which has just been admitted. Even the best juror's eyes glaze over when given this type of instruction.

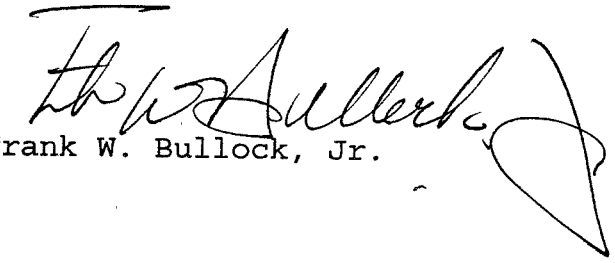
I remember Professor Rice mentioning at the Advisory Committee meeting in Charleston that either the Evidence Project or the Advisory Committee might want to consider an amendment specifically codifying the Tome decision. Of course, I realize that my suggestion is just the opposite.

Please be assured that I do not seek nor expect any special consideration of this suggestion because of my position on the Committee. It is a suggestion that I would have made to your Committee anyway, and it should be treated as simply that. After

all, as I recall from my days as a law review editor, one of the purposes of law review articles is to spur debate.

With highest regards, I am,

Sincerely,



Frank W. Bullock, Jr.

FWB,jr.:jdl

Enclosure (law review article)

cc Professor Paul R. Rice
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FLORIDA STATE UNIVERSITY

LAW REVIEW

PRIOR CONSISTENT STATEMENTS AND THE PREMOTIVE RULE

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

VOLUME 24 SPRING 1997 NUMBER 3

PRIOR CONSISTENT STATEMENTS AND THE PREMOTIVE RULE

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

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I. INTRODUCTION

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

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

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* Chief Judge, United States District Court for the Middle District of North Carolina. B.A., University of North Carolina, 1961; LL.B., University of North Carolina, 1963.

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

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

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

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

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

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

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

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

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

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

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

II. THE COMMON LAW AND PRIOR CONSISTENT STATEMENTS

A. *Development of the Common-Law Rule*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the Model Code of Evidence.[37] The common-law rule described earlier remained the accepted rule regarding prior consistent statements.

B. *Circumstances Required for the Admission of Prior Consistent Statements Under the Common-Law Rule*

Although the accepted common-law rule continued to govern, courts disagreed on what circumstances must precede the admission of a prior consistent statement. Courts' decisions in this regard generally depended on (1) what the impeachment charged or attacked, (2) the method by which the impeachment was accomplished, and (3) the purpose for which the prior consistent statement was offered.

1. *Charge or Attack*

Courts overwhelmingly agreed that prior consistent statements were admissible to rebut impeachment that charged recent fabrication or improper influence or motive.[38] Such a charge can be accomplished by several means of impeachment, including opposing counsel's questions and the introduction of prior inconsistent statements.

Moreover, the vast majority of courts followed a time-line admissibility rule for prior consistent statements. Courts held that prior consistent statements made *before*, but not *after*, the alleged fabrication or improper influence or motive arose were admissible.[39] This time-line rule is known as the premotive rule.

Courts following the premotive rule reasoned that prior consistent statements made *before* the existence of the alleged motive directly rebut such impeachment by demonstrating that the declarant's in-court statement is consistent with out-of-court statements

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37. *See* 21 *id.* § 5005, at 88-89. As a result of the Nebraska Supreme Court's adoption of the Model Code of Evidence, the Nebraska Legislature repealed the court's rulemaking power and rejected the Model Code. *See* 21 *id.* § 5005, at 89 & n.80 (citing Edmund M. Morgan, *The Future of the Law of Evidence*, 29 TEX. L. REV. 587, 599 (1951)).

38. *See, e.g.*, Conrad v. Griffey, 52 U.S. (11 How.) 480, 491-92 (1850); Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931); Dwyer v. State, 145 A.2d 100, 109-10 (Me. 1958); Commonwealth v. Retkovitz, 110 N.E. 293, 297-99 (Mass. 1915); State v. Flint, 14 A. 178, 184-86 (Vt. 1888); *see also* Annotation, *Admissibility, for Purposes of Supporting Impeached Witnesses, of Prior Statements by Him Consistent with His Testimony*, 75 A.L.R.2D 909, 935-50 (1961) (citing cases) [hereinafter 75 A.L.R.2D]; Annotation, *Admissibility, for Purpose of Supporting Impeached Witness, of Prior Statements by Him Consistent with His Testimony*, 140 A.L.R. 21, 78-129 (1942) (citing cases) [hereinafter 140 A.L.R.].

Judge Weinstein and Professor Berger note that "[p]rior to the federal rules, the courts were virtually unanimous in allowing" prior consistent statements to be used following impeachment by this method. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(1)(B)[01], at 801-149 to -150 (1996).

39. *See, e.g.*, *Ellicott*, 35 U.S. (10 Pet.) at 439; Ryan v. UPS, 205 F.2d 362, 364 (2d Cir. 1953); People v. Walsh, 301 P.2d 247, 250-51 (Cal. 1956); People v. Singer, 89 N.E.2d 710, 711-12 (N.Y. 1949); *see also* 75 A.L.R.2D, *supra* note 38, at 944-46 (citing cases); 140 A.L.R., *supra* note 38, at 117-21 (citing cases).

made when the declarant is not alleged to have had an improper motive to falsify his or her statement.[40] Conversely, these courts noted, prior consistent statements made *afterwards* could be the result of the same improper influence that generated the in-court statements, and therefore are of little value.[41]

In nearly all of these jurisdictions, a prior consistent statement's admissibility was decided in the same manner as other evidentiary questions that require predicate showings for admissibility. The trial judge determined whether a prior consistent statement was premotive or postmotive based on evidence presented to the jury up to the time the statement's admission was sought, evidence presented to the judge out of the jury's presence, or a combination of these two means. The judge's determination of this question would normally dictate the admissibility of the statement.[42]

The United States Court of Appeals for the Second Circuit, recognizing the strength and propriety of the jury's fact-finding ability, adopted a different, deferential standard of admissibility. The Second Circuit held that if it is "reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them."[43]

A small minority of courts held that prior consistent statements made *after* the alleged fabrication or improper influence or motive arose also could be admissible.[44] These courts reasoned that postmotive prior consistent statements and the circumstances surrounding such statements are relevant to the jury's evaluation of the declarant's motive and testimony.[45]

A witness's memory is sometimes attacked as faulty. Such an attack can be accomplished by opposing counsel's questions, prior inconsistent statements, negative evidence, and other impeachment means.[46] Several courts held prior consistent statements admissible following an attack on a witness's memory.[47] These courts reasoned

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40. *See* sources cited *supra* note 39.

41. *See* sources cited *supra* note 39.

42. *See* sources cited *supra* note 39.

43. United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957); *see also* United States v. Sampol, 636 F.2d 621, 673 (D.C. Cir. 1980); United States v. DiLorenzo, 429 F.2d 216, 220 (2d Cir. 1970); Greenway v. State, 626 P.2d 1060, 1062 (Alaska 1980) (Matthews, J., concurring).

44. *See, e.g.*, United States v. Gandy, 469 F.2d 1134, 1134-35 (5th Cir. 1972); Hanger v. United States, 398 F.2d 91, 104-05 (8th Cir. 1968); Copes v. United States, 345 F.2d 723, 725-26 (D.C. Cir. 1964); State v. George, 30 N.C. 324, 328 (1848).

45. *See, e.g.*, *Gandy*, 469 F.2d at 1134-35; *Copes*, 345 F.2d at 725.

46. It is important to note that an attack on a witness's memory often, but not always, includes a charge of recent fabrication.

47. *See, e.g.*, Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 61 (2d Cir. 1972); Felice v. Long Island R.R., 426 F.2d 192, 198 n.6 (2d Cir. 1970); United States v. Keller, 145 F. Supp. 692, 695-97 (D.N.J. 1956); People v. Basnett, 8 Cal. Rptr. 804, 810-11 (Ct. App. 1960); Thomas v. Ganezer, 78 A.2d 539, 542 (Conn. 1951); Openshaw v. Ad-

that such statements indicate the witness's "true belief"[48] or demonstrate the witness's "accuracy of memory."[49] Moreover, these courts reasoned that such statements are "necessary to give the jury a complete basis upon which to judge the credibility" of the witness's testimony.[50] Given this rationale, many of these courts required that the prior consistent statement be made soon after the event in question.[51]

A few courts held prior consistent statements inadmissible in like circumstances.[52] These courts did not explicitly set forth their rationale in this regard. It appears, however, that their reasoning was based on a very strict adherence to the general common-law rule prohibiting the use of hearsay.[53]

Many courts construed an attack on a witness's memory to be a charge of recent fabrication. Thus, these courts admitted prior consistent statements to rebut such attacks under the well-recognized rule admitting such statements to rebut a charge of recent fabrication.[54] These courts took an expansive view of the term "fabricated." Courts recognized "fabricated" to mean "fabricat[ion] to meet the exigencies of the case."[55] However, "fabricated" normally indicates a

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ams, 445 P.2d 663, 668-69 (Idaho 1968); Cross v. State, 86 A. 223, 227 (Md. 1912); People v. Mann, 212 N.W.2d 282, 287 (Mich. Ct. App. 1973); State v. Slocinski, 197 A. 560, 562 (N.H. 1938); Jones v. Jones, 80 N.C. 246, 250 (1878); *see also* Graham, *supra* note 1, at 605-06 (noting that prior consistent statements properly support such an attack "if the statement was made shortly after the event in question"); 1 MCCORMICK ON EVIDENCE, *supra* note 31, § 47, at 178 n.18 ("If the witness's accuracy of memory is challenged, it seems clear common sense that a consistent statement made shortly after the event and before he had time to forget, should be received in support."); 75 A.L.R.2D, *supra* note 38, at 929-30 (citing cases); 140 A.L.R., *supra* note 38, at 48-49 (citing cases). Courts hold similarly today. *See* Debra T. Landis, Annotation, *Admissibility of Impeached Witness' Prior Consistent Statement—Modern State Civil Cases*, 59 A.L.R.4TH 1000, 1023 (1988 & Supp. 1994) (citing cases) [hereinafter 59 A.L.R.4TH]; Debra T. Landis, Annotation, *Admissibility of Impeached Witness' Prior Consistent Statement—Modern State Criminal Cases*, 58 A.L.R.4TH 1014, 1051-53 (1987 & Supp. 1994) (citing cases) [hereinafter 58 A.L.R.4TH].

48. *Openshaw*, 445 P.2d at 669.

49. *Thomas*, 78 A.2d at 542 (quoting *Jones*, 80 N.C. at 250) (internal quotation marks omitted).

50. *Applebaum*, 472 F.2d at 62.

51. *See, e.g.*, *id.* at 61-62; *Jones*, 80 N.C. at 250; *see also* 1 MCCORMICK ON EVIDENCE, *supra* note 31, § 47, at 178 n.18.

52. *See, e.g.*, People v. Doyell, 48 Cal. 85, 90-91 (1874); People v. Kinney, 95 N.E. 756, 757 (N.Y. 1911); Cincinnati Traction Co. v. Stephens, 79 N.E. 235, 236-37 (Ohio 1906); Green v. State, 110 S.W. 929, 929-30 (Tex. Crim. App. 1908); *see also* Graham, *supra* note 1, at 605-06; 140 A.L.R., *supra* note 38, at 47-48. The common-law trend throughout the twentieth century, however, was to admit prior consistent statements following an attack on a witness's memory.

53. *See, e.g.*, *Kinney*, 95 N.E. at 757 ("It is sufficient to state somewhat dogmatically that this evidence [a prior consistent statement regarding identification] was utterly incompetent, for this is so baldly the law that there is no chance for debate or discussion.").

54. *See* sources cited *supra* note 47.

55. *E.g.*, People v. Singer, 89 N.E.2d 710, 711 (N.Y. 1949).

conscious and purposeful falsification.[56] "Fabricate" is defined as "to make up for the purposes of deception."[57]

Although an attack on a witness's memory may include a charge of purposeful deception, such an attack does not always do so. For example, an attack charging inaccurate memory by showing the witness's simple forgetfulness or confusion may be made without charging purposeful deception. Common-law courts, however, often seemed to treat "recent fabrication" as a term of art, including non-purposeful deception within its definition.[58]

Other courts, in admitting prior consistent statements to rebut attacks on a witness's memory, recognized some distinction between such attacks and a charge of recent fabrication. These courts reasoned that such attacks created situations that were "sufficiently analogous" to the cases admitting prior consistent statements to rebut a charge of recent fabrication.[59]

2. *Other Types of Impeachment*

Common-law courts largely agreed that impeachment methods that did not charge a recent fabrication or improper influence or motive, or attack the witness's memory, did not open the door to the introduction of prior consistent statements.[60] Some methods received near-uniform treatment, while others resulted in disagreement.

Nearly all courts held prior consistent statements inadmissible to rebut impeachment by mere contradiction evidence.[61] If mere contradiction justified the admission of prior consistent statements, "then the witness who had repeated his story to the greatest number of people would be the most credible."[62]

Most courts, noting that a person of bad moral character could easily repeat a story, held prior consistent statements inadmissible

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56. *See* Graham, *supra* note 1, at 582-83.

57. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 443 (1989).

58. *See, e.g.*, sources cited *supra* notes 38-39.

59. *E.g.*, Thomas v. Ganezer, 78 A.2d 539, 542 (Conn. 1951).

60. Professor Michael Graham refers to this type of impeachment as "naked impeachment." Graham, *supra* note 1, at 594.

61. Mere contradiction evidence usually takes the form of a witness whose testimony portrays a different version of the matter about which a previous witness testified. Many courts decline to admit prior consistent statements to rebut such impeachment. *See, e.g.*, Inman Bros. v. Dudley & Daniels Lumber Co., 146 F. 449, 456 (6th Cir. 1906); Evans v. State, 22 S.E. 298, 298-99 (Ga. 1894); People v. Katz, 103 N.E. 305, 312-13 (N.Y. 1913); *see also* 4 WIGMORE, *supra* note 13, § 1127, at 267; 140 A.L.R., *supra* note 38, at 38-42 (citing cases).

A very small minority of courts, however, ruled such statements admissible following contradiction evidence. *See, e.g.*, Mallonee v. Duff, 19 A. 708, 708-09 (Md. 1890); State v. Rhyne, 13 S.E. 943, 943-44 (N.C. 1891); *see also* 140 A.L.R., *supra* note 38, at 42-47 (citing cases). Dean Wigmore described these courts as "misled." 4 WIGMORE, *supra* note 13, § 1127, at 267.

62. 4 WIGMORE, *supra* note 13, § 1127, at 267.

to rebut impeachment by evidence of the declarant's bad moral character.[63] Following the same general reasoning, nearly all courts held prior consistent statements inadmissible to rebut impeachment by evidence of the declarant's bad reputation for veracity.[64]

Courts split as to whether prior consistent statements were admissible following impeachment of the witness by prior inconsistent statements alone.[65] A majority of courts held prior consistent statements inadmissible following such impeachment.[66] These courts generally reasoned that "since the self-contradiction is conceded, it remains as a damaging fact, and is in no sense explained away by the inconsistent statement."[67] A number of courts, however, held that prior consistent statements were admissible following impeachment by prior inconsistent statements alone.[68] These courts generally rea-

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63. *See, e.g.*, Edwards v. Commonwealth, 140 S.W. 1046, 1047 (Ky. 1911); Lyles v. State, 239 S.W. 446, 449-50 (Tenn. 1922); Thurmond v. State, 11 S.W. 451, 452 (Tex. Ct. App. 1889); *see also* 4 WIGMORE, *supra* note 13, § 1125, at 258; 140 A.L.R., *supra* note 38, at 34-35 (citing cases). A few courts, however, admitted prior consistent statements to rebut the impeachment of the declarant's moral character. *See, e.g.*, State v. Rowe, 4 S.E. 506, 509-10 (N.C. 1887); Zell v. Commonwealth, 94 Pa. 258, 267 (1880); *see also* 140 A.L.R., *supra* note 38, at 35-36 (citing cases).

64. *See, e.g.*, Yoder v. United States, 71 F.2d 85, 89 (10th Cir. 1934); McKelton v. State, 6 So. 301, 301 (Ala. 1889); Mason v. Vestal, 26 P. 213, 213-14 (Cal. 1891); *see also* 4 WIGMORE, *supra* note 13, § 1125, at 258; 75 A.L.R.2D, *supra* note 38, at 927-28 (citing cases); 140 A.L.R., *supra* note 38, at 36-37 (citing cases). A few courts, however, admitted prior consistent statements to rebut such impeachment. *See, e.g.*, State v. Parrish, 468 P.2d 143, 149 (Kan. 1970); State v. Dove, 32 N.C. 469, 474-75 (1849); 4 WIGMORE, *supra* note 13, § 1125, at 258; 140 A.L.R., *supra* note 38, at 37 (citing cases).

65. "The admission of prior consistent statements to support a witness impeached by prior inconsistent statements has plagued the courts for centuries . . . ." Hanger v. United States, 398 F.2d 91, 103 (8th Cir. 1968). Impeachment by prior inconsistent statement is also called self-contradiction. *See id.*

66. *See, e.g.*, Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944); Gelbin v. New York, N.H. & H.R. Co., 62 F.2d 500, 502 (2d Cir. 1933); American Agric. Chem. Co. v. Hogan, 213 F. 416, 420-21 (1st Cir. 1914); Baker v. People, 209 P. 791, 793 (Colo. 1922); Chicago City Ry. v. Matthieson, 72 N.E. 443, 444-45 (Ill. 1904); *see also* 4 WIGMORE, *supra* note 13, § 1126; 140 A.L.R., *supra* note 38, at 49-59 (citing cases). Much of the case law recognized this as the "general rule."

67. 4 WIGMORE, *supra* note 13, § 1126, at 259.

68. *See, e.g.*, Schoppel v. United States, 270 F.2d 413, 417 (4th Cir. 1959); United States v. Corry, 183 F.2d 155, 157 (2d Cir. 1950); Childs v. State, 55 Ala. 25, 28 (1876); Thompson v. State, 58 N.E.2d 112, 112-13 (Ind. 1944), *overruled by* Dean v. State, 433 N.E.2d 1172 (Ind. 1982); American Stores Co. v. Herman, 171 A. 54, 55-56 (Md. 1934); Cross v. State, 86 A. 223, 226-27 (Md. 1912); People v. Purman, 185 N.W. 725, 727 (Mich. 1921); Stewart v. People, 23 Mich. 63, 74-76 (1871); Stafford v. Lyon, 413 S.W.2d 495, 498 (Mo. 1967); Piehler v. Kansas City Pub. Serv. Co., 226 S.W.2d 681, 683-84 (Mo. 1950); Reeves v. Hill, 158 S.E.2d 529, 537 (N.C. 1968); Hale v. Smith, 460 P.2d 351, 353 (Or. 1969); State v. Turner, 15 S.E. 602, 602-03 (S.C. 1892); Kepley v. State, 320 S.W.2d 143, 145 (Tex. Crim. App. 1959); State v. Sibert, 310 P.2d 388, 391 (Utah 1957); Russell v. Cavelero, 246 P. 25, 26 (Wash. 1926); *see also* Kaneshiro v. United States, 445 F.2d 1266, 1271 (9th Cir. 1971); Sweazey v. Valley Transp., Inc., 107 P.2d 567, 572 (Wash. 1940) (describing admitting prior consistent statements to rebut prior inconsistent statements as the minority rule); 140 A.L.R., *supra* note 38, at 59-65 (citing cases); *see generally* 4 WIGMORE, *supra* note 13, § 1126, at 258-67.

soned that "if a contradictory statement counts against the witness, a consistent one should count for him."[69]

Moreover, some courts reasoned that prior consistent statements are admissible following impeachment by a prior inconsistent statement alone if the prior consistent statement is related to an explanation or denial of the alleged prior inconsistent statement.[70] In other words, courts held that prior consistent statements could be admitted to help explain that the previously admitted prior inconsistent statement is incorrect or misleading, or to help explain that the prior inconsistent statement was simply never made.[71] Appellate courts sometimes answered this difficult question by leaving the decision to the trial judge's sound discretion.[72]

This remained the state of the common law regarding prior consistent statements until the enactment of the Federal Rules of Evidence. Both state and federal common-law evidentiary rules were important to federal courts of the time. Before the enactment of the Federal Rules of Evidence, the admission of evidence in federal civil cases was primarily governed by Rule 43(a) of the Federal Rules of Civil Procedure.[73] Rule 43(a), enacted in 1938, provided for the admission of evidence in federal court in civil trials if the evidence was admissible under federal statute, federal common law or decisions, or under statutes or rules of the state where the district court sat.[74]

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69. 4 WIGMORE, *supra* note 13, § 1126, at 259.

70. *See, e.g.*, United States v. Fayette, 388 F.2d 728, 733-35 (2d Cir. 1968); Newman v. United States, 331 F.2d 968, 970-71 (8th Cir. 1964); United States v. Agueci, 310 F.2d 817, 834 (2d Cir. 1962); United States v. Lev, 276 F.2d 605, 608 (2d Cir. 1960); Cafasso v. Pennsylvania R.R., 169 F.2d 451, 453 (3d Cir. 1948); *Affronti*, 145 F.2d at 7 ("[I]f some portions of a statement made by a witness are used on cross-examination to impeach him, other portions of the statement which are relevant to the subject matter about which he was cross-examined may be introduced in evidence to meet the force of the impeachment."); United States v. Weinbren, 121 F.2d 826, 828-29 (2d Cir. 1941); United States v. Katz, 78 F. Supp. 435, 440 (M.D. Pa. 1948), *aff'd*, 173 F.2d 116 (3d Cir. 1949); *see generally* MICHAEL H. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 6712, at 461 (interim ed. 1992).

71. *See, e.g.*, Felice v. Long Island R.R., 426 F.2d 192, 198 (2d Cir. 1970); Twardosky v. New England Tel. & Tel. Co., 62 A.2d 723, 727 (N.H. 1948); *Sweazey*, 107 P.2d at 572; *see also* 4 WIGMORE, *supra* note 13, § 1126, at 260-65; GRAHAM, *supra* note 70, § 6712, at 461; Graham, *supra* note 1, at 594-602.

72. *See, e.g.*, Hanger v. United States, 398 F.2d 91, 103-04 (8th Cir. 1968); National Postal Transp. Assoc. v. Hudson, 216 F.2d 193, 200 (8th Cir. 1954); *Cafasso*, 169 F.2d at 453; *Affronti*, 145 F.2d at 7; State v. Ouimette, 298 A.2d 124, 133-34 (R.I. 1972).

73. FED. R. CIV. P. 43(a) (1938) (amended 1972).

74. *See id.* Rule 43(a) provided, in pertinent part:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs . . . .

Id.; *see also generally* Thomas F. Green, Jr., *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560 (1952).

Rule 26 of the Federal Rules of Criminal Procedure provided that the admissibility of evidence in federal criminal cases was generally governed by common law.[75]

III. THE FEDERAL RULES OF EVIDENCE AND PRIOR CONSISTENT STATEMENTS

A. *Prior Consistent Statements and Rule 801(d)(1)(B) of the Federal Rules of Evidence*

The Federal Rules of Evidence gave rise to a new era of evidence law. Congress enacted the Federal Rules of Evidence in 1975 "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[76] Moreover, the Rules sought to reduce inconsistency and arbitrariness in the admission of evidence in federal courts.[77]

Although much of the Federal Rules of Evidence is based on the Uniform Rules of Evidence,[78] the Federal Rules of Evidence did not incorporate the Uniform Rules of Evidence's position on prior statements as nonhearsay.[79] Instead, the Federal Rules of Evidence generally adhered to the prevailing common-law hearsay rules.[80]

Federal Rule of Evidence 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[81] Hearsay is generally excluded from evidence under Rule 802.[82]

Rule 801(d)(1)(B) addresses the admission of prior consistent statements by removing certain prior consistent statements from the definition of hearsay. Rule 801(d)(1)(B) provides:

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the state-

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75. *See* FED. R. CRIM. P. 26 (1946). Rule 26 provided, in pertinent part: "The admissibility of evidence . . . shall be governed, except when an act of Congress or these rules otherwise provide, 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." *Id.*

76. FED. R. EVID. 102.

77. *See* William L. Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 FED. B.J. 225, 228-29 (1973).

78. *See* 21 WRIGHT & GRAHAM, *supra* note 36, § 5005, at 90.

79. *See* FED. R. EVID. 801(d) advisory committee's note (comparing Rule 63(1) of the Uniform Rules of Evidence with Rule 801(d)).

80. *See id.*

81. FED. R. EVID. 801(c). Rule 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a). Rule 801(b) defines a "declarant" as "a person who makes a statement." FED. R. EVID. 801(b).

82. *See* FED. R. EVID. 802. Rule 802 provides that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." *Id.*

> ment, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.[83]

The most important aspect in which Rule 801(d)(1)(B) differs from the common-law rule governing the admission of prior consistent statements is that Rule 801(d)(1)(B) allows the admission of statements within its scope for substantive purposes.[84] The Advisory Committee noted that this aspect of Rule 801(d)(1)(B) rejects the "bulk of the case law" and is a "judgment . . . more of experience than of logic."[85]

Many federal circuits hold that prior consistent statements offered for the limited purpose of rehabilitation, and not for substantive use, are not governed by Rule 801(d)(1)(B).[86] Evidence commentators agree with this conclusion.[87] Courts reason that Rule 801(d)(1)(B) applies only to statements offered for the truth of the matter asserted.[88] Because prior consistent statements offered for the limited purpose of rehabilitation are not offered for the truth, these courts reason, Rule 801(d)(1)(B) does not govern their admission.[89] Some courts state their belief that the Federal Rules of Evidence did not alter prior common-law rules in this regard.[90] In addition, some

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83. FED. R. EVID. 801(d)(1)(B). Of course, prior consistent statements admissible under Rule 801(d)(1)(B) must still qualify for admission under the relevancy rules. *See* FED. R. EVID. 401-03.

84. This is true for all prior statements admitted under Rule 801(d). *See* FED. R. EVID. 801(d) advisory committee's note.

85. *Id.*

86. *See, e.g.*, Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 729-30 (6th Cir. 1994); United States v. Castillo, 14 F.3d 802, 805-06 (2d Cir. 1994); United States v. White, 11 F.3d 1446, 1449 (8th Cir. 1993); United States v. Casoni, 950 F.2d 893, 905-06 (3d Cir. 1991); United States v. Bolick, 917 F.2d 135, 138 (4th Cir. 1990); United States v. Roy, 843 F.2d 305, 307 (8th Cir. 1988); United States v. Colon, 835 F.2d 27, 31 (2d Cir. 1987); United States v. Khan, 821 F.2d 90, 94 (2d Cir. 1987); United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986); United States v. Brennan, 798 F.2d 581, 587-88 (2d Cir. 1986), *aff'd*, 867 F.2d 111 (2d Cir. 1989); United States v. Andrade, 788 F.2d 521, 532-33 (8th Cir. 1986); United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986); United States v. Harris, 761 F.2d 394, 399-400 (7th Cir. 1985); United States v. Juarez, 549 F.2d 1113, 1114 (7th Cir. 1977); *see also* United States v. Jones, 766 F.2d 994, 1004 (6th Cir. 1985) (holding, without discussion, that trial court's admission of prior consistent statements to rehabilitate witnesses was not an abuse of discretion); *see also* United States v. Rubin, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring) (arguing that the limitations on the use of prior consistent statements apply only to affirmative evidence), *aff'd*, 449 U.S. 424 (1981); United States v. James, 609 F.2d 36, 50 n.20 (2d Cir. 1979) (noting but not deciding the issue).

87. *See* 2 MCCORMICK ON EVIDENCE, *supra* note 31, § 251, at 117; WRIGHT & GRAHAM, *supra* note 36, § 6712, at 461-63; Graham, *supra* note 1, at 594-604.

88. *See, e.g.*, *Engebretsen*, 21 F.3d at 730; *Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 399; *Rubin*, 609 F.2d at 66-70 (Friendly, J., concurring); United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir. 1978); *see also White*, 11 F.3d at 1449; *Bolick*, 917 F.2d at 138; *Bowman*, 798 F.2d at 338.

89. *See* cases cited *supra* note 88.

90. *See, e.g.*, *Quinto*, 582 F.2d at 233.

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

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

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

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

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

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

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

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

95. *Id.* (emphasis omitted).

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

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

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

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

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

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

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

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

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

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

Id. at 246-47.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

105. *See, e.g.*, *Harris*, 761 F.2d at 400; United States v. Juarez, 549 F.2d 1113, 1114 (7th Cir. 1977).

106. *See, e.g.*, United States v. Parodi, 703 F.2d 768, 785 (4th Cir. 1983).

107. *See, e.g.*, United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986); *Harris*, 761 F.2d at 400.

108. *See, e.g.*, *Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 400; *see also* GRAHAM, *supra* note 70, § 6712, at 461-63.

109. *See, e.g.*, *Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 400; United States v. Rubin, 609 F.2d 51, 70 (2d Cir. 1979); United States v. Baron, 602 F.2d 1215, 1252 (7th Cir. 1979); *see also* United States v. Andrade, 788 F.2d 521, 533 (8th Cir. 1986) ("[T]his rehabilitative use of prior consistent statements is in accord with the principle of completeness prompted by Rule 106."); *supra* note 86 and accompanying text. *But see* Ohlbaum, *supra* note 97, at 282 & n.140 ("[T]hese courts have relied on a tortured reading of the 'rule of completeness' . . . ."). Courts, too, have noted that this is "not a precise use of Rule 106." *E.g.*, *Pierre*, 781 F.2d at 333.

statements—postmotive prior consistent statements—are not admissible as substantive evidence under Rule 801(d)(1)(B).[124]

A. The Majority Opinion

The pertinent common-law evidentiary rule that prevailed in the United States for over a century before the enactment of the Federal Rules of Evidence was important to the Court's analysis. The majority defined the common-law premotive rule as holding that "a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made *before* the alleged fabrication, influence, or motive came into being, but it was inadmissible if made *afterwards*."[125]

In seeking to determine the effect of the Federal Rules of Evidence on the common-law rule, the Court looked to the language of Rule 801(d)(1)(B). The Court found two aspects of Rule 801(d)(1)(B)'s language especially informing: (1) the language's focus on one kind of impeachment (i.e., rebutting charges of recent fabrication or improper influence or motive), and not on other forms of impeachment; and (2) Rule 801(b)(1)(B)'s use of wording from common-law cases describing the premotive rule.[126]

The Court considered it important that the Advisory Committee did not give *all* prior consistent statements nonhearsay status.[127] It emphasized that the Advisory Committee limited the types of prior consistent statements that receive nonhearsay status to those offered to rebut only one form of impeachment: a charge of "recent fabrication or improper influence or motive."[128] This limitation, the Court found, "reinforce[s] the significance of the requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate arose."[129]

The Court reasoned that the rebuttal force of premotive prior consistent statements is very strong when introduced to rebut a

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124. *See id.* at 705.

125. *Id.* at 700 (emphasis added) (citing Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836) ("[W]here the testimony is assailed as a fabrication of a recent date . . . in order to repel such imputation, proof of the *antecedent* declaration of the party may be admitted."); *see also* People v. Singer, 89 N.E.2d 710, 712 (N.Y. 1949). The majority also cited the treatises of Professor McCormick and Dean Wigmore. *See Tome*, 115 S. Ct. at 700 (citing MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 (2d ed. 1972); 4 WIGMORE, *supra* note 13, § 1128, at 268).

126. *See Tome*, 115 S. Ct. at 701-02.

127. *See id.* at 701.

128. *Id.* The majority noted that the Advisory Committee used "the same phrase . . . in its description of the 'traditiona[l]' common law of evidence." *Id.* (citing FED. R. EVID. 801(d) advisory committee's note).

129. *Id.* The majority rephrased this reasoning: "the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense." *Id.*

charge of recent fabrication or improper influence or motive.[130] The Court, however, explained that little rebuttal force is present when any prior consistent statement is introduced to rebut other forms of impeachment, such as character impeachment by misconduct, convictions, or bad reputation.[131] Likewise, the Court explained, little rebuttal force is present when postmotive prior consistent statements are introduced to rebut a charge of recent fabrication or improper influence or motive,[132] even though such statements may "suggest in some degree that the testimony did not result from some improper influence."[133]

The Court further reasoned that if Rule 801(d)(1)(B)'s drafters intended to permit admission of postmotive prior consistent statements—which have low rebuttal force—then there is "no sound reason" for the drafters to have expressly limited the use of prior consistent statements to rebut impeachment only when such statements have very high rebuttal force,[134] while prohibiting the use of such statements to rebut other forms of impeachment when such statements have low rebuttal force similar to the low rebuttal force of postmotive prior consistent statements.[135] The Court thus found it "clear . . . that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement."[136]

The Court found support for its analysis by observing that Congress easily could have adopted an evidentiary rule that expressly allows admission of postmotive prior consistent statements.[137] In the Court's view, its "analysis is strengthened by the observation that the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common-law cases that describe the premotive requirement."[138] It reasoned that this similarity sup-

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130. *See id.* ("A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive.").

131. *See id.* ("[P]rior consistent statements carry little rebuttal force when most other types of impeachment are involved.") (citing MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 (2d ed. 1972); 4 WIGMORE, *supra* note 13, § 1131, at 293).

132. *See id.* ("[O]ut-of-court statements that postdate the alleged fabrication . . . refute the charged fabrication in a less direct and forceful way.").

133. *Id.* at 702.

134. Recall that prior consistent statements have very high rebuttal force when used to rebut impeachment by charges of recent fabrication or improper influence or motive. *See supra* note 130 and accompanying text.

135. *See Tome*, 115 S. Ct. at 702 (explaining that if there is no temporal requirement "imbedded in" Rule 801(d)(1)(B), then there is "no sound reason not to admit consistent statements to rebut other forms of impeachment as well").

136. *Id.*

137. *See id.* The majority suggested that a rule that provides that "a witness' prior consistent statements are admissible whenever relevant to assess the witness's truthfulness or accuracy" would embody the Government's theory. *Id.*

138. *Id.* at 702 (citing Ohlbaum, *supra* note 97, at 245 ("Rule 801(d)(1)(B) employs the precise language—'rebut[ting] . . . charge[s] . . . of recent fabrication or improper influence or motive'—consistently used in the panoply of pre-1975 decisions.")); *see also* Ellicott v.

ports the conclusion that Rule 801(d)(1)(B) "was intended to carry over the common-law pre-motive rule."[139]

The Court rejected the government's argument that "the common-law premotive rule . . . is inconsistent with the Federal Rules' liberal approach to relevancy."[140] It noted that because "[r]elevance is not the sole criterion of admissibility," relevant out-of-court statements may still be inadmissible.[141]

The Court also based its reasoning on the negative aspects of not having such a rule. It feared that the premotive rule's absence could shift a trial's emphasis from the in-court statements to the out-of-court statements.[142] In addition, the Court stated its belief that the absence of the premotive rule would increase the burden of the trial court, and would provide no guidance to attorneys preparing for trial or to reviewing appellate courts.[143]

Four members of the five-justice majority found their analysis "confirmed by an examination of the Advisory Committee Notes to the Federal Rules of Evidence."[144] The plurality explained: "Where, as with Rule 801(d)(1)(B), 'Congress did not amend the Advisory Committee's draft in any way, . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.' "[145] The plurality found that the Advisory Committee's notes stated a "purpose to adhere to the common law" except where expressly provided.[146] They reasoned that when the Rules departed from the common law, "in general the Committee said so."[147] The plurality found no indication from the notes "that Rule 801(d)(1)(B) abandoned the premotive requirement."[148] Moreover, the plurality asserted, the Rules demonstrate the Committee's compromise, one that the Committee stated was "more of experience than of logic,"[149]

Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Hanger v. United States, 398 F.2d 91, 104 (8th Cir. 1968); People v. Singer, 89 N.E.2d 710, 711 (N.Y. 1949).

139. *Tome*, 115 S. Ct. at 702.

140. *Id.* at 704 ("This argument misconceives the design of the Rules' hearsay provisions.").

141. *Id.*

142. *See id.* at 705.

143. *Id.* The majority noted that postmotive prior consistent statements could gain admission under Federal Rule of Evidence 803(24) if the statements met Rule 803(24)'s requirements. *See id.* Rule 803(24) is known as the "catch-all exception." *See generally* GRAHAM, *supra* note 70, § 6775; *see also infra* note 205.

144. *Tome*, 115 S. Ct. at 702. Justice Scalia did not join in Part II.B of the Court's opinion because the majority's discussion "gives effect to those Notes" as displaying "the 'purpose' or 'inten[t]' of the draftsmen." *Id.* at 706 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

145. *Id.* at 702 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 165-66 n.9 (1988)).

146. *Id.*

147. *Id.* at 702-03.

148. *Id.* at 703.

149. *Id.* at 704.

"between the views expressed by the 'bulk of the case law . . . against allowing prior statements of witnesses to be used generally as substantive evidence' and the views of the majority of 'writers . . . [who] ha[d] taken the opposite position.' "[150]

Based on this analysis, the Court overruled six of the federal circuits[151] and held that Rule 801(d)(1)(B) codified the common-law premotive rule.[152] Thus, following *Tome*, postmotive prior consistent statements are not admissible as substantive evidence under Rule 801(d)(1)(B).

B. *The Dissenting Opinion*

Four justices, in a dissent authored by Justice Breyer, expressed their disagreement with the majority opinion. The majority and dissenting opinions began from the same point—acknowledgment of the traditional common-law rule—but quickly parted company.

Although the dissent agreed with the majority's statement of the common-law rule,[153] the dissent emphasized that the reason for the premotive requirement was that postmotive prior consistent statements had "no *relevance* to rebut the charge."[154] This point of departure served as the basis for the Court's fracture in this case.

The dissent characterized the majority's holding as finding that a *hearsay*-related rule—Rule 801(d)(1)(B)—codified a common-law *relevancy* rule, and asserted that Rule 801(d)(1)(B) "has nothing to do with relevance. Rather, that Rule carves out a subset of prior consistent statements that were formerly admissible only to rehabilitate a witness."[155]

The dissent rejected the majority's premise that the Advisory Committee "singled out one category" of rehabilitative prior consistent statements for nonhearsay treatment because of the category's high probative force.[156] It pointed out that other categories also have high probative force in certain situations, including prior consistent statements used to rebut a charge of faulty memory.[157] The dissent further argued that, doubts regarding the majority's premise aside,

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150. *Id.* at 703-04 (quoting FED. R. EVID. 801(d) advisory committee's note).

151. *See supra* note 110 and accompanying text.

152. *See Tome*, 115 S. Ct. at 700.

153. *See id.* at 706 (Breyer, J., dissenting).

154. *Id.* The dissent noted that the treatises discuss the issue "under the general heading of 'impeachment and support' (McCormick) or 'relevancy' (Wigmore), and not 'hearsay.' " *Id.* at 706-07.

155. *Id.* at 707.

156. *Id.*

157. *See id.* " '[I]f the witness's accuracy of memory is challenged, it seems *clear common sense* that a consistent statement made shortly after the event and before he had time to forget, should be received in support.' " *Id.* (quoting MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 n.88 (2d ed. 1972)) (alteration in original).

respect to rehabilitation) the use of postmotive prior consistent statements to rebut a charge of recent fabrication, improper influence or motive (subject of course to, for example, Rule 403)."[179] When allowed, the dissent explained, such admission would be as substantive evidence.[180]

V. OBSERVATIONS REGARDING RULE 801(D)(1)(B) AND THE CURRENT PREMOTIVE RULE

Rule 801(d)(1)(B) of the Federal Rules of Evidence has generated considerable confusion since its enactment. Some commentators have called for the Rule's amendment and have suggested changes.[181] These commentators, however, do not provide for the admission of postmotive prior consistent statements under Rule 801(d)(1)(B).

As the *Tome* Court explained, Rule 801(d)(1)(B) codified a per se time-line premotive rule.[182] Rule 801(d)(1)(B) should be amended. Any such amendment should serve at least two purposes. First, the amendment should reject the per se time-line premotive rule and allow the admission of prior consistent statements where the statements are relevant and have value but are inadmissible under the *Tome* Court's interpretation of Rule 801(d)(1)(B). Second, the amendment should expressly provide for the admission of prior consistent statements as substantive evidence in all cases where such statements are admissible for rehabilitation.

A. *The Pitfalls of the Per Se Approach*

The overwhelming majority of common-law courts applied a per se time-line premotive rule.[183] It is important to understand, however, why a per se time-line rule developed. Courts reasoned that a consistent statement made during the time in which the witness allegedly had the same motivation that resulted in the impeached in-court statement has no rebuttal force and is thus irrelevant.[184] In the vast majority of cases, a strict time-line rule furthers this rationale. Consequently, the rule developed into a per se time-line rule because such a rule is properly determinative in the great majority of cases in which the issue of temporalness and prior consistent statements arise, and theoretically provides predictability and facilitates the decision-making process.

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179. *Id.* at 709-10.
180. *See id.* at 710.
181. *See, e.g.*, Graham, *supra* note 1; Ohlbaum, *supra* note 97.
182. *See* 115 S. Ct. at 702.
183. *See supra* note 39 and accompanying text.
184. *See supra* note 41 and accompanying text.

Common-law courts applying the rule shortly before the development and codification of the Federal Rules of Evidence sensed that something was wrong with the per se time-line premotive rule.[185] This sense had not fully developed when the Federal Rules of Evidence were enacted. As a result, Rule 801(d)(1)(B) codified, as the *Tome* Court explained, the common-law rule accepted by the vast majority of courts, including the time-line premotive requirement.[186]

Courts' wariness of the time-line premotive rule continued and expanded under the Federal Rules. Several courts applying Rule 801(d)(1)(B) before *Tome* allowed the admission of postmotive prior consistent statements as substantive evidence under the Rule in some instances.[187] Moreover, all but one of the circuits admitted postmotive prior consistent statements for the limited purpose of rehabilitation in some instances.[188]

Courts and commentators have become overly focused on a pure time-line analysis when examining prior consistent statements. While it is true that the time-line premotive rule comports to unadorned logic, in practical application the rule's per se approach can be overly restrictive.

There are situations where a postmotive prior consistent statement is relevant, has some rebuttal force or related value, and should be admissible. One such time is when a separate motive to tell the truth or to make a different statement exists at the statement's making. Consider a situation where the declarant has been impeached by a charge of improper influence or motive arising at a particular time. Normally (and logically), a statement that is made after the time the improper influence or motive arose and is consistent with the declarant's in-court testimony offers no rebuttal value and is irrelevant. However, if the postmotive prior consistent statement is made when a separate motive to tell the truth or to make a different statement exists, the postmotive prior consistent statement may offer some rebuttal force. The *Tome* dissent provided examples of this situation:

> A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances also make clear to the speaker that

185. *See, e.g.*, United States v. Gandy, 469 F.2d 1134, 1134-35 (5th Cir. 1972); Hanger v. United States, 398 F.2d 91, 104-05 (8th Cir. 1968); Copes v. United States, 345 F.2d 723, 725-26 (D.C. Cir. 1964); *see also* United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957).

186. *See* 115 S. Ct. at 702.

187. *See supra* notes 110-20 and accompanying text.

188. *See supra* notes 100-09 and accompanying text. The Ninth Circuit reasoned that prior consistent statements are admissible as substantive evidence or not at all. *See supra* notes 93-95, 110, 116-20 and accompanying text. However, the Ninth Circuit allowed postmotive prior consistent statements for substantive use in certain situations. *See* United States v. Miller, 874 F.2d 1255, 1274 (9th Cir. 1989).

> only the truth will save his child's life. Or, suppose the postmotive statement was made . . . when the speaker's motive to lie was much weaker than it was at trial.[189]

The dissent explained that "[i]n these and similar situations, special circumstances may indicate that the prior statement was made for some reason other than the alleged improper motivation; it may have been made not because of, but despite, the improper motivation."[190]

If a motivation to tell the truth or to make a different statement at the time the prior consistent statement was made appears greater than or equal to the strength of the improper influence or motivation charged at the statement's making, the prior consistent statement may have some rebuttal force or related value, may be relevant, and should be admissible. Any amendment to Rule 801(d)(1)(B) should provide for this situation. A jury is fully capable of making this assessment and should be permitted to do so.

Another situation where a postmotive prior consistent statement is relevant, has some rebuttal force or related value, and should be admissible, is when the charged motive is contextually weak. For example, consider a situation where a criminal defendant alleges that a large number of police officers are conspiring to frame the defendant. The defendant impliedly charges that the officers are lying on the stand about their investigation, and charges that the improper motivation arose as soon as each officer arrived on the crime scene. Should such a charge prevent the officers from being rehabilitated by showing that they made prior consistent statements from the beginning of their investigation? Would not their consistency tend to show the absence of such a conspiracy even though the prior consistent statements were made after the alleged conspiracy began?

Still another example where the charged motive may be contextually weak and the postmotive prior consistent statement would have some rebuttal force or related value was cited by the *Tome* dissent: postmotive statements made spontaneously.[191] Circumstances may reveal that any alleged effect of the charged motive on the declarant was greatly weakened by the reliability evidenced by the statement's spontaneity. The statement could serve to rebut a charge of improper motive and its admissibility should be determined in context.

There are other situations where postmotive prior consistent statements may have some value and should be admissible. A declarant's ability to tell a complicated or unique story more than once

189. 115 S. Ct. at 708 (Breyer, J., dissenting).
190. *Id.*
191. *See id.*

may, in some instances, indicate reliability and be relevant. Child sex-abuse cases are one example of this situation. A young child's postmotive description of the details of sexual abuse can offer some value and indicate that the child is not fabricating the story. A jury is able to weigh these possibilities in context and should be allowed to do so.

In addition, in a situation when a witness testifies as to his or her own prior consistent statement, the jury's ability to view the witness testifying offers more than the statement itself. It gives the jurors another opportunity to observe the witness and judge the witness's credibility.

It is important to note that in most cases, postmotive prior consistent statements will be inadmissible under the relevancy rules for the reasons originally noted by courts developing common-law evidentiary rules.[192] The suggestions made in this Article will not change the result in the vast majority of situations, but will refocus the inquiry regarding the admission of prior consistent statements where it belongs—on relevancy.

An argument can be made that anything but a time-line rule leaves some uncertainty in the parties' pre-trial preparation. However, this potential uncertainty does not outweigh the need to allow the jury to consider relevant matters. Moreover, rejecting the time-line rule would leave no more uncertainty than is present with the current rule. The parties cannot know exactly how the court will rule in regard to relevancy or the premotive or postmotive status of a prior consistent statement. This is particularly evident in the many co-defendant-turned-state's-evidence cases. Whether the trial court will find that the co-defendant's motive arose when he or she was first approached by the government, after a deal was put on paper, or at some other time, seems nearly impossible to predict ahead of the ruling.[193] Similarly, witnesses' uncertainty of dates and wavering testimony will often leave pre-trial predictions on the admissibility of a prior consistent statement difficult.

The per se premotive rule also results in administrative problems that hamper the fact-finding process. Sometimes, a trial judge may find that the motive arose and the prior consistent statement was made on particular dates when a different fact-finder could reasonably choose different dates. This results in a trial judge sometimes finding a prior consistent statement to be made postmotive when a jury could reasonably find it to be made premotive, or vice-versa. Prior consistent statements that may rehabilitate should not be excluded in such circumstances. This situation could be rectified

192. *See supra* Part II.
193. *See infra* notes 195-99 and accompanying text.

by using the Second Circuit's *Grunewald* standard: If it is "reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them."[194] This standard acknowledges that the determination of a prior consistent statement's admissibility is often too crucial to deprive the jury of weighing the statement and determining its value when reasonable minds could differ on the timing of events. Although the use of this rule would be a step in the right direction, it is not enough to solve the numerous other problems with the per se premotive rule.

Additionally, it is often difficult for the trial court to pin down the date when a charged improper influence or motive arose or the date when a statement was made. Frequently, and particularly in criminal drug trials, witnesses cannot remember even the month in which a particular event occurred. Evidence concerning when an improper influence or motive arose and when a particular prior consistent statement was made may be scant. The trial judge should be free to allow the jury to weigh the evidence under all the circumstances without being bound by a restrictive time-line rule.

These problems with the per se time-line rule have, on occasion, resulted in some legal gymnastics on the issue of when a motive arose. For example, in *United States v. Henderson*,[195] the defendant impeached the government's informant by charging that the informant fabricated his allegations against the defendant in return for leniency.[196] On redirect, the trial court admitted the informant's prior consistent statements made after arrest but before the informant and the government reached a plea agreement.[197] On appeal, the defendant argued that such admission was error. The Fourth Circuit rejected the defendant's argument. The court reasoned that the defendant's argument "effectively swallows the rule with respect to prior consistent statements made to government officers: by definition such statements would never be prior to the event of apprehension or investigation by the government which gave rise to a motive to falsify."[198] The court explained that "[s]uch a result also would render superfluous our [previous] distinction . . . between statements made to police after arrest but before a bargain and statements made after an agreement is reached. We decline to so eviscerate Rule 801(d)(1)(B)."[199] Thus, the arrestee-declarant's prior consistent

194. United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957); *see supra* note 43 and accompanying text.
195. 717 F.2d 135 (4th Cir. 1983).
196. *See id.* at 138.
197. *See id.*
198. *Id.* at 139.
199. *Id.* (citations omitted).

statements made after arrest but before the government and the arrestee-declarant reach a plea agreement are admissible under the *Henderson* rule, while such statements made post-agreement are not.

In many cases, it is doubtful that a motive to fabricate suddenly changes upon the signing of an agreement. It seems much more likely that the motive to fabricate was the same before and after the agreement. In such instances, a pre-agreement (or premotive per *Henderson*) prior consistent statement offers little that a post-agreement (or postmotive) prior consistent statement does not. The parties, and the jury, would be better served if the court could consider the admissibility of a proffered prior consistent statement in relation to all of the circumstances of the particular case.

When considering the admissibility of prior consistent statements, courts' attention should be directed toward the charged motive, its context, and *all* of its characteristics, not merely the motive's alleged birthday. When the characteristics and context of a prior consistent statement, including a postmotive prior consistent statement, indicate that the statement is relevant to the juries' consideration of a witness's credibility, or to other relevant issues, the statement should be admissible.

B. Admissibility of Prior Consistent Statements Outside of Rule 801(d)(1)(B)

Any amendment to Rule 801(d)(1)(B) also should clarify the question of the admissibility of prior consistent statements outside of Rule 801(d)(1)(B). This is particularly important because, before *Tome*, all circuits but the Ninth Circuit held postmotive prior consistent statements admissible for the limited purpose of rehabilitation. Many of these courts explained that Rule 801(d)(1)(B) did not govern such statements.

Some commentators and the Ninth Circuit reason that the drafters of the Federal Rules meant to provide that prior consistent statements are admissible under Rule 801(d)(1)(B) or not at all.[200] Of course, statements that are not offered for the truth of the matter asserted are not hearsay by definition. Thus, logically, there would be no reason to seek the admission of a statement offered merely for rehabilitation purposes—and not for the truth of the matter asserted—under Rule 801(d)(1)(B). Absent a desire to use the statement substantively, there would be no reason to seek to classify as nonhearsay under Rule 801(d)(1)(B) a statement that is already outside the definition of hearsay. Therefore, the admission of such a statement

200. *See supra* notes 93-96 and accompanying text.

would be governed by the relevancy rules. It would seem that Rule 801(d)(1)(B), part of Article VIII—the hearsay rules—would play no part in the calculus. The circuits allowing the admission of prior consistent statements offered for the limited purpose of rehabilitation without reference to Rule 801(d)(1)(B) follow the logical path provided by the Federal Rules.

Any indication that *Tome* provides in relation to the question of whether postmotive prior consistent statements offered for the limited purpose of rehabilitation are admissible is dictum in the classic sense. It was not necessary for the Supreme Court to decide this question to reach its decision in *Tome*. The prior consistent statements at issue in *Tome* were admitted by the trial court as nonhearsay under Rule 801(d)(1)(B). The statements were not offered for the limited purpose of rehabilitation. The government's brief explained that "[t]his case does not require the Court to decide whether a premotive rule also applies to prior consistent statements that are not admitted as substantive evidence, but are used merely to rehabilitate a witness."[201] Moreover, the *Tome* opinion clearly states that "[o]ur holding is confined to the requirements for admission under Rule 801(d)(1)(B)."[202]

After *Tome*, there are two possible scenarios regarding the admission of prior consistent statements. The first is that premotive prior consistent statements are admissible as substantive evidence, while postmotive prior consistent statements are not admissible for *any* purpose. As explained above, this situation is unsatisfactory. The second scenario is that premotive prior consistent statements are admissible as substantive evidence, while postmotive prior consistent statements are admissible for the "limited purpose of rehabilitation." This, too, is an unsatisfactory situation.

Distinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning. Juries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use. This is likely a large part of the reason that the drafters of Rule 801(d)(1)(B) provided that evidence that meets the Rule's requirements is admissible substantively.

It makes little sense to differentiate prior consistent statements with a cumbersome time-line rule in regard to the statements' admission as substantive evidence while also allowing the admission of statements rejected by such a rule when juries normally do not make such differentiations. Experience shows that jurors are adept at determining the *weight* to be given to a witness's testimony and can

201. Respondent's Brief at 45 n.24, *Tome* (No. 93-6892).
202. 115 S. Ct. at 705.

easily recognize the interest a witness has in the matter about which he or she testified, including any motive that could affect the witness's credibility. In recognition of this, the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence. The weight given these statements would then be for the jury to determine. Amending Rule 801(d)(1)(B) to account for the issues raised herein would alleviate the concern over substantive versus limited rehabilitative use of prior consistent statements, eliminate the often misunderstood limiting instruction, and make the Rule compatible with the realities of a jury trial.

Courts have cited other evidence rules in allowing the admission of postmotive prior consistent statements. Several courts cite Rule 106 to account for a "completeness" admission of prior consistent statements.[203] Courts have recognized that this is not a precise use of Rule 106.[204] Indeed, it appears that this is not a contemplated use of Rule 106 at all. However, the admission of a prior consistent statement to clarify a self-contradiction is often a practical necessity of trial. Such statements should not be forced through the back door of Rule 106, but should be explicitly recognized as admissible when relevant.

As the *Tome* Court noted, postmotive prior consistent statements, even though not admissible under Rule 801(d)(1)(B), may be admitted substantively under Rule 803(24)[205] if the statements meet Rule 803(24)'s requirements.[206] Although this avenue is available, Rule 803(24) does not address the issues raised above. Moreover, it is often difficult to meet all of Rule 803(24)'s requirements,[207] and such

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203. *See supra* note 109 and accompanying text.

204. *See supra* note 109 and accompanying text.

205. Rule 803(24) provides that:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24).

206. *See* 115 S. Ct. at 705; *see also* United States v. Obayagbona, 627 F. Supp. 329, 340-41 (E.D.N.Y. 1985); United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976); Arizona v. Huerta, 826 P.2d 1210, 1212-14 (Ariz. Ct. App. 1991); Arizona v. Thompson, 805 P.2d 1051, 1053-55 (Ariz. Ct. App. 1990); *see generally* Arthur H. Travers, Jr., *Prior Consistent Statements*, 57 NEB. L. REV. 974, 998-1002 (1978).

207. *See generally* GRAHAM, *supra* note 70, § 6775.

requirements are usually unnecessary when addressing the admissibility of postmotive prior consistent statements. For example, Rule 803(24)'s notice requirement is normally superfluous in such a situation because an opposing litigant knows that if a charge of recent fabrication or improper influence or motive is made, prior consistent statements may be admissible. In addition, the notice requirement of Rule 803(24) would require the proponent of a postmotive prior consistent statement to anticipate the opponent's impeachment of the declarant with a charge of recent fabrication or improper influence or motive. Because some courts may continue a trial in recognition of Rule 803(24)'s notice requirement when a party seeks to use the rule and has not notified the opposing party before trial, the use of Rule 803(24) in this situation could result in needless delay.[208]

A charge of recent fabrication or improper influence or motive is a serious charge reflecting unfavorably on its recipient. The charging party is aware that such a charge can open the door to relevant prior consistent statements that meet the requirements of Rule 801(d)(1)(B). Once that party has opened the door in this manner, there is no convincing reason not to admit, as substantive evidence, prior consistent statements that have some value to the jury from a practical standpoint and that meet the relevancy rules' requirements.

VI. CONCLUSION

Federal Rule of Evidence 801(d)(1)(B) is overly restrictive in regard to the admission of prior consistent statements in many instances. The primary example of this problem is the focus of this Article: postmotive prior consistent statements. Such statements, on occasion, are relevant and offer sufficient value to warrant their admission. Nevertheless, Rule 801(d)(1)(B), as interpreted by the Supreme Court in *Tome v. United States*, provides a per se prohibition on such statement's admission as substantive evidence. Rule 801(d)(1)(B) should be amended to allow the admission of a prior consistent statement as substantive evidence in instances where the statement is relevant and valuable, but is inadmissible under the current Federal Rules of Evidence after *Tome*.

The issue of the admissibility of prior consistent statements has long been recognized as "perplexing."[209] Much of the confusion arises from conflict between the theoretical and the practical approaches to the issue. This tension must be recognized and reconciled or the is-

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208. *See id.* § 6775, at 744-47. Rule 803(24)'s other requirements are similarly unnecessary and overburdensome in this situation.

209. 41 L.R.A. (N.S.), *supra* note 1, at 858.

sue will remain a puzzle. An amendment to the Federal Rules of Evidence addressing the several observations discussed in this Article would serve to clarify the admissibility of prior consistent statements and to further the goals of the Federal Rules of Evidence.

on the ground that the witness is in essence repudiating the prior statement by taking refuge in a lack of memory; and (2) bona fide memory loss, which precludes the use of a prior statement on the ground that it is not inconsistent with a subsequent loss of memory.[26] Thus, in a case like *Owens*, where the witness' memory loss was clearly bona fide (he had been hit over the head with a lead pipe), a prior statement of the witness would not be admissible under Rule 801(d)(1)(A): The witness *would* be subject to cross-examination within the meaning of *Owens*, but the prior statement *would not* be inconsistent with any in-court testimony that the witness would provide. However, if the previous statement was a prior identification, as was the case in *Owens*, it would be admissible under Rule 801(d)(1)(C), because that Rule contains no requirement that the prior statement be inconsistent with the subsequent testimony; and even the forgetful witness would be "subject to cross-examination" within the meaning of the Rule, for reasons already discussed.

Prior consistent statements that are nonhearsay

Subdivision (d)(1)(B) of Rule 801 covers the substantive use of prior consistent statements. Such statements are admissible at common law to rebut an express or implied charge of recent fabrication on the part of a witness. It is interesting to note that under the House version of the Rule, a prior consistent statement could be introduced for its truth whether or not it was given under oath, although in common-law jurisdictions, prior consistent statements and prior inconsistent statements receive similar treatment in that both are excluded when offered for their truth. The Senate version tracked the common law.

Why did the House want to differentiate? The answer lies in practical aspects of testimony. Once a witness testifies and an attack is made on the witness' credibility, if the cross-examiner manages to impeach the witness or to break down the witness' story, it is likely that any prior consistent statement will fall with it. If the trial testimony is rejected as unbelievable by the trier of fact, an identical out-of-court statement also will be rejected.

Contrast this with the situation where a prior inconsistent statement is introduced. The party offering the prior statement hopes that the trial testimony will be disbelieved and that the inconsistent statement will be accepted as true. Here, it is only when trial testimony fails that the inconsistent statement will be used as substantive evidence. Because the party offering an inconsistent statement as substantive evidence wants the trier of fact to accept it as true, and in preference to trial testimony, arguably greater circumstantial guarantees of trustworthiness should be required than in the case of consistent statements.

The Conference compromise rejects common-law uniformity, which would have been provided by the Senate version, and apparently accepts the arguments for differentiation. Thus, prior consistent statements are, in one respect, more readily admissible than inconsistent statements. Consistent statements need not have been made under oath or in a pro-

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26. See, e.g., United States v. Bigham, 812 F.2d 943 (5th Cir. 1987) (feigned memory loss is inconsistent with a prior statement); United States v. DiCaro, 772 F.2d 1314, 1321 (2d Cir. 1985) ("[P]articularly in a case of manifest reluctance to testify, if a witness has testified to certain facts before a grand jury and forgets them at trial, his grand jury testimony falls squarely within Rule 801(d)(1)(A)."), *cert. denied*, 475 U.S. 1081 (1986); United States v. Balliviero, 708 F.2d 934 (5th Cir.) (faulty memory is not inconsistent with a previous statement), *cert. denied*, 464 U.S. 939 (1983).

ceeding. On the other hand, the distinction between substantive use and impeachment use is much less significant for prior consistent statements than it is for prior inconsistent statements. With prior consistent statements, the substance of the statement is already before the factfinder by way of the witness' in-court testimony. Consequently, an error in either admitting or excluding a statement for its truth under Rule 801(d)(1)(B) is more likely, though not certain, to be harmless.[27]

Limitation on use of prior consistent statements

Rule 801(d)(1)(B) limits substantive admissibility of consistent statements to cases in which some suggestion is made that the witness has fabricated testimony or has been the subject of undue influence. The reason for this restriction is that consistent statements are easily manufactured prior to trial and thus are often not very probative of truthfulness. A witness could lie or distort facts on several occasions as easily as on one. However, once the suggestion is made that trial testimony is fabricated or that the witness has been unduly influenced, consistent statements made prior to the time when there was a motive for the witness to lie or the influence was likely are especially probative and are admissible under Rule 801.[28]

Prior consistent statements might also be useful for purposes other than to rebut a charge of fabrication or bad motive. For example, if the witness is charged with a bad memory, a statement by the witness made near to the event and consistent with the in-court testimony tends to rebut the charge. Rule 801(d)(1)(B), however, provides for substantive admissibility *only* when the prior consistent statement rebuts a charge of fabrication or bad motive. If the prior consistent statement is used for any other rehabilitative purpose, it may be admitted only as proof of the witness' credibility, and not as substantive evidence.

Timing of a prior consistent statement and use for rehabilitation, not for truth

At one time, there was dispute among the Courts about whether a statement can be admissible for its truth under Rule 801(d)(1)(B) when the witness is attacked for having a motive to falsify and the prior consistent statement was made *after* the motive to falsify arose. The Supreme Court resolved this dispute in *Tome v. United States*, 513 U.S. 150

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27. See, e.g., United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993) (the defendant's defense to a drug charge was that he was luring drug dealers to Florida in order to turn them in to the authorities; at trial, the government argued that the defense was an afterthought; the defendant had made a statement prior to his arrest that was consistent with his defense; the Trial Court excluded the statement, and the Court of Appeals found this to be error; the statement was admissible as a prior consistent statement to rebut a charge of recent fabrication; but the error was harmless, because the defendant had testified to his version of the events); United States v. White, 11 F.3d 1446 (8th Cir. 1993) (prior consistent statement was improperly admitted for its truth because it preceded the witness' motive to fabricate; but the error was harmless because the statement was "duplicative" of the witness' in-court testimony).

28. See, e.g., United States v. Barrett, 937 F.2d 1346 (8th Cir.) (consistent statement of the complainant, made before any motive to falsify arose, was held properly admitted for its truth under Rule 801(d)(1)(B)), *cert. denied*, 502 U.S. 916 (1991); United States v. Payne, 944 F.2d 1458 (9th Cir. 1991) (prior consistent statements were properly admitted for their truth, to show that the complainant's alleged motive to fabricate was largely speculative), *cert. denied*, 503 U.S. 975 (1992).

(1995). The defendant in *Tome* was tried for sexual abuse of his young daughter. At trial, the daughter implicated the defendant, basically by answering yes or no to a series of leading questions. On cross-examination, defense counsel asked 348 questions, many of which were background questions, some of which concerned her allegations of abuse, and some of which were designed to show that the daughter preferred living with her mother to living with her father. The daughter refused to answer many of the questions. The prosecution then called six witnesses, each of whom testified that the daughter had made statements to them accusing the defendant of sexual abuse. The Tenth Circuit held that all of these statements were properly admitted for their truth under Rule 801(d)(1)(B).[29]

It should be noted that the Court of Appeals in *Tome* had rejected the defendant's argument that there was no charge of recent fabrication or improper motive that would trigger the necessity of introducing prior consistent statements. The Court stated that "the defense's questions on cross-examination clearly implied that A.T. had fabricated the allegations of abuse out of a desire to live with her mother." By getting her to express her opinion about where she would rather live, defense counsel "attacked more than her general credibility or memory." The Court of Appeals was clearly correct in its assertion that a charge of fabrication or improper motive can be made implicitly as well as explicitly. Of course, not every attack on credibility opens the door for rehabilitation with prior consistent statements; for example, if the witness is attacked for having an untruthful character, he cannot be rehabilitated with prior consistent statements because such statements do not respond to the attack that the witness has a character trait for lying. But if there is an implicit attack on the witness' motivation, the party who sponsors the witness should be permitted a response.[30] The Supreme Court did not grant certiorari as to this aspect of the decision in *Tome*.

The Tenth Circuit had also rejected Tome's argument that the girl's consistent statements should not have been admitted because they were made at a time when she had the desire to live with her mother, i.e., they were made subject to the same motive to falsify as existed at the time the witness testified. The Court was of the opinion that Rule 801(d)(1)(B) does not require that a statement predate the charged motive to fabricate before it can be admissible. It reasoned that a "pre-motive" limitation on the Rule would be too broad, because "it is simply not true that an individual with a motive to lie will always do so." The Court of Appeals opted for a case-by-case approach which evaluated whether, "in light of the potentially powerful motive to fabricate, the prior consistent statement has significant probative force bearing on credibility apart from mere repetition." Here the Court found that the charged motive was "not particularly strong" and that the child's statements were "spontaneous" and not coached. Hence they were, in the Court's view, properly admitted for their truth under Rule 801(d)(1)(B).

It is this ruling in *Tome* on which the Supreme Court granted review. In an opinion by Justice Kennedy for five Justices, the Court held that a prior consistent statement is not

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29. United States v. Tome, 3 F.3d 342 (10th Cir. 1993).

30. See, e.g., Gaines v. Walker, 986 F.2d 1438 (D.C. Cir. 1993) (a charge of fabrication is not made merely because counsel points out inconsistencies in the witness' testimony; but where counsel argues that an officer made up a charge after the fact, this amounted to an allegation of fabrication that could be rebutted by a consistent statement).

Timing of a prior consistent statement and use for rehabilitation, not for truth (cont'd)

admissible for its truth under Rule 801(d)(1)(B) unless the statement was made *before* the charged fabrication or improper influence or motive arose. Because of this temporal limitation, the daughter's consistent statements in *Tome* could not be admitted as proof that the defendant abused her.

Justice Kennedy relied heavily on the common-law rule, under which prior consistent statements were not admissible to rebut a charge of recent fabrication or improper motive unless they were made before the fabrication or motive to falsify arose. According to Justice Kennedy, the drafters of the Federal Rules intended to preserve the common-law timing requirement. He based this conclusion on several factors: (1) the "somewhat peculiar language" of Rule 801(d)(1)(B) tracked the language concerning prior consistent statements in common-law cases, thus implying an intent to carry over the common-law timing rule; (2) the Notes by the Advisory Committee which initially drafted the Federal Rules "disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary" and there is no indication in the Notes of an intent to abrogate the common-law pre-motive requirement with respect to prior consistent statements; (3) the common-law Courts uniformly adhered to the pre-motive requirement, and "with this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement]"; (4) imposing a pre-motive requirement on prior consistent statements was consistent with the Advisory Committee's generally cautious approach to such statements, or, as the Court put it, the Committee's "stated unwillingness to countenance the general use of prior prepared statements as substantive evidence."

It is odd that the *Tome* Court relied so heavily on the common law in finding a pre-motive requirement in Rule 801(d)(1)(B). The common-law rule concerned admissibility of prior consistent statements solely to rehabilitate the credibility of a witness. The common law did not provide that such statements could be admitted for their truth. So it is clear that the Advisory Committee *did* intend to change the common-law rule, in a rather fundamental way. This certainly diminishes the strength of the majority's argument that the Advisory Committee was wedded to the common-law pre-motive requirement.

While the Court's reliance on the common law provides a weak basis for its decision, this does not mean that the Court was wrong to impose a pre-motive requirement for prior consistent statements offered as substantive evidence. Justice Kennedy was clearly correct in his assertion that a pre-motive requirement was implicit in Rule 801(d)(1)(B). Such a construction is required in order to make sense out of the categories of prior consistent statements that could qualify for substantive admissibility under the Rule. The Rule states that only those prior consistent statements that are offered to rebut a charge of fabrication, motive, or influence can be used substantively — i.e., for the truth of the statement as opposed to use for rehabilitation of a witness' credibility. But many prior consistent statements could be offered for other kinds of rebuttal. If the drafters of the Federal Rules did not intend to impose a pre-motive requirement, then there would have been no need to carve out those statements offered to rebut a charge of fabrication, motive, or influence for special substantive treatment. It is only the pre-motive requirement that distinguishes prior consistent statements offered to rebut a charge of fabrication, motive, or influence from all other consistent statements. As Justice Scalia put it in his

concurring opinion: "Only the premotive-statement limitation makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks."

The strongest support for the *Tome* Court's adoption of the pre-motive requirement is a policy argument: it is best, with respect to prior consistent statements, to have a bright-line rule that tends to limit their admissibility. If Trial Judges are allowed to admit prior consistent statements whenever they are merely relevant to rebut an express or implied charge of fabrication, improper motive, or influence, the opponent of the evidence — often a criminal defendant as in *Tome* — will be subject to all manner of bolstering statements of adverse witnesses. The case will often be decided on the basis of the witness' hearsay rather than on the witness' in-court testimony. As Justice Kennedy put it: "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

Tome itself was a case in point. In response to what the Lower Courts found to be a "weak" charge of improper motive — that the child fabricated her testimony so that she could remain with her mother — the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount the girl's detailed out-of-court statements to them. Because these statements were made at a time when the witness had the same motive to fabricate that she allegedly had at trial, they were not very relevant to rebut the charge of fabrication — assuming they were relevant at all. Notably, at closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive. The "rehabilitation" was really a smokescreen for bringing hearsay in front of the jury.

The risk of an unbridled use of Rule 801(d)(1)(B) is therefore that the Trial Court may play fast and loose with principles of relevance. This danger is reflected in Justice Breyer's dissenting opinion, in which he argued for a flexible, relevance-based approach to the admissibility of prior consistent statements, rather than a rigid pre-motive requirement. And yet, when assessing whether the statements offered against *Tome* at trial were even relevant to rebut the weak charge of fabrication, Justice Breyer punted. He found "no reason to reevaluate this factbound conclusion" of the Trial Court. The majority, aware of the fact that prior consistent statements that post-date a motive are almost always irrelevant as rebuttal evidence at any rate, and unwilling to leave the question of relevance to possible Trial Court abuse, chose the proper result — a bright-line, pre-motive requirement for admissibility.

It is important to remember that the Court in *Tome* did not hold that the pre-motive requirement must always be satisfied before prior consistent statements may even be heard by the factfinder. Prior consistent statements can be introduced for *credibility* purposes, to rehabilitate a witness, whenever they are responsive to an attack on credibility. One such situation is where the consistent statement is offered to explain or to clarify an inconsistent statement introduced by the adversary.[31] If the witness claims, for example, that the apparently inconsistent statement was taken out of context, he can explain the

31. See, e.g., United States v. Brennan, 798 F.2d 581 (2d Cir. 1986) (prior statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)").

context, which may include statements consistent with his testimony. Rule 801 is not needed to justify such an explanation. The evidence is relevant under Rule 401 and admissible under Rule 402 to rehabilitate the witness' credibility.[32] As the Court stated in *United States v. Harris*, 761 F.2d 394 (7th Cir. 1985), the general principle set forth in Rule 801(d)(1)(B) — i.e., "the motive to fabricate must not have existed at the time the statements were made or they are inadmissible" — "need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."

However, to be admitted *substantively*, in the absence of some other hearsay exception, a prior consistent statement must be relevant to rebut a charge of recent fabrication or improper influence or motive. Where a consistent statement is admissible for other, rehabilitation purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence under Rule 801(d)(1)(B), the adversary is entitled to a limiting instruction as to the appropriate use of the evidence.[33]

Perhaps the distinction just made — between consistent statements offered solely for rehabilitation and those offered under the Rule as substantive evidence to rebut a charge of recent fabrication or improper influence or motive — is an insubstantial one. Since consistent statements are identical to trial testimony, an instruction that some of them should not be considered for their truth is, as stated above, unlikely to be understood by a jury. A line between substantive and rehabilitative use of these statements may well be of little use. Yet this is the line drawn by the Rule, which carves out only certain prior consistent statements for substantive use: those that rebut a charge of recent fabrication or improper influence or motive. And most importantly, the *Tome* pre-motive requirement assures that many prior consistent statements — those made to rebut a charge of fabrication or motive and yet which post-date the motive — will not be admissible *at all*, either substantively or for impeachment purposes. This will help to ensure that the jury decides

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32. See, e.g., United States v. Pierre, 781 F.2d 329 (2d Cir. 1986):

> When the prior statement tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony, its use for rehabilitation purposes is within the sound discretion of the trial judge. Such use is also permissible when the consistent statement will amplify or clarify the allegedly inconsistent statement.

See also United States v. Parodi, 703 F.2d 768 (4th Cir. 1983) ("proof of prior consistent statements of a witness whose testimony has been allegedly impeached may be admitted to corroborate his credibility whether under Rule 801(d)(1)(B) or under traditional federal rules, irrespective of whether there was a motive to fabricate.").

33. See, e.g., United States v. Castillo, 14 F.3d 802 (2d Cir.) (a prior consistent statement can be offered to rehabilitate the witness' credibility, even though it is not admissible under Rule 801(d)(1)(B); however, a limiting instruction must be given and the prosecutor cannot abrogate "the court's limiting instructions by improperly arguing the truth of the hearsay testimony" during opening and closing arguments"), *cert. denied*, 513 U.S. 829 (1994); United States v. White, 11 F.3d 1446 (8th Cir. 1993) (although rehabilitative statements "were admissible when accompanied by a limiting instruction," they were not admissible for their truth under Rule 801(d)(1)(B) because they did not precede the witness' motive to fabricate; the Trial Court therefore erred in admitting the statements without a limiting instruction; but the error was harmless since the prior consistent statements were "duplicative" of the witness' testimony at trial).

the case on the basis of testimony at the trial rather than on prior statements of witnesses.[34]

Identifications

As proposed by the Advisory Committee and approved by the House, Rule 801(d)(1)(C) established that an identification of a person made after perceiving him[35] is not hearsay if the person making the identification is available to testify at the trial or hearing. While such identifications are certainly hearsay, there was a belief that they are more reliable than in-court identifications. The Senate objected to the proposed Rule, and it was deleted. But in 1975, an amendment restored the provision. Interestingly, the Senate concluded upon further reflection that its initial concern that prior identifications are too weak to support a conviction "appears misdirected," since the language does not cover the "weight" to be given the evidence and "all hearsay exceptions" (technically this is an exemption rather than an exception) allow into evidence statements that may not have been made under oath (except former testimony). Moreover, the identifying witness must be available for cross-examination. Finally, the Senate noted that the earlier in time the identification takes place, the more likely it is that memory problems will be avoided.

Although we support the amendment, we believe that the prospect that prior identifications will be admissible as substantive evidence should lead the Supreme Court to reconsider *Kirby v. Illinois*, 406 U.S. 682 (1972), *United States v. Ash*, 413 U.S. 300 (1973), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), and to require greater care in the conduct of identification procedures. Unfortunately, there is no evidence of a judicial inclination toward requiring better procedures.[36] In fact, in *United States v. Owens*, discussed *supra*, the Court referred with apparent approval to the Advisory Committee's belief that use of out-of-court identifications was to be fostered rather than discouraged, and held that a witness who had no memory of his identification was nonetheless subject to cross-examination about it within the meaning of the Rule.

In our discussion of Rule 801(d)(1)(A), *supra*, we offered a hypothetical bank robbery case. It is helpful to return to it again here. If an eyewitness, who told the police after the robbery that "Frank Smith robbed me," testifies at trial that "Frank Smith was not present at the time of the robbery," is the prior statement admissible under (C) if it is not made under oath in a proceeding, as required under (A)? What is a recent identification for purposes of (C)? Certainly, if the witness picked out Frank Smith's picture as that of the robber and later denied at trial, under oath, that Smith was the culprit, the identification

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34. See, e.g., United States v. Forrester, 60 F.3d 52 (2d Cir. 1995) (reversing a defendant's cocaine convictions, in part because a prior statement of a government witness was erroneously introduced; defense counsel asserted that a cooperating witness was making up her story; a consistent statement made by the witness after her arrest was not admissible because the witness' motive to fabricate arose as soon as she was arrested, thus the consistent statement post-dated the motive to falsify).

35. The language "after perceiving him" is superfluous and probably is the result of having been included in other drafts that contained slightly different language from that found in the Rule.

36. For a discussion of the constitutional limitations on pretrial identification evidence, see S. SALTZBURG & D. CAPRA, AMERICAN CRIMINAL PROCEDURE, ch. 4 (5th ed. 1996).

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RULE 801(d)(1)(B) — STATEMENTS WHICH ARE NOT HEARSAY — PRIOR STATEMENT BY WITNESS — CONSISTENT

Anticipating impeachment

Ross v. Saint Augustine's College, 103 F.3d 338 (4th Cir. 1996): After the plaintiff gave testimony against the defendant in a reverse-discrimination suit, her fortunes as a student changed radically, causing psychological injury necessitating psychiatric treatment. In her subsequent action against the college for reckless infliction of emotional distress, the plaintiff missed most of the trial on advice of her psychiatrist. Before she testified, several other witnesses were permitted to provide, as "corroborating" evidence over the defendant's objection, hearsay testimony as to what she had said. The statements were confirmed by documentary evidence or by her subsequent testimony, and all were subjected to impeachment efforts during the defendant's thorough cross-examination of the plaintiff. The Court held that although there was a violation of the sequence required by Rule 801(d)(1)(B), the risks it had identified in *United States v. Bolick*, *infra*, were not present and the violation did not affect any substantial right of a party, so any error was harmless. In *United States v. Bolick*, 917 F.2d 135 (4th Cir. 1990), the Court reversed a conviction for selling cocaine because a government agent had testified to prior consistent statements by informant witnesses before those highly impeachable witnesses had given testimony or had their credibility called into question. The dissenting Judge believed that admission of the evidence was within the Trial Court's discretion regarding the proper order of proof, as the statements provided background helpful to a complete understanding of the agent's testimony.

United States v. Azure, 801 F.2d 336 (8th Cir. 1986): The Court indicated that statements should not be admitted under this Rule until a witness has been cross-examined.

Corroborating accused's testimony

United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993): The defendant in a cocaine conspiracy prosecution testified he had made a trip to Florida to turn others in to the DEA. The Court held that his girlfriend should have been allowed to corroborate his testimony that he had told her the purpose of the trip before going, but the error was harmless.

Corroborating witness' testimony

United States v. Acker, 52 F.3d 509 (4th Cir. 1995): The Court reversed a bank robbery conviction because an officer was permitted to recount a statement given by the principal prosecution witness after he had been arrested and indicted for participation in the robbery. The evidence was erroneously admitted only to corroborate the witness' testimony and not to rebut a charge of fabrication; in any event, it would have been difficult to satisfy the foundation requirement that the statement was made before the witness had a motive to fabricate.

Hearsay within hearsay

United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988): The Court reversed a conviction for marijuana offenses, finding that a Coast Guard officer's handwritten report of events on the night of a chase of a small boat from which marijuana was thrown was improperly admitted. Even if the officer had been sufficiently attacked to justify rehabilitation, the report contained hearsay within hearsay and therefore was more than a prior statement of the officer.

Opportunity for examination

United States v. Piva, 870 F.2d 753 (1st Cir. 1989): Affirming a marijuana conviction, the Court held that an officer's testimony regarding an informant's prior consistent statement to which an officer testified was properly admitted even before the defendant had an opportunity to examine the informant about the statement. No showing was made that the defense was unable to recall the informant and to examine him.

United States v. Bond, 87 F.3d 695 (5th Cir. 1996): Affirming the Trial Judge's refusal to permit a defendant to withdraw his guilty plea, the Court held that a Magistrate Judge properly excluded a tape made by the defendant while he was a fugitive, since the defendant did not testify and could not therefore offer evidence of a prior consistent statement.

Opportunity for cross-examination

United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995): At the defendant's trial for cocaine importation and possession, testimony given by a coconspirator at a prior trial *in absentia*, at which the defendant was neither present nor represented, was admitted as a prior consistent statement, as former testimony, and under the residual exception. The Court held that it was not admissible as consistent with the coconspirator's subsequent deposition because the defendant had not been notified of the government's intention to offer the former testimony at the time of the deposition, and thus had no opportunity to cross-examine the witness concerning the statements in the former testimony. The evidence was also not admissible under Rule 804(b)(1), but the Court held that the former testimony was properly admitted under the residual exception.

Rehabilitation use only

United States v. Castillo, 14 F.3d 802 (2d Cir.), *cert. denied*, 513 U.S. 829 (1994): Seeking to discredit an undercover officer's testimony by arguing that he lied about the presence of a gun to justify his snorting cocaine during a drug purchase, defense counsel contrasted the officer's testimony that he told his superior immediately after the buy that he had been forced to ingest cocaine "at gunpoint" with his testimony that the gun was displayed but never removed from an accomplice's waistband. The Court held it was not an abuse of discretion to admit testimony from the superior repeating what the officer had said to him, as the evidence was offered only to rehabilitate credibility rather than for its truth, and thus it did not matter if the officer had a motive to fabricate when he was

debriefed by his superior. According to the Court, the superior's testimony helped the jury decide whether "at gunpoint" was shorthand for the presence of the gun in the waistband, but according to the dissenting Judge, the hearsay had no rebutting force beyond the mere fact that the witness had repeated on a prior occasion a statement consistent with his trial testimony. In *United States v. Pierre*[116] the Court affirmed a heroin conviction, finding that the Trial Judge properly admitted evidence that an agent's formal report stated that the defendant refused to make a controlled delivery, after the defense elicited testimony from the agent that his notes of his interview with the defendant contained no reference to the refusal. Examining its earlier opinions on prior consistent statements, the Court reasoned that

> not every prior consistent statement has much force in rebutting the effect of a prior inconsistent statement, and the issue ought to be whether the particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.

The Court rejected the notion that every use of a prior consistent statement is governed by Rule 801(d)(1)(B), and stated that "a prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition." In *United States v. Brennan*[117] the Court, affirming a former State Judge's bribery and corruption convictions, followed *Pierre* and held that the Trial Judge properly admitted grand jury testimony to rehabilitate a witness who had been attacked on cross-examination with suggestions that he had made inconsistent statements to the grand jury.

United States v. Casoni, 950 F.2d 893 (3d Cir. 1991): When the defendant sought on cross-examination to impeach the principal witness in a trial of racketeering offenses by suggesting he fabricated his testimony to gain immunity, the government called the witness' attorney to testify to what the witness had told him at their first meeting, before the attorney advised him to seek immunity by offering testimony that incriminated others in the scheme. The Court held there was no abuse of discretion in finding the statements were made before the motive to fabricate arose, even though there was evidence that the witness knew he was in trouble before he consulted the attorney. When, as here, the statements are offered only to rehabilitate, the possibility that a motive to fabricate existed when the statements were made is a matter of relevance, not a condition barring admissibility. The Court also indicated that the statement was consistent with the witness' trial testimony, even though there were some differences in details.

United States v. Ellis, 121 F.3d 908 (4th Cir. 1997): Affirming convictions arising out of a bank robbery, the Court held there was no abuse of discretion in admitting summaries of FBI interviews with a cooperating witness as prior consistent statements, since they were offered only for the limited purpose of rehabilitating the witness' credibility. In such a situation, the only requirement is that the prior statement have some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement

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116. 781 F.2d 329 (2d Cir. 1986).

117. 798 F.2d 581 (2d Cir. 1986).

consistent with his trial testimony; the restrictions of Rule 801(d)(1)(B) and the "pre-motive rule" of *Tome v. United States* do not apply.

Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994): Affirming a defendant's judgment in a product liability case, the Court held that reports containing opinions of defense expert witnesses as well as prejudicial hearsay should not have been admitted under Rules 702 and 703 simply because the experts testified. Rule 702 permits admission of expert opinion *testimony*, and Rule 703 permits an expert to base an opinion on inadmissible evidence but not to introduce that evidence for its truth. However, because the plaintiffs relied on the reports in impeaching the experts, the reports were properly admitted for rehabilitation rather than for their truth. The Court concluded that there is greater latitude when admitting statements for rehabilitation than for their truth, although it added in a footnote that a Judge may be obliged to limit rehabilitation to testimony about documents rather than to admission of the documents themselves.

United States v. Harris, 761 F.2d 394 (7th Cir. 1985): This case is discussed in the Editorial Explanatory Comment to this Rule.

United States v. White, 11 F.3d 1446 (8th Cir. 1993): In a prosecution for sexual abuse, a child victim testified for the government and the defendant sought to discredit the testimony by showing it was fabricated. The Court held there was no error in admitting testimony by other witnesses that the victim had told them he had been abused, as an instruction was given that the evidence was admitted only for whether the victim had said he had been abused, not whether he had in fact been abused. Although the Court implied that the requirements of the Rule need be complied with only when the prior consistent statement is offered as substantive evidence, it did not explain how the statements in this case were relevant to rehabilitate the witness. In *United States v. Andrade*[118] the Court affirmed fraud convictions, holding there was no error in admitting evidence of an agent's notes concerning an interview with a defendant. The defendant questioned two other witnesses concerning the notes and left the impression of inaccuracies in the notes and the suggestion that there might have been collaboration between government witnesses. Under these circumstances, the Court found that the rehabilitation was proper. In *United States v. Bowman*[119] the Court found it was error to admit statements under Rule 801(d)(1)(B) where they were made during plea bargaining and after a motive to falsify may have arisen, although it affirmed a defendant's convictions arising out of the robbery of a pharmacist. The error was harmless, partly because "the prior consistent statements were admissible for the purposes [*sic*] of rehabilitating the witness, even if not admissible for the truth of the matters asserted in those statements." See also *United States v. Demarrias*[120] (the Court did not decide whether prior statements of the victim in this sex abuse prosecution were offered to rebut an implied claim of fabrication, but held that the statements were not impermissible hearsay, because the Trial Judge gave a limiting instruction that the jury was to consider them only with regard to the victim's credibility and not as substantive evidence); *United States v. Roy*[121] (upholding admission of

118. 788 F.2d 521 (8th Cir.), *cert. denied*, 479 U.S. 963 (1986).

119. 798 F.2d 333 (8th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

120. 876 F.2d 674 (8th Cir. 1989).

121. 843 F.2d 305 (8th Cir.), *cert. denied*, 487 U.S. 1222 (1988).

accomplices' prior consistent statements in a murder case for rehabilitation, but not as substantive evidence, because they were made after a motive to fabricate arose).

United States v. Collicott, 92 F.3d 973 (9th Cir. 1996): In cross-examining a prosecution witness in a drug case, the defense asked her what time of day she had told an arresting officer that a drug dealer had come to the hotel room she was sharing with the defendant, but she said she did not remember. Defense counsel then called the officer to recount what the witness said about the time the dealer arrived. On cross-examination of the officer, the government elicited other statements the witness had made to the officer during that conversation about the defendant's connection with the dealer. Reversing the conviction, the Court held that the remainder of the conversation was not admissible under Rule 801(d)(1)(B) because the statements were not made before the existence of a motive to fabricate. Neither could the remainder come in on the ground that the defendant had "opened the door" by introducing the officer's testimony, which was inconsistent with the witness' stated failure of memory; the remaining hearsay statements did not clarify or provide context for the inconsistent statements, such that they would become relevant for a purpose other than to prove the truth of the matters asserted therein. Rather, they merely augmented the inconsistency and further impeached the witness by contrasting her detailed conversation with her testimony denying memory of the conversation. In *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991), *cert. denied*, 503 U.S. 975 (1992), the Court affirmed a conviction for carnal knowledge of a female under age sixteen, holding that prior consistent statements could be admitted, even though made after the motive to fabricate arose, when they came from the same investigative reports from which impeaching inconsistent statements had been drawn, as they demonstrated that the inconsistencies were a minor part of an otherwise consistent account.

United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1841 (1997): Affirming convictions arising out of a public corruption scheme, the Court held there was no abuse of discretion in admitting tape recordings of breakfast/bribery meetings between a conspirator cooperating with the government and two other councilmembers, in which the cooperating witness made several references to the defendant. Because the tapes were made after the witness began working for the government, it was error to admit them under Fed. R. Evid. 801(d)(1)(B). However, admission of the tapes was upheld because, *inter alia*, the conversations were innocuous and they tended to rehabilitate the witness' testimony that the people involved had a familiar relationship and had regular breakfast meetings.

Response to inconsistent statement

United States v. Coleman, 631 F.2d 908 (D.C. Cir. 1980): The Court said that "[e]ven where the suggestion of contradiction is only imputation of an inaccurate memory, a prior consistent statement is admissible to rebut the inference."

United States v. Zuniga-Lara, 570 F.2d 1286 (5th Cir.), *cert. denied*, 436 U.S. 961 (1978): The Court upheld the introduction of a prior consistent statement to rehabilitate a government witness who was impeached on cross-examination on the basis of his failure to include information in a written report. This case is also illustrative of the need sometimes to rehabilitate a witness impeached, not on the basis of a prior statement, but on the basis of a prior failure to make a statement.

United States v. Allen, 579 F.2d 531 (9th Cir.), *cert. denied*, 439 U.S. 933 (1978): The Court approved the admission of government evidence that its key witness in this armed bank robbery case, an accomplice, made consistent statements, after the defense emphasized an inconsistent statement and "contended that her testimony on direct examination was the result of an attempt to avoid criminal prosecution." Interestingly, after the defense indicated in the opening statements its plan to impeach the witness, the government offered the inconsistent statement under Rule 607, but it did not offer the consistent statement until the defense impeached the witness on cross-examination.

Rainey v. Beech Aircraft Corp., 827 F.2d 1498 (1987), *reinstating en banc* 784 F.2d 1523 (11th Cir. 1986), *aff'd in part and rev'd in part*, 488 U.S. 153 (1988): The Court reversed a judgment for the defendants in an action by spouses of two people killed in a Navy aircraft. It found error when the defendant was permitted to cross-examine one plaintiff about portions of a letter he had written to a Navy officer investigating the crash, but the plaintiff was denied the opportunity assured by Rule 106 to place the evidence in perspective by bringing out other portions of the letter. The Court added that since the defendant used the portions of the letter as a prior inconsistent statement, the plaintiff should have been permitted to introduce other portions as prior consistent statements under Rule 801(d)(1)(B). The Supreme Court affirmed the Rule 106 decision, so it did not address the Rule 801(d)(1)(B) point.

Scope of rehabilitation

United States v. Pedroza, 750 F.2d 187 (2d Cir. 1984): The Court criticized the admission of hearsay statements pursuant to the government's representation that the declarants would subsequently testify. This procedure permitted the government to benefit from statements that would not have been admitted under Rule 801(d)(1)(B), since the declarants had not been attacked and rehabilitation was neither necessary nor permissible. Compare *Pedroza* with *United States v. Wilkinson*, 754 F.2d 1427 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985) (a prior consistent statement was properly used to rehabilitate a witness impeached with an inconsistent statement).

United States v. Brantley, 733 F.2d 1429 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985): One codefendant in a marijuana importation case prepared, with his counsel, a thirty-one-page statement in the hopes of obtaining a good plea bargain. He subsequently pleaded guilty and testified for the government. On cross-examination, he was asked whether his statement disclosed all the facts to which he testified. In response to the implication that the witness might have fabricated facts, the government introduced the entire statement. The Court upheld its admission, finding that no request had been made to eliminate any specific portions. This is a troubling case. Surely, the government should have been permitted to show that its witness was consistent after the witness was attacked. But the showing of consistency could have been narrowly confined to the facts at which the cross-examination was directed. The probative value for rehabilitation of admitting thirty-one pages might have been substantially outweighed by the danger that the jury would unduly rely on the written statement, which amounted to a summary of this witness' complete testimony on direct examination.

Subject to cross-examination

United States v. Hebeka, 25 F.3d 287 (6th Cir. 1994): In a food stamp fraud prosecution, defense counsel attacked the credibility of the government's star witness, Dennis Alfred, by implying that he fabricated his testimony to avoid prosecution. The Court found no error when a rehabilitating prior consistent statement was introduced through another witness rather than through Alfred himself: the "literal requirements of Rule 801 can be met even when a third party testifies as to someone else's prior statement." The Court noted that Alfred was in Court, subject to cross-examination, and could easily have been recalled after the third party's testimony. The Court stated that "the Seventh Circuit appears to be a minority of one" in its rule in *West* (*infra*) that prior statements may be admitted through the declarant only.

United States v. West, 670 F.2d 675 (7th Cir.), *cert. denied*, 457 U.S. 1124, 1139 (1982): After a key government witness was impeached with extrinsic evidence of inconsistent statements, the government called a police officer to testify about the witness' consistent statement. The Court held that this was error (but harmless), because the rehabilitated witness was not subject to cross-examination concerning the consistent statement.

Suggestion of fabrication — civil cases

Gaines v. Walker, 986 F.2d 1438 (D.C. Cir. 1993): Reversing an arrestee's judgment against a police officer alleged to have inflicted unnecessary force, the Court held that the defendant should have been permitted to offer his police report as a prior consistent statement. In response to the defense that the officer merely responded to the plaintiff's attempt to knife him, the plaintiff cross-examined the officer as to the difference between the offenses of carrying a deadly weapon and possession of a prohibited weapon. The officer responded that the possession crime implies an intent to use the weapon; the plaintiff then elicited that the document prepared by the U.S. Attorney's office regarding the incident, which likely would have been based upon the officer's report, charged the plaintiff only with carrying, and not with possession. Although the Court recognized that not every attempt to impeach a witness by showing inconsistencies between trial testimony and pretrial statements amounts to a charge of recent fabrication, it concluded that the only reasonable interpretation of the questions put to the officer was to suggest that he had fabricated his account of the plaintiff's use of the knife. The failure to admit the officer's report in this case was especially prejudicial because the charge of fabrication was based upon a misleading or partial rendering of the officer's own past statements in the report.

Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979): The Court held that a rape complaint, made a few days after the event, was admissible to rehabilitate the credibility of a plaintiff, who encountered a defense that the rape never occurred.

Thomas v. United States, 41 F.3d 1109 (7th Cir. 1994): Affirming a judgment assessing penalties against corporate officers for wilfully failing to pay withheld employment taxes to the government, the Court held that a prior consistent statement of one of the officers (Thomas) was properly excluded. Thomas testified that he left the corporation because he thought the corporation was headed toward financial ruin. On cross-examination, the government implied that Thomas quit in part because he was afraid of

incurring liability for the corporation's unpaid employment taxes. An IRS form prepared by Thomas after he left the corporation was consistent with his testimony as to his reasons for leaving, but the Court held that the document was properly excluded because the government had not charged Thomas with fabricating his testimony. The Court stated that "[o]ne may impeach for lack of credibility without going so far as to charge recent fabrication." It concluded that the "line of questioning was intended to show that Thomas was not telling the whole story, that an *additional* reason for his leaving was his fear that he would be liable for the unpaid taxes."

Mayoza v. Heinold Commodities, Inc., 871 F.2d 672 (7th Cir. 1989): The Court affirmed a judgment for brokers who were sued by a commodities investor, holding that the plaintiff's wife was properly barred from testifying to a statement made during a telephone conversation with his principal broker, as no effort had been made to prove that the husband had recently fabricated testimony. In *Christmas v. Sanders*[122] the Court affirmed a judgment for the plaintiff in a civil rights action against a police officer, upholding the exclusion of two police reports offered as consistent statements. It found that there was no charge made of recent fabrication and that the reports might have been rejected in any event because of their extensive references to the testimony of other witnesses.

Breneman v. Kennecott Corp., 799 F.2d 470 (9th Cir. 1986): Affirming a judgment for an employer in a sex discrimination case, the Court upheld exclusion of handwritten notes apparently made by a supervisor concerning a conversation he had with the plaintiff where it was unclear when the notes were made and the defendant did not imply fabrication on the part of the plaintiff.

Garcia v. Watkins, 604 F.2d 1297 (10th Cir. 1979): The Court held it was error to exclude evidence of a statement made following an auto accident by a plaintiff who, the defendants implied, was fabricating her testimony.

Suggestion of fabrication — criminal cases

United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986): In a kidnapping case, the Court found that evidence that a defendant allegedly attempted to send a note to the victim prior to his arrest was not admissible as a prior consistent statement until such time as the government attempted to suggest that the defendant's trial testimony was fabricated.

United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 909 (1996): Affirming a conviction for holding a household servant in involuntary servitude, the Court held there was no error in admitting the servant's prior consistent statements to nurses, a therapist, and a police officer, as the defense had impugned her motives by cross-examination suggesting that she had recently met with a Hollywood producer interested in purchasing film rights to her story and that she had been interviewed by Boston papers to drum up publicity for her story. In *United States v. Arias-Santana*, 964 F.2d 1262 (1st Cir. 1992), the Court affirmed convictions for cocaine distribution, holding that a police report identifying the defendant at a drug buy, which would normally be inadmissible under Rule 803(8)(B), was admissible under the Rule after the report was used on cross-examination and the officer was impliedly charged with recent fabrication. In

122. 759 F.2d 1284 (7th Cir. 1985).

United States v. Vest[123] the Court held that responses of a witness during a phone conversation were admissible, since the witness' credibility was questioned on cross-examination and the witness had no motive to fabricate at the time of the conversation.

United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977): In a prosecution for soliciting and accepting a bribe, the chief prosecution witness was an officer in a corporation that was seeking a government contract who claimed that the defendant indicated that the contract could not be awarded unless a bribe was paid. The defendant denied this conversation and argued that the corporate officer had suggested the bribe. He explained that tape-recorded conversations he had with the corporate officer were attempts to gather evidence against the corporate officer. Evidence at trial also revealed that the defendant had told the FBI after his arrest that his conversations with the officer had been a joke. In rebuttal, the government introduced two witnesses who testified that the corporate officer reported to them on the same day as the alleged bribe request that the defendant had solicited a bribe. Noting that the statements of the witnesses on rebuttal would be hearsay at common law, the Trial Judge cited Rule 801(d)(1)(B) as authority for the proposition that the statements were not hearsay. This is an example of a case in which a prior consistent statement is introduced even though no prior inconsistent statement has been offered to impeach the relevant witness.

United States v. Provenzano, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980): Even though the Trial Judge did not actually find that certain out-of-court statements were in furtherance of a conspiracy, the Court concluded that they were admissible anyway, since they were consistent with the declarant's trial testimony and tended to rebut the implicit defense claim that the declarant's testimony was a fabrication used to buy his way out of prison.

United States v. Henderson, 19 F.3d 917 (5th Cir.), *cert. denied*, 513 U.S. 877 (1994): The Court affirmed a conviction for fraudulent banking activities, holding that cross-examination of a government witness about an FBI investigation raised questions about the witness' motives and possible collusion between the witness and the government, which provided a foundation for admission of prior statements by the witness consistent with his trial testimony. After the defendant in *United States v. Peña*, 949 F.2d 751 (5th Cir. 1991), insinuated that a testifying DEA agent may have inserted facts he learned subsequently in his final report on his interview with the defendant, the agent's handwritten notes on the interview were admitted. The Court held that the defendant had opened the door to the notes made the day of the interview by challenging the final report made seventeen days after the interview.

United States v. Smith, 746 F.2d 1183 (6th Cir. 1984): The Court reversed a conviction arising from the robbery of a postal employee because the defendant's brother's confession was admitted at trial before the brother actually testified. The Court found that the confession was not admissible as a consistent statement, since no charge of improper motive had been made when the statement was offered.

United States v. Cherry, 938 F.2d 748 (7th Cir. 1991): The Court held that the defendant's extensive cross-examination challenging the core of the victim's testimony in a

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123. 842 F.2d 1319 (1st Cir.), *cert. denied*, 488 U.S. 965 (1988).

sexual abuse case could constitute an implied charge of recent fabrication justifying admissibility of prior consistent statements.

United States v. Barrett, 937 F.2d 1346 (8th Cir.), *cert. denied*, 502 U.S. 916 (1991): In a sexual abuse prosecution in which the defendant argued that the victim changed her story about the attack from first saying she was awake before penetration to later saying she was awake only after penetration had occurred, the Court held that an FBI agent was properly permitted to testify that shortly after the assault, the victim had told him that she was not aware of the defendant until after he had penetrated her. In *United States v. Red Feather*[124] the Court affirmed sexual assault convictions of a father who abused his daughter, and held that the daughter's diary entries were properly admitted to rehabilitate her after a cross-examination that suggested she had been coached by social service counselors. In *United States v. Nelson*[125] the Court sustained a conviction for failing to file income tax returns and held it was not error to exclude the defendant's offer of a prior statement that was consistent with his trial testimony. Since the government's cross-examination indicated only that the defendant's explanation had differed on a prior occasion, not that he had fabricated testimony, the Court declined to disturb the ruling below that the prior statement was unnecessary for rehabilitation.

United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985): In a prosecution for obstruction of justice and conspiracy, the Court upheld the admission of testimony of a government witness' wife as to her husband's statements concerning the defendant's telephone instructions to destroy records. Since the defendant had cross-examined the witness in a way that suggested the fabrication of his testimony concerning the telephone conversations, the wife's testimony was admissible to rehabilitate the witness.

United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991): Affirming a conviction for violating civil rights, the Court held there was no error in admitting a prior consistent statement where the implication that testimony had been fabricated fairly arose from the line of questioning pursued. In *United States v. Griggs*[126] the Court reversed a conviction for conspiring to pass counterfeit money because of a prosecutorial comment on the defendant's failure to testify, but it upheld the admission of a statement made by one conspirator to another concerning the defendant. The Court indicated that the statement was admissible under Rule 801(d)(1)(B) as well as under the coconspirator rule, since the conspirator-declarant testified at trial and was under attack continuously by the defense. In *United States v. Andrews*,[127] a prosecution for illegal trafficking in food stamps, the Court upheld the admission of a tape made by an undercover police officer, while looking through the window of the defendant's home, that recorded his visual impressions. It found that the tape qualified as a prior consistent statement that was properly used to rebut the defendant's claim that the officer could not have seen inside the house.

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124. 865 F.2d 169 (8th Cir. 1989).

125. 735 F.2d 1070 (8th Cir. 1984).

126. 735 F.2d 1318 (11th Cir. 1984).

127. 765 F.2d 1491 (11th Cir. 1985).

Timing of prior consistent statement

Tome v. United States, 513 U.S. 150 (1995): In reversing and remanding a conviction for child sex abuse, the Court held (5-4) that Rule 801(d)(1)(B) permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged fabrication, influence, or motive arose. Accordingly, the child's out-of-court statements implicating her father were erroneously admitted for their truth under the Rule, because the statements were made at a time when the child had a motive to fabricate (i.e., a desire to live with her mother rather than her father). The Court held that Rule 801(d)(1)(B) embodies the prevailing common-law rule in existence for more than a century before the Federal Rules of Evidence were adopted: that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but was inadmissible if made afterwards. The Court remanded for a determination of whether the child's hearsay statements were admissible under the residual exception or under some other exception. The dissenting Justices contended that Rule 801(d)(1)(B) contains no ironclad temporal limitation, and that the real question of admissibility of prior consistent statements was one of relevance. The dissenters concluded that a prior consistent statement could be relevant to rebut a charge of recent fabrication or improper motive, even if the statement was made after the charged fabrication or motive arose. This case is discussed in the Editorial Explanatory Comment to this Rule.

United States v. Forrester, 60 F.3d 52 (2d Cir. 1995): A witness who had been arrested as a member of the conspiracy gave testimony in a cocaine trial that implicated the defendant. On cross-examination defense counsel asserted that the witness was making up her story. In response, the prosecutor had marked for identification, and used to refresh the recollection of the witness, a handwritten statement that the witness had prepared for the government three weeks after her arrest; the statement was consistent with her trial testimony. The Court held it was error to permit use of the document as a prior consistent statement. Because the witness' motive to fabricate arose as soon as she was arrested, the consistent statement post-dated the motive to falsify. The Court concluded that "the *Tome* rationale applies to a document marked for identification where the government has admitted that its purpose in using the statements contained in the document was to rebut the inference that the witness was making up [her] story." See also *United States v. Quinto*,[128] which anticipated *Tome* in reversing a conviction for tax evasion when the government was improperly permitted to introduce a detailed IRS memorandum as a prior consistent statement after a witness was subjected to vigorous cross-examination. The Court concluded that the IRS memorandum was not made prior to the time that the motive to falsify arose, since the defendant contended that, from the beginning, government agents were ruthlessly seeking a conviction, regardless of actual guilt.

United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984): The Court upheld a bank robbery conviction, finding no error in permitting the prosecution to bring out a prior consistent statement of an important government witness.

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128. 582 F.2d 224 (2d Cir. 1978).

The statement was made after arrest, but before a plea bargain was struck. Thus, the Court concluded that it was made prior to the time that a motive to falsify existed.

United States v. Riddle, 103 F.3d 423 (5th Cir. 1997): Reversing a bank chairman's conviction for fraud in connection with loans in which he was interested, the Court noted that it was no longer permissible to admit a prior consistent statement made after the declarant had an improper motive to fabricate testimony. Thus, it was error to admit a proffer made in the course of plea bargaining by another participant in the scheme.

United States v. Fulford, 980 F.2d 1110 (7th Cir. 1992): Affirming convictions for methamphetamine distribution offenses, the Court held there was no abuse of discretion in admitting postarrest consistent statements of a cooperating witness for rehabilitation after it was suggested his testimony was a recent fabrication. The defense implied the witness' motive to fabricate arose from his cooperation agreement, so statements prior to that agreement were relevant to rehabilitate. In *United States v. Davis*[129] the Court held that there had been no abuse of discretion in excluding the tape of a television interview offered by the defendant in a political corruption prosecution to rebut a charge he had fabricated his defense, because the interview was conducted seven days after FBI agents had indicated to him he was the subject of an investigation. In *United States v. Feldman*[130] the Court affirmed convictions for fraud in a scheme to use false bank guarantee letters to fulfill the collateral requirements for trading in stock options. After defense counsel emphasized in his opening statement and on cross-examination of a codefendant that he had made a deal with the government, the prosecutor was properly permitted to introduce a statement that the codefendant had made to the FBI prior to entering into a plea agreement. The Court found that no motive to help the government at the expense of the defendant existed when the statement was made. In *United States v. McPartlin*[131] the Court upheld a ruling that statements made by a defendant prior to trial could not be introduced as prior consistent statements when the same motive to falsify existed at the time of the statements as at the time of trial.

United States v. White, 11 F.3d 1446 (8th Cir. 1993): In a prosecution for sexual abuse, the Court held that statements of the child victim to a social worker regarding the abuse were not admissible as substantive evidence consistent with the victim's testimony because they were made after the motive to fabricate implied by the defendant's questioning and evidence came into existence. The error in admitting the statements was harmless, however.

United States v. Collicott, 92 F.3d 973 (9th Cir. 1996): In cross-examining a prosecution witness in a drug case, the defense asked her what time of day she had told an arresting officer that a drug dealer had come to the hotel room she was sharing with the defendant, but she said she did not remember. Defense counsel then called the officer to recount what the witness said about the time the dealer arrived. On cross-examination of the officer, the government elicited other statements the witness had made to the officer during that conversation about the defendant's connection with the dealer. Reversing the conviction, the Court held that the remainder of the conversation was not admissible under Rule 801(d)(1)(B) because the witness' motive to falsify was exactly the same when

129. 890 F.2d 1373 (7th Cir. 1989), *cert. denied*, 493 U.S. 1092 (1990).

130. 711 F.2d 758 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983).

131. 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).

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the arrest took place as at trial. See also *United States v. Rohrer*[132] (affirming cocaine convictions, but holding that a diagram made by a witness shortly before signing a cooperation agreement was improperly used to rehabilitate the witness); *United States v. Stuart*[133] (affirming convictions for misapplying funds of a savings and loan and finding the government was properly permitted to offer consistent statements made prior to the plea agreement to bolster the testimony of its key witness, after the defendant vigorously cross-examined the witness regarding the agreement).

United States v. Moreno, 94 F.3d 1453 (10th Cir. 1996): The Court found error, albeit harmless, in the admission of a prior consistent statement offered to rehabilitate a government witness. The witness was a participant in the crime and testified against the defendant pursuant to a plea agreement. The consistent statement was made before the witness entered into the plea agreement, but after the witness had been arrested. The Court held that the post-arrest statement was not made before the motive to falsify arose, because the witness "had an incentive to concoct a story" implicating the defendant as soon as he was arrested. In a prosecution for conspiring to manufacture methamphetamine, *United States v. Albers*, 93 F.3d 1469 (10th Cir. 1996), the Court held that it was error (but harmless) to introduce prior consistent statements made, in one case, after the declarant had been arrested on unrelated charges, and in the other, after the declarant's guilty pleas had been accepted but while he was still seeking to appeal his sentence.

RULE 801(d)(1)(C) — STATEMENTS WHICH ARE NOT HEARSAY — PRIOR STATEMENT BY WITNESS — IDENTIFICATION

Drawings

United States v. Moskowitz, 581 F.2d 14 (2d Cir.), *cert. denied*, 439 U.S. 871 (1978): The Court affirmed an armed bank robbery conviction. One piece of evidence offered at trial was a drawing made by an artist from information supplied by witnesses. Two witnesses testified that the drawing looked like the robber. The statements about the sketch looking like the robber, the Court unanimously agreed, were admissible under Rule 801(d)(1)(C), and the majority of the panel believed that the sketch itself was not hearsay. Judge Friendly's one-paragraph concurring opinion said that he thought it would be a more straightforward analysis to regard the sketch as an integral part of the prior identification evidence admissible under the hearsay exemption. Under either approach, the evidence was properly admitted.

Memory problem

United States v. Owens, 484 U.S. 554 (1988), *rev'g* 789 F.2d 750 (9th Cir. 1986): A correctional counselor at a federal prison was attacked and severely beaten, leaving him with severely impaired memory. At the defendant's trial for assault with intent to murder, the victim had no present memory of his attacker's identity and admitted on cross-examination that he could not remember seeing his assailant, but said he remembered identifying the defendant to an FBI agent who visited him in the hospital. He could not

132. 708 F.2d 429 (9th Cir. 1983).

133. 718 F.2d 931 (9th Cir. 1983).

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

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

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

Rules That Might Be Affected By Technology

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

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

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

Rules That Refer to "Writing" or "Written"

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

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

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

* * *

(c) PROCEDURE TO DETERMINE ADMISSIBILITY –

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

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

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

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

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

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

* * *

(b) *Time limit.* — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its

prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance **written** notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

4. Rule 612. Writing Used to Refresh Memory

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

(1) while testifying, or

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

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

5. Rule 801. Definitions

The following definitions apply under this article:

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

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

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

6. Rule 901. Requirement of Authentication or Identification

* * *

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

* * *

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

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

7. Rule 903. Subscribing Witness' Testimony Unnecessary

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

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

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

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

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

* * *

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

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

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

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

of a kind of which a **memorandum, report, record, or data compilation** was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

See the note after Rule 803(6).

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

See the note after Rule 803(6).

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

See the note after Rule 803(6).

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

See the note after Rule 803(6).

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

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

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

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

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

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

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

* * *

2. Rule 901. Requirement of Authentication or Identification

* * *

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

* * *

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

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

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

3. Rule 902. Self-authentication

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

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

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

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

See the comment to Rule 902(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Computerized evidence comes in five basic forms at this time:

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

2. Second, a computerized presentation may be offered as proof of how an event occurred. For this purpose, the use of a computer to recreate an event is no different in kind from videotaping a recreation of a car crash. Courts consistently apply Rule 403 to determine whether the recreation is substantially similar to the original conditions. If the conditions are substantially different, the recreation, computerized or not, is excluded as substantially more prejudicial than probative. See, e.g., *Racz v. R.T. Merryman Trucking, Inc.*, 1994 WL 124857 (E.D.Pa. 1994) (computerized accident reconstruction held inadmissible under Rule 403, because not all data was taken into account). Any problems of authenticating such a computerized demonstration are handled by Rule 901(b)(9), which permits authentication for "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."See Greg Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations,* SB67 ALI-ABA 81 (1997) (noting ways in which authentication questions can be

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

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

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

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

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

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

Some Problems Not Yet Encountered

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

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

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

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

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

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

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

The Uniform Rules Solution

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

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

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

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

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

Reporter's Comment on Uniform Rules Proposal:

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

Finally, the Uniform Rules proposals on computerized evidence must be considered in the context of other Uniform Rules ventures, particularly in the area of Uniform Commercial Code and electronic contracting. The Uniform Rules project is, quite understandably, integrating language pertinent to computerization throughout all the Uniform Rules. There is no such need

for integration, at this time, with respect to the Federal Rules of Evidence.

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

The Solution of a Single Amendment to Rule 1001

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

Rule 1001. Definitions

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

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

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

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

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

Reporter's Comment on the Proposal:

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

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

The Solution of a More Expansive Amendment to Rule 1001

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

Rule 1001. Definitions

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

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

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

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

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

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

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

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

Reporter's Comment on the Proposal:

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

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

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

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

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

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

The proposal has some disadvantages, however:

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

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

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

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

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

The Maryland "Solution"

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

Conclusion

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

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

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

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

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

FIRST READING DRAFT

Articles I - VI

FOR DRAFTING COMMITTEE APPROVAL

February 20-22, 1998

REVISION OF UNIFORM RULES OF EVIDENCE

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Drafting Committee to Revise
Uniform Rules of Evidence of 1974, As Amended

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Rule 106. [Remainder of or Related Records ~~Writings or Recorded Statements~~].

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

Reporter's Note

The existing **Comment** to Rule 106 states:

> "[a] determination of what constitutes 'fairness' includes consideration of completeness and relevancy as well as possible prejudice."

Uniform Rule 106 also differs from its federal rule counterpart by substituting the phrase "in fairness ought" for the phrase "ought in fairness."

Two amendments to Rule 106 are proposed. First, this proposal for amending Rule 106 eliminates the gender-specific language in the rule which is technical and no change in substance is intended.

Second, the Drafting Committee proposes amending Uniform Rule 106 to substitute the word "record" for the language "writing or recorded statement" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. Comparable amendments are also made in Rules 612, 801(a), 803(5) through 803(17), 901 through 903 and 1001 through 1007. The proposed amendment also carries forward established policy of the Conference to accommodate the admissibility of evidence stored and maintained in various electronic mediums.

"Record" is then defined in a proposed amendment to Uniform Rule 1001(1) as follows:

"Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form. All writings, recordings, photographs and images are records.

The definition of "record" in the first sentence of Uniform Rule 106 is derived from § 5-102(a)(14) of the Uniform Commercial Code and would carry forward established policy of the Conference to accommodate the use of electronic evidence in business and governmental transactions. The Drafting Committee has inserted a second sentence in the definition of record to include "writings, recordings, photographs and images" to accommodate the admissibility of records kept in the traditional forms of writings, recordings and photographs, as well as the more recent innovation of maintaining records in the form of images. The definitions of "writings", "recordings", and "photographs" are carried forward in Uniform Rule 1001, Subdivisions (2) and (3), with clarifying amendments and the term "images" is newly defined in Subdivision (4). *See* further, the **Reporter's Note** to Uniform Rule 1001, *infra.*

The Advisory Committee on the *Federal Rules of Evidence* has not recommended similar amendments to the Federal Rules.

Rule 612. [Record ~~Writing~~ or Object Used to Refresh Memory].

(a) While testifying. If, while testifying, a witness uses a record ~~writing~~ or object to refresh ~~his~~ memory, an adverse party is entitled to have the record ~~writing~~ or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) Before testifying. If, before testifying, a witness uses a record ~~writing~~ or object to refresh ~~his~~ memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the record ~~writing~~ or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) Terms and conditions of production and use. A party entitled to have a record ~~writing~~ or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the record ~~writing~~ or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the record ~~writing~~ or object contains matters not related to the subject matter of the testimony, the court shall examine the record ~~writing~~ or object *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a record ~~writing~~ or object is not produced, made available for inspection, or delivered

pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Reporter's Note

First, this proposal for amending Rule 612 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

Second, it is proposed that Rule 612 be amended to substitute the word "record" for the language "writing" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. "Record" is then defined in a proposed amendment to Uniform Rule 1001(1) as follows:

> "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form. All writings, recordings, photographs and images are records.

The definition of "record" in the first sentence of Uniform Rule 106 is derived from § 5-102(a)(14) of the Uniform Commercial Code and would carry forward established policy of the Conference to accommodate the use of electronic evidence in business and governmental transactions. The Drafting Committee has inserted a second sentence in the definition of record to include "writings, recordings, photographs and images" to accommodate the admissibility of records kept in the traditional forms of writings, recordings and photographs, as well as the more recent innovation of maintaining records in the form of images. The definitions of "writings", "recordings", and "photographs" are carried forward in Uniform Rule 1001, Subdivisions (2) and (3), with clarifying amendments and the term "images" is newly defined in Subdivision (4). *See further*, the **Reporter's Note** to Uniform Rule 1001, *infra*.

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

Reporter's Note

It is proposed that Rule 803(5) be amended to delete the words "memorandum or" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra.*

There are no other proposals at the present time for amending Rule 803(5).

The Evidence Project proposes a substantial revision in Rule 803(5) of the *Federal Rules of Evidence* and moving and renumbering the rule as Rule 805(3) as follows:

> (3) **Recorded recollection.** [Moved from Current Rule 803(5)] A ~~memorandum or~~ record ~~concerning a matter which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and~~ accurately~~, shown to have been~~ reflecting a witness' knowledge of an event, made or adopted by the witness ~~when the matter was fresh in the witness' memory and to reflect that knowledge correctly~~ soon after the event's occurrence under conditions of apparant sincerity. ~~If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.~~

(6) Records of regularly conducted business activity. A ~~memorandum, report,~~ record, ~~or data compilation,~~ in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the ~~memorandum, report,~~ record, ~~or data compilation,~~ all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or with a statute providing for certification, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. As used in this paragraph, "business@ includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Reporter's Note

First, it is proposed that Rule 803(6) be amended to delete the words "memorandum," "report" and "data compilation" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

Second, it is proposed that Rule 803(6) be amended to provide for satisfying through certification the foundational requirements for the admissibility of a business record as an alternative to the expense and inconvenience of producing a time-consuming foundation witness. The language of the amendment is drawn from a proposed amendment to Rule 803(6) of the *Federal Rules of Evidence* which was adopted by the Advisory Committee at its meeting on October 20-21, 1997 and recently approved by the Standing Committee of the Judicial Conference of the United States for publication for official comment. A uniform rule of evidence providing for satisfying the foundational requirements for admissibility of business records would appear to be compatible with a

1 federal rule on the subject. It is also recommended that Uniform Rule 902 be amended to
2 provide for the self-authentication of domestic and foreign records to provide adequate
3 protection for the admissibility of business records under the certification procedure
4 provided for in Uniform Rule 803(6). *See* the proposed amendments to Uniform Rules
5 902(11) and 902(12), *infra*.

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

Reporter's Note

It is proposed that Rule 803(7) be amended to delete the words "memoranda," "reports," "data compilations," and "data compilation" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra.*

There are no other proposals at the present time for amending Rule 803(6).

The Evidence Project proposes including Rule 803(7), dealing with the absence of business records and entries, as a subdivision (b) of Rule 803(6) of the *Federal Rules of Evidence*, and revised as follows:

> ~~(7)~~ (b) **Absence of entry in records kept in accordance with the provisions of paragraph ~~(6)~~ (a).** [Moved from Current Rule 803(7)] Evidence that a matter is not included in ~~the memoranda, reports,~~ records, ~~or data compilations, in any form,~~ kept in accordance with the provisions of paragraph ~~(6)~~(a), to prove the nonoccurrence or nonexistence of ~~the~~ a matter, if the matter was of a kind which an ~~memorandum, report, record or data compilation~~ entry was regularly made and preserved, unless the sources of the information or other circumstances indicate lack of trustworthiness.

See Rice, Paul R., *The Evidence Project, Proposed Revisions to the Federal Rules of*

(8) **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, ~~reports, statements, or data compilations~~ in any form, of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: ~~(i)~~ (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; ~~(ii)~~ (B) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; ~~(iii)~~ (C) factual findings offered by the government in criminal cases; and ~~(iv)~~ (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

Reporter's Note

First, it is proposed that Rule 803(8) be revised to make the format of the rule consistent with the format employed in Tentative Draft #2 of Articles I through VI.

Second, it is proposed that Rule 803(8) be amended to delete the words "reports," "statements" and "data compilations" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

There are no other proposals at the present time for amending Rule 803(8).

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

Reporter's Note

It is proposed that Rule 803(9) be amended to delete the words "or data compilations, in any form" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is propsed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

There are no other proposals at the present time for amending Rule 803(9).

1 **(10) Absence of public record or entry.** To prove the absence of a record,
2 ~~report, statement, or data compilation, in any form,~~ or the nonoccurrence or nonexistence
3 of a matter of which a record, report, or statement~~, or data compilation, in any form,~~ was
4 regularly made and preserved by a public office or agency, evidence in the form of a
5 certification in accordance with Rule 902, or testimony, that diligent search failed to
6 disclose the record, report, statement, ~~or data compilation,~~ or entry.
7
8 **Reporter's Note**
9
10 It is proposed that Rule 803(10) be amended to delete the words "report,"
11 "statement," or "data compilation, in any form" to conform the rule to the
12 recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic
13 Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of
14 the American Bar Association. It is proposed that "record" in the amended rule be defined
15 by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of
16 "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby
17 carry forward the established policy of the Conference to accommodate the use of
18 electronic evidence in business transactions. See, in this connection, the *Reporter's Note*
19 to Rule 106 of the *Uniform Rules of Evidence, supra.*
20
21 There are no other proposals at the present time for amending Rule 803(10).
22
23 *See* the **Reporter's Note** to Rule 803(8) for the discussion of *The Evidence*
24 *Peoject's* proposal to locate Rule 803(10) as a subparagraph to Rule 803(8) of the *Federal*
25 *Rules of Evidence*.

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

Reporter's Note

It is proposed that the word "records" be substituted for the word "certificates" in the heading of Rule 803(12) and that the language, "or record thereof" be added in the body of the rule to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the admissibility of certificates where they are preserved in a form other than a writing. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

There are no other proposals at the present time for amending Rule 803(12).

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

(B) A "public record" is a record of a public office in which office an applicable statute authorizes the filing or recording of documents of that kind.

Reporter's Note

It is proposed that Rule 803(14) be amended as indicated to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the admissibility of certificates where they are preserved in a form other than a writing. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

The recommendation of the Task Force that the definition of a "public record," now contained in the last three lines of Rule 803(14), be defined in a separate section is also incorporated in the proposed amendments of Rule 803(14).

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

Reporter's Note

It is proposed that Rule 803(15) be amended to delete the words "documents," and "document" and, in lieu thereof substitute the word "record" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra.*

There are no other proposals at the present time for amending Rule 803(15).

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

Reporter's Note

It is proposed that Rule 803(16) be amended to delete the words "documents," and "document" and add the word "record" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

There are no other proposals at the present time for amending Rule 803(16).

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

Reporter's Note

It is proposed that Rule 803(17) be amended to add the words "or publicly recorded" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra.*

There are no other proposals at the present time for amending Rule 803(17).

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

Reporter's Notes

It is proposed that Rule 901(b)(7) be amended to add the words "public record" and delete the words "writing authorized by law to be recorded or filed and in fact recorded or filed in a public office" and "report, statement, or data compilation, in any form" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from § 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

There are no other proposals at the present time for amending Rule 803(16).

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

Reporter's Notes

It is proposed that Rule 901(b)(8) be amended to add the word "record" and delete the words "document or data compilation, in any form" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

It is also proposed that the subdivisions be recast to conform the rule to the format generally followed in the *Uniform Rules of Evidence*.

There are no other proposals at the present time for amending Rule 901(b)(8).

(5) **Official publications.** Books, pamphlets, ~~or other~~ publications, or other publicly issued records, in the form of a writing or other record, if in a form indicative of the genuineness of such a record, issued by public authority.

Reporter's Notes

It is proposed that Rule 902(5) be amended to delete the words "or other" and add the words "or other publicly issued records, in the form of a writing or other record, if in a form indicative of the genuineness of such a record" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. These changes will reflect official publications or reports in non-written formats. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra.*

There are no other proposals at the present time for amending Rule 902(5).

1 **(6) Newspapers and periodicals.** Publicly distributed ~~Printed~~ material purporting

2 to be newspapers or periodicals.

3

4 **Reporter's Notes**

5

6 It is proposed that Rule 902(6) be amended to add the words "Publicly distributed"
7 and delete the word "printed" to conform the rule to the recommendations of the Task Force
8 on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of
9 Commerce in Cyberspace, Section on Business Law of the American Bar Association. These
10 changes will reflect publicly distributed material in non-written formats. It is proposed that
11 "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of*
12 *Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform
13 Commercial Code and thereby carry forward the established policy of the Conference to
14 accommodate the use of electronic evidence in business transactions. See, in this connection,
15 the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

16

17 There are no other proposals at the present time for amending Rule 902(6).

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

Reporter's Note

It is proposed that Rule 902(8) be amended to delete the words "documents" and add the words "records" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. These changes will reflect publicly distributed material in non-written formats. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the *Reporter's Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

There are no other proposals at the present time for amending Rule 902(8).

1 **(9) Commercial paper and related ~~documents~~ records**. Commercial paper,

2 signatures thereon, and ~~documents~~ records relating thereto or having the same legal effect as

3 commercial paper to the extent provided by general commercial law.

4

5 **Reporter's Note**

6

7 It is proposed that Rule 902(9) be amended by deleting the word "documents" and
8 adding the words "records" and "or having the same legal effect as commercial paper" to
9 conform the rule to the recommendations of the Task Force on Electronic Evidence,
10 Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace,
11 Section on Business Law of the American Bar Association. These changes will facilitate the
12 authentication of commercial paper in non-written formats. It is proposed that "record" in
13 the amended rule be defined by amending Rule 1001 of the *Uniform Rules of Evidence*, to
14 embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial
15 Code and thereby carry forward the established policy of the Conference to accommodate the
16 use of electronic evidence in business transactions. See, in this connection, the *Reporter's*
17 *Note* to Rule 106 of the *Uniform Rules of Evidence, supra*.

18

19 There are no other proposals at the present time for amending Rule 902(9).

TENTATIVE DRAFT #1

ARTICLE X

FOR DRAFTING COMMITTEE DISCUSSION ONLY

February 20-22, 1998

UNIFORM RULES OF EVIDENCE OF 1974, AS AMENDED

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Drafting Committee to Revise
Uniform Rules of Evidence of 1974, As Amended

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ARTICLE X

CONTENTS OF RECORDS, WRITINGS, RECORDINGS, ~~AND~~ PHOTOGRAPHS AND IMAGES

Rule 1001. [Definitions].

For purposes of ~~this Article~~ these Uniform Rules the following definitions are applicable:

(1) **Record.** "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. All writings, recordings, photographs and images are records.

~~(1)~~(2) **Writings and recordings.** "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, ~~magnetic impulse,~~ mechanical or electronic recording, ~~or other form of data compilation~~ or other technology in perceivable form.

~~(2)~~(3) **Photographs.** "Photographs" are forms of a record which include still photographs, X-ray films, video tapes, and motion pictures.

(4) **Images.** "Images" are forms of a record which include digitized copies or images of information.

~~(3)~~(5) **Original.** An "original" of a record, writing, or recording is the record, writing, or recording itself, or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, including by stored images, any printout of a record or other perceivable output readable by sight, shown to reflect the data accurately, is an "original."

~~(4)~~(6) **Duplicate.** A "duplicate" is a counterpart reproduced by any technique that reproduces the original in perceivable form or that is produced by the same impression as the original, or from the

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

Reporter's Note

The proposed amendments to Uniform Rule 1001, as well as the amendments to the following Uniform Rules 1002 through 1008 in Article X, define and embellish on the term "record" which has been substituted for the word "writing" appearing throughout the existing Articles I through IX of the Uniform Rules of Evidence of 1974, As Amended. Although both the Federal Rules and the Uniform Rules of Evidence presently include specific reference, when appropriate, to "data compilations" to accommodate the admissibility of records stored electronically, many business and governmental records do not now consist solely of data compilations. Rather, in today's technological environment, records are kept in a variety of mediums other than in just data compilations. "Records" may include items created, or originated, on a computer, such as through word processing or spreadsheet programs; records sent and received through electronic communications, such as electronic mail; data stored through scanning or image processing of paper originals; and information compiled into data bases. One, or all, of these processes may be involved in ordinary and customary business and governmental record-keeping. Modern technology thus dictates that any of the foregoing records should be admissible when they are relevant providing reasonable thresholds of evidentiary reliability are satisfied. The amendments to the Uniform Rules in Articles I through IX, as well as in Article X, are intended to accommodate these innovations in record keeping, as well as to continue to accommodate more traditional forms of record keeping, such as writings, recordings and photographs. *See,* in this connection, Fry, Patricia Brumfield, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law,* 26 Loyola of Los Angeles L. Rev. 607 (1993).

The proposed amendments to Rules 1001 through 1008 are based in part on recommendations of Commissioner Patricia Brumfield Fry of North Dakota, the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association and the definition of "record" derived from § 5-102(a)(14) of the Uniform Commercial Code. The proposed amendments thus carry forward established policy of the Conference to accommodate the use of electronic evidence in business and governmental transactions. *See also,* in this connection, the Memorandum of the Reporter to the Evidence Subcommittee, *Admissibility of Evidence of Electronically Based Communications and Transactions Under the Uniform Rules* (April 17, 1995) and the Memorandum of Patricia Brumfield Fry to the Reporter, *Evidence Rules and Record* (April 11, 1995).

Rule 1002. [Requirement of Original].

To prove the content of a record, writing, recording, or photograph, the original record, writing, recording, or photograph is required, except as otherwise provided in these rules or by [rules adopted by the Supreme Court of this State or by] statute.

Reporter's Note

The amendments to Rule 1002 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

Rule 1003. [Admissibility of Duplicates].

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Reporter's Note

There are no proposals at the present time for amending Rule 1003.

Rule 1004. [Admissibility of Other Evidence of Contents].

The original is not required, and other evidence of the contents of a record, writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure;

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and he does not produce the original at the hearing; or

(4) Collateral matters. The record, writing, recording, or photograph is not closely related to a controlling issue.

Reporter's Note

The amendments to Rule 1004 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

Rule 1005. [Public Records].

The contents of an official record, or of a private record ~~document~~ authorized to be recorded or filed in the public records and actually recorded or filed, ~~including data compilations in any form,~~ if otherwise admissible, may be proved by a copy in perceivable form, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy in perceivable form complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

Reporter's Note

The amendments to Rule 1005 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

Rule 1006. [Summaries].

The contents of voluminous records, writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, ~~or~~ calculation, or other perceivable presentation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Reporter's Note

The amendments to Rule 1006 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

Rule 1007. [Testimony or recorded ~~Written~~ Admission of Party].

Contents of records, writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by ~~his~~ that party's written admission, without accounting for the nonproduction of the original.

Reporter's Note

This proposal for amending Rule 1007 eliminates the gender-specific language in Rule 1007. This change is technical and no change in substance is intended.

In addition, amendments to Rule 1007 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

Rule 1008. [Functions of Court and Jury].

Whenever the admissibility of other evidence of contents of records, writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted record or writing ever existed, or (2) another record, writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Reporter's Note

The amendments to Rule 1008 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-504.3, as follows:

Rule 2-504.3. COMPUTER-GENERATED EVIDENCE AND MATERIAL

(a) Definitions

(1) Computer-Generated Evidence

"Computer-generated evidence" means computer-generated data, a computer-generated illustration, a computer simulation, and electronically-imaged documentary evidence, as those terms are defined in this subsection.

Committee note: The definition of "computer-generated evidence" does not encompass routine videotapes or audiotapes. However, "computer-generated evidence" purposefully has been defined broadly to allow for future technological changes.

(A) "Computer-generated data" means any evidence, other than a computer-generated illustration, a computer simulation, or electronically-imaged documentary evidence, that is:

(i) prepared in anticipation of litigation or for trial;

(ii) intended to be used as substantive evidence or as a basis for expert opinion testimony; and

(iii) stored electronically or generated from information that is stored electronically.

(B) "Computer-generated illustration" means a computer-generated aural, visual, or other sensory aid, including a computer-generated depiction or animation of an event or thing,

that is used to assist a witness by illustrating the witness's testimony and is not offered as substantive evidence.

(C) "Computer simulation" means a mathematical program or model that, when provided with a set of assumptions and parameters, will formulate a conclusion in numeric, graphic, or some other form and that is intended to be used as substantive evidence or as a basis for expert opinion testimony in accordance with Rule 5-703.

(D) "Electronically-imaged documentary evidence" means the image of any document that has been electronically imaged for purposes of presentation at trial as substantive evidence or as a basis for expert opinion testimony in accordance with Rule 5-703, but does not include computer-generated data, a computer-generated illustration, or a computer simulation.

Cross reference: For the meaning of "document," see Rule 2-422 (a).

(2) Computer-Generated Material

As used in section (f) of this Rule and Rule 4-322 (b), "computer-generated material" means a computer-generated presentation, including a depiction or animation, used solely for argument.

(b) Notice

(1) Subject to subsection (b)(2) of this Rule, any party who intends to offer computer-generated evidence at trial for any purpose shall file a written notice that:

(A) contains a descriptive summary of the computer-generated evidence the party intends to use, including (i)

reference by rule number to the definitional subcategory of computer-generated evidence intended to be used, (ii) a description of the subject matter of the computer-generated evidence, and (iii) a statement of what the computer-generated evidence purports to prove or illustrate;

(B) is accompanied by a written undertaking that the party will take all steps necessary to (i) preserve the computer-generated evidence and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (ii) comply with any request by an appellate court for presentation of the computer-generated evidence to that court; and

(C) is filed within the time provided in the scheduling order or no later than 90 days before trial if there is no scheduling order.

(2) Any party who intends to offer computer-generated evidence at trial for purposes of impeachment or rebuttal shall file, whenever practicable, the notice required by subsection (b)(1) of this Rule.

(c) Required Disclosure; Additional Discovery

Within five days after service of the notice required by section (b) of this Rule, the proponent shall make the computer-generated evidence available to any party. Notwithstanding any provision of the scheduling order to the contrary, the filing of a notice of intention to use computer-generated evidence entitles any other party to a reasonable period of time to discover any relevant information needed to oppose the use of the computer-

generated evidence before the court holds the hearing provided for in section (e) of this Rule.

(d) Objection

Not later than 60 days after service of the notice required by section (b) of this Rule, a party may file any then-available objection that the party has to the use at trial of the computer-generated evidence and shall file any objection that is based upon an assertion that the computer-generated evidence does not meet the requirements of Rule 5-901 (b)(9). The mandatory objection based on the alleged failure to meet the requirements of Rule 5-901 (b)(9) is waived if not so filed, unless the court for good cause orders otherwise.

(e) Hearing and Order

If an objection is filed in accordance with section (d) of this Rule, the court shall hold a pretrial hearing to rule on the objection. If the hearing is an evidentiary hearing, the court may appoint an expert or other person that the court deems necessary to enable it to rule on the objection, and the court may assess against one or more parties the reasonable fees and expenses of the person appointed. In ruling on the objection, the court may require modification of the computer-generated evidence and may impose conditions relating to its use at trial. The court's ruling on the objection shall control the subsequent course of the action. If the court rules that the computer-generated evidence may be used at trial, when it is used, (1) the proponent may, but need not, present any evidence that was presented at the hearing on the objection, and (2) the party

objecting to the evidence is not required to re-state an objection made in writing or at the hearing in order to preserve that objection for appeal. If the court excludes or restricts the use of computer-generated evidence, the proponent need not make a subsequent offer of proof in order to preserve that ruling for appeal.

103e

(f) Preservation of Computer-Generated Evidence and Material

The party offering computer-generated evidence or using computer-generated material at any proceeding shall (1) preserve the computer-generated evidence or computer-generated material and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (2) present the computer-generated evidence or computer-generated material to an appellate court upon request.

Committee note: This section requires the proponent of computer-generated evidence or computer-generated material to reduce the computer-generated evidence or material to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence or material and the technology available for preservation of that computer-generated evidence or material. No special arrangements are needed for preservation of computer-generated evidence or material that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer-generated evidence or material. However, when the computer-generated evidence or material involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence or material must make other arrangements for preservation of the computer-generated evidence or material and any subsequent presentation of it that may be required by an appellate court.

Cross reference: For the shortening or extension of time periods set forth in this Rule, see Rule 1-204.

Source: This Rule is new.

REPORTER'S NOTE

Proposed new Rule 2-504.3 reflects several policy determinations by the Rules Committee. The Committee believes that "computer-generated evidence" ("CGE") as that term has been defined in this Rule can be powerful and outcome-determinative. Pretrial disclosure of CGE, early judicial intervention with respect to a determination of objections to the CGE (particularly any objection alleging that the CGE does not meet the requirements of Rule 5-901 (b)(9)), and appropriate preparations for the preservation of CGE for appellate review are essential features of this Rule.

The Visual and Electronic Evidence Subcommittee debated at length the issue of what CGE should comprise. Under section (a), CGE means "computer-generated data, a computer-generated illustration, a computer simulation, and electronically-imaged documentary evidence," as those terms are defined in subsections (a)(1)(A), (B), (C), and (D), respectively. If a party intends to offer any of the four types of CGE at trial, the notice requirement of section (b), the disclosure requirement of section (c), and the evidence preservation requirement of section (f) are triggered. In order to trigger the evidence preservation requirement of section (f) -- but not to trigger the notice and disclosure requirements of sections (b) and (c) -- a definition of "computer-generated material" ("CGM") has been added to the Rule. As defined in subsection (a)(2), CGM means, with respect to evidence preservation requirements, a computer-generated presentation, including a depiction or animation, used solely for argument.

Under section (b), a party intending to offer CGE at trial must file a written notice of that intention within the time allowed under subsection (b)(1)(C). With respect to CGE that a party intends to offer solely for impeachment or rebuttal, the mandatory nature of the notice is tempered by the addition of the phrase "whenever practicable." The notice must state by rule number the definitional subcategory of CGE. This requirement, together with the disclosure requirement set forth in section (c), assists other parties in making informed decisions with respect to the extent of discovery needed and whether to file an objection. For example, CGE that is a computer simulation will often be more closely examined than CGE that cannot be used as substantive evidence or CGE that is merely an unmodified electronic image of other clearly-admissible evidence. Subsection (b)(1)(A) also requires that the notice contain descriptive information concerning the CGE -- its subject matter and a statement of what it purports to prove or illustrate. Subsection (b)(1)(B) requires that a written undertaking be filed with the notice, stating that the party will take all necessary steps to preserve the CGE for appeal and, upon request, present it to an appellate court. The undertaking requirement highlights, at an early stage in the proceedings, the obligation

of the proponent of CGE to preserve and present it in accordance with section (f).

Under section (c), after a party files a notice of intention to offer CGE, the proponent must make the CGE available to other parties, and the other parties have a reasonable period of time to conduct discovery of any relevant information needed to oppose the CGE.

Under section (d), any objection to CGE on the ground that the CGE does not meet the requirements of Rule 5-901 (b)(9) must be filed no later than 60 days after service of the notice required by section (b). Objections on this ground are waived unless timely made in accordance with this Rule. Objections on other grounds also may be made at this time. The Committee recognizes that some objections, such as certain objections based on relevancy, may not be capable of pretrial determination within the time frame set forth in this Rule and, therefore, may be made at any appropriate time, including with a motion in limine or during the trial.

The filing of an objection pursuant to section (d) triggers a pretrial hearing under section (e). If the court conducts an evidentiary hearing, it may appoint an expert or other person to assist the court with the assessment of the CGE. Because the Committee was concerned that disparate resources of the parties could lead to the use of CGE that does not meet even minimum standards of authenticity under Rule 5-901 (b)(9), a provision is included in section (e) that allows the court to assess among the parties the reasonable fees and expenses of persons so appointed. Section (e) also includes provisions that allow the court the option of ordering modification of the CGE or imposition of conditions to the use of the CGE, rather than outright rejection of CGE. Although the Rule allows a judge to order curative measures with respect to the CGE, there is no requirement or duty imposed on the judge to do so. Section (e), using language borrowed from Rule 2-504.2 (c), states that the court's ruling on the objection controls the subsequent course of the action. At trial, the parties are not required to repeat a foundation laid or to restate and relitigate objections raised at the pretrial stage, but neither are they precluded from introducing evidence relevant to the CGE's authenticity or the weight to be given to the CGE. Also, in order to preserve for appeal a pretrial ruling that excludes or restricts the use of CGE, it is not necessary for the proponent of the CGE to make an offer of proof at trial.

Section (f) requires the party offering CGE or using CGM at any pretrial or trial proceeding to preserve and furnish the CGE or CGM to the clerk in a manner suitable for transmittal as a part of the record on appeal and to comply with any request by an appellate court to have the CGE or CGM presented to the appellate court. A Committee note describes acceptable methods of preservation. The Committee believes that the preservation issue

will become less of a problem after this Rule is adopted because vendors of CGE and CGM will include preservation of the CGE and CGM as part of the package they sell. The Committee intentionally omitted from the Rule any mention of sanctions if a party fails to properly preserve CGE or CGM for appeal. If the failure becomes apparent at the trial court level, the implicit sanction is that the trial judge will prohibit use of the CGE or CGM. If the failure becomes apparent at the appellate level, the appellate court can order appropriate discretionary consequences in accordance with Rule 1-201 (a).

A cross reference to Rule 1-204 (Motion to Shorten or Extend Time Requirements) follows the Rule. The Committee believes that the complex technical issues that arise with respect to some CGE may preclude adherence to strict timetables in some cases.

Because this is a Title 2 Rule, it is applicable only to civil cases, in a circuit court. The Subcommittee considered, and rejected, a comparable Title 4 Rule applicable to criminal proceedings. The Subcommittee believes that such a rule is not feasible because of (1) the time constraints that exist in criminal proceedings as a result of the defendant's Constitutional right to a speedy trial and Rule 4-271 (a), (2) the Constitutional issues surrounding mandatory disclosures from a criminal defendant, and (3) a process of discovery in criminal proceedings that does not contemplate a procedure as detailed as the approach set forth in proposed new Rule 2-504.3. However, the Subcommittee does recommend amendments to Rule 4-263 with respect to disclosure of CGE and amendments to Rule 4-322 with respect to preservation of CGE and CGM.

No changes are recommended to the Title 3 Rules. The use of CGE and CGM in the District Court, at this time, is not a common occurrence, although the Committee recognizes that with advances in technology, CGE and CGM in the form of affordable "canned" programs depicting automobile accidents, bodily injuries, etc. could become more prevalent in the District Court. However, given the limited jurisdiction of the District Court, the volume of cases heard, the time constraints on trials, the absence of jury trials, and the limited discovery available, amendments to the Title 3 Rules with respect to CGE and CGM are not recommended at this time.

The Committee also considered the evidentiary issues raised in a Memorandum from Professor Lynn McLain dated June 6, 1996 (included in the materials for the September 6, 1996 meeting of the Rules Committee). The Committee believes that the Title 5 Rules in their current form are sufficient to handle CGE issues. The Subcommittee suggests that CGE evidentiary issues, such as foundation requirements and hidden hearsay problems, should be the subject of legal and judicial educational programs.

The Subcommittee has considered recommendations as to jury instructions pertaining to CGE and whether Rules 2-521 and 4-326 should be amended to specify the circumstances under which CGE may be taken to the jury room. A memorandum concerning those topics was included in the materials for the November 15, 1996 meeting of the Rules Committee. However, jury instructions are not within the bailiwick of the Rules Committee and the Committee is not recommending any amendment to Rules 2-521 and 4-326 at this time.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 to add a certain provision concerning computer-generated evidence to the required contents of a scheduling order, as follows:

Rule 2-504. SCHEDULING ORDER

. . .

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule 16-202;

(B) one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402 (e)(1)(A);

<u>(C) one or more dates by which each party shall file the notice required by Rule 2-504.3 (b) concerning computer-generated evidence;</u>

[(C)] <u>(D)</u> a date by which all discovery must be completed;

[(D)] <u>(E)</u> a date by which all dispositive motions must be filed; and

[(E)] <u>(F)</u> any other matter resolved at a scheduling

conference held pursuant to Rule 2-504.1.

. . .

REPORTER'S NOTE

This amendment to Rule 2-504 is proposed in light of proposed new Rule 2-504.3 (b), which specifies that the notice of a party's intention to use computer-generated evidence must be filed "within the time provided in the scheduling order or no later than 90 days prior to trial if there is no scheduling order."

MARYLAND RULES OF PROCEDURE

TITLE 2 — CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 — TRIAL

AMEND Rule 2-504.1 to require a scheduling conference in any action in which an objection to the use of computer-generated evidence is filed in accordance with Rule 2-504.3 (d), as follows:

Rule 2-504.1. SCHEDULING CONFERENCE

(a) When Required

The court shall issue an order requiring the parties to attend a scheduling conference:

(1) in any action placed or likely to be placed in a scheduling category for which the case management plan adopted pursuant to Rule 16-202 b requires a scheduling conference; [or]

<u>(2) in any action in which an objection to computer-generated evidence is filed in accordance with Rule 2-504.3 (d); or</u>

[(2)] <u>(3)</u> in any action, upon request of a party stating that, despite a good faith effort, the parties have been unable to reach an agreement (i) on a plan for the scheduling and completion of discovery, (ii) on the proposal of any party to pursue an available and appropriate form of alternative dispute resolution, or (iii) on any other matter eligible for inclusion in a scheduling order under Rule 2-504.

. . .

REPORTER'S NOTE

This amendment to Rule 2-504.1 is proposed because the Committee believes that if an objection to the use of computer-generated evidence is filed in a case in accordance with Rule 2-504.3, the case is probably somewhat complex and a required scheduling conference would be helpful in the management of the case.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to add certain disclosure requirements concerning computer simulations and other computer-generated evidence, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

. . .

(b) Disclosure Upon Request

Upon request of the defendant, the State's Attorney shall:

. . .

(4) Reports or Statements of Experts

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, [or] comparison, <u>or computer simulation,</u> and furnish the defendant with the substance of any such oral report and conclusion;

<u>Cross reference: For the definition of "computer simulation," see Rule 2-504.3 (a).</u>

(5) Evidence for Use at Trial

Produce and permit the defendant to inspect, copy, and photograph any documents <u>(including any computer-generated</u>

evidence that is a document under Rule 2-422 (a)), recordings, photographs, or other tangible things that the State intends to use at the hearing or trial;

Cross reference: For the definition of "computer-generated evidence," see Rule 2-504.3 (a).

. . .

(d) Discovery by the State

Upon the request of the State, the defendant shall:

. . .

(2) Reports of Experts

Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, [or] comparison, or computer simulation, and furnish the State with the substance of any such oral report and conclusion;

Cross reference: For the definition of "computer simulation," see Rule 2-504.3 (a).

. . .

REPORTER'S NOTE

The proposed amendment to Rule 4-263 adds disclosure requirements concerning computer simulations to subsections (b)(4) and (d)(2). The amendment also specifically includes computer-generated evidence that is a "document," within the meaning of that term set forth in Rule 2-422 (a), as a "document" that must be disclosed in accordance with subsection (b)(5).

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-322 to add certain provisions concerning the preservation of computer-generated evidence and computer-generated material, as follows:

Rule 4-322. EXHIBITS

(a) Generally

All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall form part of the record and, unless the court orders otherwise, shall remain in the custody of the clerk. With leave of court, a party may substitute a photograph or copy of any exhibit.

Cross reference: Rule 16-306.

(b) Preservation of Computer-Generated Evidence and Material

The party offering computer-generated evidence or using computer-generated material at any proceeding shall (1) preserve the computer-generated evidence or computer-generated material and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (2) present the computer-generated evidence or computer-generated material to an appellate court upon request.

Cross reference: For the definitions of "computer-generated evidence" and "computer-generated material," see Rule 2-504.3.

Committee note: This section requires the proponent of computer-generated evidence or computer-generated material to reduce the computer-generated evidence or material to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence or material and the technology available for preservation of that computer-generated evidence or material. No special arrangements are needed for preservation of computer-generated evidence or material that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer generated evidence or material. However, when the computer-generated evidence or material involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence or material must make other arrangements for preservation of the computer-generated evidence or material and any subsequent presentation of it that may be required by an appellate court.

. . .

REPORTER'S NOTE

The proposed amendment to Rule 4-322 adds a new section (b) concerning the preservation of computer-generated evidence and computer-generated material. The new section and Committee note are taken verbatim from section (f) of proposed new Rule 2-504.3. A cross reference to that Rule is also proposed.

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Agenda Item II H

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Civil Rule 44
Date: March 1, 1998

At the last meeting of the Evidence Rules Committee, there was some preliminary discussion about whether Civil Rule 44 should be abrogated in light of its apparent overlap with some of the Rules of Evidence governing proof of public records. The question was referred to the Civil Rules Committee, and the initial impression was that it would be easy to simply delete Rule 44 and leave the field to the Evidence Rules. But it was discovered upon further investigation by Ed Cooper, the Reporter to the Civil Rules Committee, that the problem was not as simple as it might initially appear. Ed's conclusion was that substantial thought must be given to whether Rule 44 and the Evidence Rules are coextensive. If Rule 44 in fact provides coverage that is broader than the Evidence Rules in some respects, then it is apparent that the Rule cannot simply be abrogated. Rather, the Evidence Rules would either have to be amended to pick up the slack, or a decision would have to be made that the more expansive coverage of Rule 44 should simply be rejected. Ed Cooper's letter on these points is attached to this memorandum, and I would like to thank him very much for his excellent contributions to our joint effort.

Ed and I have agreed that the initial research on the relationship between Rule 44 and the Evidence Rules should be conducted by the Advisory Committee on Evidence Rules. This memorandum sets forth my research on this very technical, complicated and headache-inducing question. I have reached the following tentative conclusions:

1. Rule 44 has been applied in a few situations in which the Evidence Rules are apparently not applicable. Mostly this has occurred in immigration cases, specifically deportation proceedings. The Federal Rules of Evidence are not applicable to these proceedings. Thus, unless there is a desire to amend the Federal Rules to make them applicable to these proceedings, the abrogation of Rule 44 would appear to have some practical effect. That practical effect might be limited, however, since there is a regulation that is employed in these immigration proceedings which closely tracks the language of Rule 44. Moreover, the irony is that Rule 44 is not really supposed to apply to these proceedings either--and yet the courts apply it. So if the Rule is

abrogated, at the very least the extant case law, and probably some settled expectations, will be affected.

2. Rule 44 does directly overlap with certain Evidence Rules, specifically Rules 803(10), 902(3),(4), and (5), and 1005. Generally speaking, the Evidence Rules are either coextensive with, or broader in application than, Rule 44. A few situations could be hypothesized, however, in which a public record might be self-authenticating under Rule 44 but not under the Evidence Rules. Whether it is worth it to abrogate Rule 44 and then to amend the Evidence Rules to account for these loopholes is a question for the Evidence Rules Committee as well as for three other Advisory Committees. Given the intricate, technical nature of these rules, it would be difficult to state with certainty that nothing would be lost in abrogating Rule 44 and transposing some of that Rule's language into the Evidence Rules.

3. No reported case or commentary could be found expressing dissatisfaction with the current state of affairs. This counsels strongly against change. While the dual system of authentication could be seen as inelegant, the Evidence Rules Committee must decide (together with the other Committees) whether it is worth the cost of change to streamline the Federal Rules, when there is no apparent problem in practice under the current rules.

Civil Rule 44

Civil Rule 44 provides as follows:

Proof of Official Record

(a) Authentication.

(1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

Reporter's Introductory Comment to Rule 44

Rule 44 is basically divided into three parts. Subdivision (a)(1) provides for authentication of domestic official records. Subdivision (a)(2) provides for authentication of foreign official records. Subdivision (b) provides for admissibility, as well as authentication, of evidence of a lack of an official record.

Note that Rule 44 is referred to indirectly in Criminal Rule 27, which provides that "[a]n official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions." And Rule 44 is referred to directly in Bankruptcy Rule 9017, which provides that "[t]he Federal Rules of Evidence and Rules 43, 44 and 44.1 F.R.Civ.P. apply in cases under the Code." Consequently, any decision to abrogate Rule 44 will implicate the interests of both the Criminal and Bankruptcy Rules Advisory Committees, as well as, of course, the Civil Rules Committee.

Evidence Rules That Might Overlap With Civil Rule 44

There are a number of Evidence Rules dealing with the admissibility of official records, which must be investigated to determine whether and to what extent they overlap with Rule 44. It should be kept in mind, however, that *overlap* does not mean *conflict*. Rule 44 (c) states that it is not intended to preclude authentication under any other rule. And Rules 901 and 902 similarly provide for authentication by other rules.

The public records rules, and their relationship to Rule 44 or lack thereof, will be discussed sequentially.

1. Rule 803(8)--Rule 803(8) sets forth a hearsay exception for certain public records. However, this Rule does not at all overlap with Rule 44. With respect to proof of public records, Rule 44(a) specifically provides that an official record, "when admissible for any purpose, may be evidenced by an official publication thereof . . ." Thus, Rule 44(a) does not establish a hearsay exception for public records. As the district court stated in *Phillips v. Medtronic,* 1990 WL 58440 (D.Kan.), compliance with Rule 44(a) "does not render a document admissible under the Federal Rules of Evidence. Rule 44 simply provides the method of proving an official record if it is otherwise admissible.".

2. Rule 803(10)--Rule 803(10) provides a hearsay exception for the absence of a public record. Unlike Rule 803(8), Rule 803(10) does extensively, if not completely, overlap with Rule 44. This is because Rule 44(b) provides that a statement that no record was found, when authenticated under subdivision (a), "is admissible" to prove the lack of a record. See *United States v. Beason,* 690 F.2d 439 (5th Cir. 1982) (affidavit offered as proof of nonpayment of tax was admissible under either Rule 803(10) or Civil Rule 44).

3. Rule 901(b)(7)--This Rule describes, as an example of sufficient authentication, evidence that a public report "is from the public office where items of this nature are kept." Certainly, satisfaction of the proof requirements of Rule 44 would provide sufficient evidence that an official record "is from the public office where items of this nature are kept." Thus, the two rules have some overlapping application. However, Rule 44 is a provision dealing with self-authentication and Rule 901 is not.

4. Rule 901(b)(10)--This Rule describes, as an example of sufficient authentication, any method of authentication provided by, inter alia, "rules prescribed by the Supreme Court pursuant to statutory authority." The Advisory Committee Note to the Rule indicates that Civil Rule 44 is one of the rules contemplated as a source for authenticating evidence outside the Evidence Rules.

5. Rule 902(1)--This Rule provides that domestic public documents under seal are self-authenticating when accompanied by "a signature purporting to be an attestation or execution." It is obviously targeted at the same kinds of records covered by Civil Rule 44(a)(1), though Rule 902(1) is significantly less detailed.

6. Rule 902(2)--Rule 902(2) provides that domestic public documents not under seal are self-authenticating if a public officer certifies under seal that the signer has signed the document in an official capacity and that the signature is genuine. Again, there is an overlap in coverage with Rule 44(a)(1), which provides a means for establishing self-authentication of domestic official records--though the path to self-authentication provided by Rule 44(a)(1) is somewhat different from that provided by Rule 902(2).

7. Rule 902(3)--This Rule sets forth requirements for self-authentication of foreign public documents. It closely tracks, but is not identical to, Rule 44(a)(2). The Advisory Committee Note to Rule 902(3) states that the Rule is "derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records."

8. Rule 902(4)--Rule 902(4) provides that a copy of an official record or document authorized by law to be recorded is self-authenticating where certified as correct by the custodian or other authorized person, and where the certificate complies with the self-authentication provisions of Rules 901(1)-(3), or, inter alia, any "rule prescribed by the Supreme Court pursuant to statutory authority." Thus, the Rule authorizes the court to treat a properly certified copy of a public record as properly authenticated. According to the Advisory Committee Note, the reference to certification procedures in other rules is designed is a deliberate reference to Rule 44, which also permits self-authentication of copies.

9. Rule 902(5)--This Rule establishes self-authentication for "[b]ooks, pamphlets, or other publications purporting to be issued by public authority." According to the Advisory Committee Note, Rule 902(5) is based on Civil Rule 44(a), which provides that domestic and foreign official records may be evidenced by an official publication.

10. Rule 1005--Rule 1005 provides a limited exception to the best evidence rule by permitting the admission of copies of two kinds of public records: (1) official records, and (2) documents authorized to be recorded or filed that have actually been recorded or filed. There is an overlap with Rule 44, which allows proof of copies of official records that meet the certification requirements of that Rule.

Does Rule 44 Provide Coverage that the Evidence Rules Do Not?

If the coverage of Rule 44 and the Evidence Rules is exactly contiguous, then a case can be made for the abrogation of Rule 44. Likewise, if the Evidence Rules have a broader application than Rule 44, then the case can be made for the abrogation of Rule 44. (Though again, in each of these cases, Bankruptcy Rule 9017 would have to be amended as well, and the Criminal Rules Committee would have to be consulted).

So the situation in which abrogation of Rule 44 would have substantial practical consequences is where that rule provides a ground of authentication that might not be provided in the Evidence Rules. If that is the case, then abrogation of Rule 44 would only work under one of two circumstances: either the Evidence Rules would have to be amended to incorporate the Rule 44 provisions that provide greater coverage, or a decision would have to be made that inclusion of the greater coverage provided by Rule 44 is not worth an amendment to the Evidence Rules. The case for abrogating Rule 44 is, therefore, much more problematic if that Rule provides for authentication in some cases where the Evidence Rules do not.

Most of the case law indicates that the Evidence Rules and Rule 44 are generally coextensive, and that in certain situations the Evidence Rules are actually broader in application. There are, however, some possible situations in which Rule 44 might permit authentication where the Evidence Rules would not.

Situations In Which Rule 44 and the Evidence Rules Are Interchangeable

Cases in which Rule 44 and the Evidence Rules were found interchangeable include: *United States v. Darveaux,* 830 F.2d 124 (8th Cir. 1987) (Rule 44 and Evidence Rule 902(3) are applied to reach the same result in authenticating a judgment of conviction); *First National Life Ins.Co., v. Calif. Pac. Life Ins. Co.*, 876 F.2d 877 (11th Cir. 1989) (complaint and cross-claim offered into evidence without a seal held not properly authenticated under either Rule 44 or Evidence Rules 901(1) and (2)); *California Assoc. Of Bioanalysts v. Rank,* 577 F.Supp. 1342 (C.D.Cal. 1983) (official publication was self-authenticating "under Rule 902(5) of the Federal Rules of Evidence, as well as under Rule 44(a)(1) of the Federal Rules of Civil Procedure"); *United States v. Hart,* 673 F.Supp. 932 (N.D.Ind. 1987) (report concerning nonpayment of taxes was admissible under Evidence Rule 803(10), Criminal Rule 27 and Civil Rule 44(b)); *Vote v. United States,* 753 F.Supp. 866 (D.Nev. 1990) (certificates of assessments and payments were admissible under Rule 803(8), and properly authenticated under both Rule 902(1) and Rule 44); *United States v. Jongh,* 937 F.2d 1 (1st Cir. 1991) ("good cause" excuse for the lack of a final certification, provided in Rule 902(3), was derived from Rule 44 and the rules are to be read identically as to the "good cause" exception); *United States v. Yousef,* 175 F.R.D. 192 (S.D.N.Y. 1997) ("good cause" standard for dispensing with final certification in Rule 902(3) is derived from Rule 44 and should be applied in the same manner).

Situations In Which the Evidence Rules Are More Comprehensive Than Rule 44

There are a few situations in which the Evidence Rules might be found more comprehensive than Rule 44. For example, Rule 1005 includes "data compilations" among the official records that can be proven by copy. Rule 44 contains no such reference. Judge McLaughlin opines that although there is no conflict between Rules 44 and 1005, the latter rule is "broader" because it permits copies of computerized printouts, that might not be permitted under Rule 44. McLaughlin, *Weinstein's Evidence* par. 1005[3]. Also, the Advisory Committee Note to Rule 902(3) states that it is broader than Rule 44 because Rule 902(3) "applies to public *documents* rather than being limited to public *records*." (Emphasis supplied).

For some cases finding or implying that the Evidence Rules are broader than Rule 44, see *United States v. Pent-R-Books, Inc.*, 538 F.2d 519 (2d Cir. 1976) (administrative records certified by a postal official rather than the custodian were not admissible under Rule 44; however, Rule 902 "has expanded the means by which official documents and copies thereof may be authenticated"; here the record was properly authenticated under Rule 902(1) because it was certified by a person who had authority to make the certification); *Amfac Distribution Corp. v. Harrelson*, 842 F.2d 304 (11th Cir. 1988) (state court judgment might not have been admissible under Rule 44 because the attestation and certification were stapled to the front of the judgment instead of the back; however, the judgment was properly authenticated under Rule 902 because the copy of the judgment bore a seal and a signature purporting to be an attestation of the custodian of the original judgment).

Situations In Which Rule 44 Has Been Applied Without Reference to the Evidence Rules

There are a few reported cases in which Rule 44 has been used as the sole means of authenticating official records. In some of these cases, I cannot figure out why the Evidence Rules were not used. For example, in *INA v. Italica*, 567 F.Supp. 59 (S.D.N.Y. 1983), the plaintiff offered certified copies of Italian weather records, to support a claim for damage due to freezing of two cargoes of wine. The records were certified by the custodian and by a department of the Italian government, but they did not bear a final certification attesting to the genuineness of the signature and official position of the persons who attested to the records's accuracy. Nonetheless, the Court found "good cause" to dispense with the final certification under Rule 44. The Court cited only Rule 44; but it seems clear that the documents were also admissible under Rule 902(3). That Rule contains a "good cause" standard that is derived from and is just as generous as that provided by Rule 44. See *United States v. Jongh*, 937 F.2d 1 (1st Cir. 1991) ("good cause" excuse for the lack of a final certification, provided in Rule 902(3), was derived from Rule 44 and the rules are to be read identically as to the "good cause" exception).

Similarly, in *Crescent Towing & Salvage Co., v. M/V Anax*, 40 F.3d 741 (5th Cir. 1994), an action brought to enforce a maritime lien, the court considered the type of evidence that must be presented to prove a judicial sale conducted in a foreign country, such as would extinguish all pre-existing maritime liens. The Court stated that the evidence must include "a certified copy of the foreign court's judgment which meets the authentication requirements of Federal Rule of Civil Procedure 44(a)(2)". But it would seem that authentication of such a judgment would also be permissible under the virtually identical Rule 902(3). It is unclear why the Court mentioned only the Civil Rule, since the Evidence Rules do in fact apply to an admiralty action of the type presented in *Crescent Towing*.

At any rate, the fact that some litigants and courts rely solely on Rule 44 for authentication of official documents, even when they might not have to, is more rather than less reason to retain the Rule. Deletion of the Rule in these circumstances would upset at least some settled expectations of courts and litigants.

Immigration Cases

Rule 44 has often been invoked in immigration deportation hearings, as a means of authenticating official records such as immigration forms. No reference in these cases is made to the Evidence Rules governing authentication, i.e., Rule 44 is used independently of the Evidence Rules. See *Espinoza v. INS*, 45 F.3d 308 (9th Cir. 1994) (form prepared by border agents who apprehended the alien was properly authenticated under Rule 44, where it was certified by the district director of the INS); *Lopez v. INS*, 45 F.3d 436 (9th Cir. 1994) (I-213 form was properly authenticated under Rule 44). In relying on Rule 44, the courts note that civil deportation hearings are not governed by the Federal Rules of Evidence. *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983). Thus, at first glance, it would appear that abrogation of Rule 44 would be problematic, because it would mean that there would be no authentication rules that could be invoked in these deportation hearings.

The issue is not that simple, however. While Rule 44 is cited as authority for authenticating official records in deportation hearings, the fact is that the Civil Rules are no more applicable than the Evidence Rules in these proceedings. The courts have, through case law, imported Rule 44 as a proper means of authentication. See, e.g., *Chung Young Chew v. Boyd*, 309 F.2d 857 (9th Cir. 1962) (while Rule 44 was not controlling in administrative hearings, the Rule nevertheless defined an acceptable method of authenticating a public record that should have been followed); *Maroon v. INS*, 364 F.2d 982 (8th Cir. 1966) (although Rule 44 did not control in an administrative proceeding, the procedure therein set forth should be followed to the extent possible). These cases were decided well before the Evidence Rules were in effect. It is reasonable to assume that when the Evidence Rules became effective, the courts saw no need to invoke Rule 902 as a means of authenticating official records in deportation proceedings, since Rule 44 was all

but identical and sufficient to meet the purpose, and since neither Rule 44 nor the Evidence Rules were directly applicable to these proceedings anyway.

What complicates matters further is that it appears that a party does not even need Rule 44 in order to authenticate official records in deportation proceedings. 8 C.F.R.§ 287.6 contains language that is "virtually identical" to Rule 44. *Espinoza v. INS,* 45 F.3d 308 (9th Cir. 1994) (form prepared by border agents who apprehended the alien was properly authenticated under both Rule 44 and C.F.R. 287.6). This would seem to mean that, at least with respect to civil deportation proceedings, the abrogation of Rule 44 would not be critical. But the issue is so complex and arcane that it would be hard to confidently state that the abrogation of Rule 44 in this area would have no effect at all. At the very least, the abrogation of Rule 44 would upset, at least to some degree, the settled practice of courts and litigants in deportation proceedings, where that Rule is routinely referred to.

Official v. Public Records

Rule 44 provides for authentication of "official" records. The captions to Rules 902(1)-(4) and Rule 1005 refer to "public" records. Could a record be "official" and yet not "public"? It would seem so. For example, in *Banco De Espana v Federal Reserve Bank,* 114 F.2d 438 (2d Cir. 1940), a case decided well before the adoption of the Federal Rules, the Federal Reserve offered the affidavit of the then Spanish ambassador testifying to the contents of secret instructions from his government, authorizing the sale of silver to the United States. The Spanish bank argued, inter alia, that Rule 44 (a) applied only to public records and copies thereof, so that any evidence relating to secret documents should not be subject to authentication under that Rule. Rejecting this contention, the Court stated that the Rule spoke not of "public" records, but only of "official" ones, and that it saw no necessity for reading into the Rule a requirement that the original be open to examination by the public. The Rule, said the court, was based on the presumption of ministerial regularity in the attestations and certifications of the public officials involved; given that premise, it did not matter that the document was not released to the public. Consequently, the Court held the ambassador's affidavit to be an appropriate subject for authentication under Rule 44 (a).

If the Evidence Rules govern only public records and not all official records, the case could be made that Rule 44 should not be abrogated because it provides more expansive coverage. In fact, however, the reference to "public" records in Rules 902 and 1005 is in the captions only. There is no such limitation in the text of any of these rules. The rules permit authentication of any document for which the certification requirements have been met. Indeed, while the captions refer to public records, the text of at least Rules 902(4) and 1005 refers explicitly to "official" records and documents. So it is possible that Rule 44 is not in fact more

expansive in application than the Evidence Rules with respect to official, as opposed to public, documents.

However, there is at least some uncertainty created by the tension in the Evidence Rules between the captions and the text. Perhaps this could be solved by an amendment to the captions of each of the problematic Rules, along with minor clarifications of the text. But perhaps it is better to retain Rule 44 as a safety valve to resolve any such tension. Whether it is worth the cost of amending the rules to solve a problem that has not yet arisen and may never arise is a question for the Committee.

Other Possible Cases In Which Rule 44 Might Be Broader than the Evidence Rules

While the Evidence Rules discussed above are drawn from Rule 44, there is no single Evidence Rule that is identical to Rule 44. If the Rules are parsed, it is possible to hypothesize some situations in which the Evidence Rules might not provide for authentication that would be provided for under Rule 44. These situations have not arisen in the cases yet, but their possibility counsels against simply deleting Rule 44. Some of the possible "gaps" in the coverage of the Evidence Rules that are covered by Rule 44 include the following:

1. Publications--As Ed Cooper mentions in his letter, Rule 44 permits proof of any domestic or foreign record "by an official publication thereof." The only Federal Rule providing self-authentication for a *publication* of an official record is Rule 902(5). That Rule states that "Books, pamphlets, or other publications purported to be issued by public authority" are self-authenticating. As Ed notes, Rule 902(5) seems to be using "publications" in a somewhat different sense than that employed in Rule 44, which covers publication of any official record. However, the admittedly sparse case law on the subject seems to say that Rule 902(5) provides for self-authentication of any official publication, not limited as to type or subject matter. *California Assoc. Of Bioanalysts v. Rank,* 577 F.Supp. 1342 (C.D.Cal. 1983) (official publication was self-authenticating "under Rule 902(5) of the Federal Rules of Evidence, as well as under Rule 44(a)(1) of the Federal Rules of Civil Procedure"). Weinstein's Evidence, citing the Advisory Committee Comment to Rule 902(5), states that "Rule 902(5) is based on Rule 44(a) of the Federal Rules of Civil Procedure, which provides that domestic and foreign official records may be evidence by an official publication." Thus, Rules 44 and 902(5) *appear* to be coextensive with respect to official publications. However, there is enough uncertainty in the language of the Rules to indicate caution before simply abrogating Rule 44.

2. Treaty Exception--As Ed Cooper points out in his letter, Rule 44(a)(2) allows certification of a foreign official document without the ordinarily required final certification if a treaty provides for that. There is no such exception provided for in Rule 902(3), the Evidence

Rules analogue in this respect. It is possible, of course, that a court would hold that any treaty dispensing with final certification must take precedence over the final certification requirement of Rule 902(3). However, the lack of a treaty exception in Rule 902(3) would at least be troubling if Rule 44 were abrogated. Therefore, if Rule 44 were to be abrogated, the prudent course would be to amend Rule 902(3) to pick up Rule 44's treaty exception. This emphasizes the point, however, that deletion of Rule 44 is not as simple as it appears at first glance.

Conclusion

The abrogation of Rule 44 presents a complex question because there are six Evidence Rules that are directly derived from Rule 44, and several others that are related in coverage. It is a daunting task to try to figure out whether abrogation of Rule 44 would actually create a gap in coverage with respect to authentication. There is enough uncertainty, however, to indicate that a gap in coverage is at least possible. And this gap, if it exists, would be difficult to cover by amending the Evidence Rules, for the very reason that it is difficult to tell where those gaps might be.

While the case law is admittedly sparse, there is no indication that courts or litigants are having a problem with the "dual" system presented by Rule 44 and the Evidence Rules. It is for the Committee to decide whether the current system, though somewhat awkward, should be changed in the absence of any indication of a problem in practice. The law of unintended consequences might well govern any attempt to make a change in this area.

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February 2, 1998

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Re: Congruance of Civil Rule 44 with Evidence Rules

Dear Dan:

This note is a somewhat belated sequel to our one-minute conversation at the Standing Committee meeting, as inspired by the one-paragraph reference to Civil Rule 44 on page 5 of the Minutes for the Criminal Rule Advisory Committee October, 1997 meeting.

My understanding is that you agree that nothing in the proposed amendments to Evidence Rules 803(6), 902(11), and 902(12) bears on Civil Rule 44. But the Minutes suggest that present Evidence Rules 803(8) and 902 do overlap with Civil Rule 44, and that it may be appropriate to consider the continued need for Civil Rule 44.

As a first matter, my instinctive reaction is that it is better to have all the evidence rules set out in the Evidence Rules, not divided between the Civil Rules, Criminal Rules, and Evidence Rules. There was good reason to have these provisions in the Civil Rules before there were any Evidence Rules, but that reason has vanished. The risk of inconsistency and confusion is always present. And even if there is no inconsistency, the need to continually check two different sets of rules is a nuisance. Or worse.

Beyond that point, I am not qualified to have a view on the specific overlaps suggested. It would take a long time for me to develop a view. Let me illustrate briefly, and then offer a suggestion.

Criminal Rule 27 seems to adopt, among other things, Civil Rule 44. It provides: "An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions." That seems to give the Criminal Rules Advisory Committee a stake in these questions.

Evidence Rule 803(8), noted in the minutes, provides that designated official records are not hearsay. This does not seem to overlap Civil Rule 44, which does not speak to

admissibility. Rule 44 applies only to official records that are "admissible for any purpose."

Evidence Rules 902(1), (2), (3), (4), and (5) do obviously bear on common subjects — proof by certification or other means, without extrinsic evidence of authenticity, of domestic public documents under seal, domestic public documents not under seal, foreign public documents, certified copies of public records, and official publications.

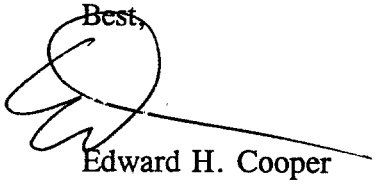
Also relevant are various other Evidence Rules. Rule 803(10) provides for proving the lack of an official record or entry, in common with Rule 44(b). Evidence Rule 1005 bears on proof of "public records," incorporating the certification provisions of Rule 902, allowing testimony by a witness who has compared a copy with the original, and permitting other evidence if a copy cannot be provided by certification or comparison testimony. Evidence Rule 901(7) provides examples of authentication of public records or reports. Rule 901(10) allows any method of authentication provided by other rules prescribed by the Supreme Court, neatly avoiding any conflict with Civil Rule 44 if indeed Rule 44 provides alternative means of proof that are not caught up in all of these Evidence Rules.

Figuring out whether Civil Rule 44 permits anything that cannot be done under one or another of the Evidence Rules would take me a great, long while. Let me offer two perplexities that come to mind on simply brushing through the rules. Rules 44(a)(1) and (2) permit proof of a domestic or foreign official record "by an official publication thereof." Evidence Rule 902(5) allows as evidence, without extrinsic evidence of authenticity, "Official publications. — Books, pamphlets, or other *publications* purporting to be issued by public authority." The use of "publications" in Rule 902(5) appears to be different from the use in Rule 44, but I do not know. For the second, Rule 44(a)(2) allows certification of a foreign official document without the ordinarily required "final certification" if a treaty provides for that. I do not see a parallel provision in Rule 902(3).

As you surely have guessed by now, I think these topics lie within the special competence of the Evidence Rules Advisory Committee and its Reporter. Two things are needed before Civil Rule 44 can be abrogated: a complete comparison of Rule 44 with all possible Evidence Rules, and incorporation into the Evidence Rules of any provision of Rule 44 that is not now in the Evidence Rules. The Criminal Rules Committee also may have an interest.

Let me know how you react to my befuddlement and suggestion.

Best,



Edward H. Cooper

EHC/lm
c: Hon. Paul V. Niemeyer
John K. Rabiej, Esq.

Agenda Item III - V

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

JUDGE WM. TERRELL HODGES
Chairman, Executive Committee

TELEPHONE:
(904) 232-1852

February 25, 1998

Honorable Alicemarie H. Stotler
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

From time to time the Committee on Rules of Practice and Procedure has recommended that the terms of its members be extended because the Rules Enabling Act process is such a lengthy one. The Executive Committee is sympathetic to that concern and has recommended that the Chief Justice consider longer terms for members of the Standing and Advisory Rules Committees.

In discussions at the Executive Committee's February 1998 meeting, the question was raised whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process. The Executive Committee would appreciate the Rules Committee's consideration of this issue. If appropriate, a legislative proposal could then be made to the Judicial Conference.

I look forward to seeing you at the Judicial Conference session in March.

Sincerely,

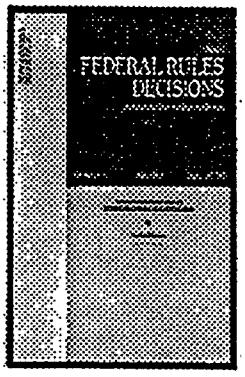
Terry

Wm. Terrell Hodges

bc: Mr. Peter McCabe
Mr. John Rabiej

A SELF–STUDY OF FEDERAL JUDICIAL RULEMAKING

A Report From the Subcommittee on Long Range Planning to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States



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delegated partly to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights." [62] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[63] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar.1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

F. The Rulemaking Calendar

The rulemaking cycle: Three changes in the rulemaking environment have occurred at roughly the same time. (1) The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. (2) The national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under consideration by an Advisory Commit-

62. 28 U.S.C. § 2072(a) & (b).

63. U.S. Const. art. III, § 1.

tee. (3) Meanwhile local rulemaking has burgeoned, in part, but only in part, at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Rules Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—so that Congress is the source of the delay it bemoans—offers no succor to those who seek swift changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the process of overlapping amendments in no uncertain terms.[64] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or so of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before shepherding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed.R.App.P. 3 and 4 that Professor Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees sensibly

64. Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev.Litigation 1 (1994).

choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve some points of stress.

Let us establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[65]

65. The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought.

[16] **Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.**

Conclusion

The Subcommittee believes that the current rulemaking process is fundamentally sound, but improvement is both possible and desirable. Practices and procedures of the federal courts are admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self–Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

Thomas E. Baker
Alvin R. Allison Professor
Texas Tech University School of Law

Frank H. Easterbrook
Circuit Judge
Court of Appeals for the Seventh Circuit

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end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule would take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.