ADVISORY COMMITTEE
ON
EVIDENCE RULES

Williamsburg, VA
October 28, 2011

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

William and Mary Law School, Williamsburg Virginia

October 28, 2011

I. Opening Business

Opening business includes approval of the minutes of the Spring, 2011 meeting; a report on the June 2011 meeting of the Standing Committee; a report on awards garnered by the Restyled Evidence Rules project; welcome to new members; and tributes to departing members.

II. Proposed Amendment to Rule 803(10)

The Committee's proposed amendment to Rule 803(10) has been released for public comment. At this writing, no public comments have been posted.

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

The agenda book contains a memorandum from the Reporter analyzing the possibility of amending Rule 801(d)(1)(B) to provide that a prior consistent statement is exempt from the hearsay rule whenever it is admissible to rehabilitate the credibility of the declarant-witness. The memorandum includes input from the DOJ, the Public Defender, and state courts — input that was sought by the Committee after its initial consideration of the proposed amendment at the last meeting.

IV. Privilege Project

A number of years ago the Evidence Rules Committee agreed to undertake a project to draft rules of privilege that would describe the current state of privilege law in the federal courts. The privilege project was delayed during the restyling effort. At the Committee's request, Professor Broun has now revived the project. The agenda book contains a memo from Professor Broun setting forth survey rules and commentary for the attorney-client privilege and the marital privileges.

V. Crawford Outline

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

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

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

VII. Presentation by the William and Mary Law School Center for Legal and Court Technology

The McGlothlin Courtroom, the home of the Center for Legal and Court Technology (CLCT), is the world's most technologically advanced trial and appellate courtroom. Continuously upgraded, the Courtroom permits both formal and informal experimental work, including CLCT's cutting edge experiment Laboratory Trials. Professor Fredric Lederer, Chancellor Professor of Law and Director of CLCT, will provide the Committee with an introduction to the Courtroom and CLCT's courtroom technology activities.

VIII. Next Meeting

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

CHAIRS and REPORTERS

Chair	Reporter
Standing Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Appellate Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Bankruptcy Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380 ——— Professor Troy A. McKenzie New York University School of Law 40 Washington Square South New York, NY 10012

Civil Honorable David G. Campbell United States District Judge United States District Court 623 Sandra Day O'Connor U.S. Courthouse 401 West Washington Street Phoenix, AZ 85003-2146	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215 --- Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978
Criminal Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360 --- Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181
Evidence Honorable Sidney A. Fitzwater Chief Judge United States District Court Earle Cabell Federal Bldg. U.S. Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023
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ADVISORY COMMITTEE ON EVIDENCE RULES

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Marjorie A. Meyers, Esq. Federal Public Defender Southern District of Texas 440 Louisiana, Suite 1350 Houston, Texas 77002	Honorable William K. Sessions III United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401
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Liaison Members: Honorable Paul S. Diamond (Civil) United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106	Honorable John F. Keenan (Criminal) United States District Court 1930 Daniel Patrick Moynihan U.S. Courthouse 500 Pearl Street New York, NY 10007-1312
Honorable Richard C. Wesley (Standing) United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043	Honorable Judith H. Wizmur (Bankruptcy) Chief Judge United States Bankruptcy Court Mitchell H. Cohen U.S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570
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Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Arthur I. Harris	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Marilyn Huff	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Rules Committee)
Judge Richard C. Wesley	(Standing Committee)

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TAB I.

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 1, 2011

Philadelphia, Pennsylvania

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 1, 2011 in Philadelphia, Pennsylvania.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
James N. Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members.

Dean Fitts of Penn Law School welcomed the Committee and stated that he was honored to have the Committee meeting at the Law School.

The minutes of the Fall 2010 Committee meeting were approved.

Judge Fitzwater noted with regret that it was the last meeting for two valued members of the Committee — Judge Joan Ericksen and Judge Joseph Anderson. He expressed the Committee's thanks and gratitude for all their fine work, and observed that they would receive a formal tribute at the next Committee meeting.

The Reporter noted for the record that this would be the first Evidence Rules Committee meeting without the stellar assistance of John Rabiej, who has taken an important position at the Sedona Conference. The Reporter stated that John's presence would be sorely missed at this meeting and in the future.

Restyling: Supreme Court Review

The Restyled Rules of Evidence were approved by the Judicial Conference in the Fall of 2010 and were sent to the Supreme Court. The Court notified Judge Rosenthal that it was considering four changes to the Restyled Rules. After a dialog with Judge Rosenthal and the Chair and Reporter of the Evidence Rules Committee, the Supreme Court withdrew its suggestions for change to two of the Rules ---- Rule 405(b) (the suggestion being to drop the word "relevant" from the rule), and Rule 801(a) (the suggestion being to specify that the intent requirement applies only to conduct and not to written or verbal assertions).

Judge Rosenthal, the Chair and the Reporter agreed with the changes suggested by the Court with respect to two rules: Rules 408 and 804(b)(4). Both changes restored language from the existing rule. Those changes, shown in blackline form, are as follows:

Rule 408:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration ~~in order to compromise~~ in compromising or attempting to compromise the claim; and

Rule 804(b)(4):

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4)** ***Statement of Personal or Family History.*** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

In sum, the proposed changes restored "in compromising or attempting to compromise a claim" to Rule 408 and "adoption" to Rule 804(b)(4). In response to these suggestions, Judge

Rosenthal contacted Judge Sentelle, the Chair of the Executive Committee of the Judicial Conference, and asked for approval of the changes proposed by the Supreme Court. The Executive Committee approved the changes on an expedited basis. The changes were then presented to the Court as a recommendation of the Judicial Conference.

At the Advisory Committee meeting, the Committee discussed the two changes proposed by the Supreme Court. Committee members noted that the Court had obviously reviewed the Restyled Rules with significant care and detail. Committee members expressed pride in the fact that out of the hundreds of changes made in the restyling, the Supreme Court found only two small revisions to be advisable. After discussion of those proposed changes, the Committee voted unanimously to ratify the changes to Rules 408 and Rule 804(b)(4)

The Committee expressed its gratitude to Judge Rosenthal and to Andrea Kuperman, Chief of the Rules Committee Support Office for their outstanding work under considerable time pressure in effectuating the changes raised by the Supreme Court. The Chair thanked the Reporter for his quick responses on the legal questions raised by the Supreme Court proposals.

Restyling Project: Legal Writing Award

Judge Rosenthal informed the Committee that the Restyled Rules have been awarded a legal writing award from the Center for Plain Language. The award will be given at an award ceremony at the National Press Club. Judge Hinkle, who chaired the Evidence Rules Committee during the restyling project, will accept the award on behalf of the Standing Committee and the Evidence Rules Committee.

II. Proposed Amendment to Rule 803(10)

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

At the last meeting, the Reporter prepared a memorandum for the Committee on the effect of *Melendez-Diaz* on the constitutionality, as applied, of the hearsay exceptions that cover records in the Federal Rules of Evidence. The memorandum made the following tentative conclusions:

1) Records fitting within the business records exception are unlikely to be testimonial, and addressing any uncertainty about the constitutional admissibility of business records in certain unusual cases should await more case law development.

2) Records admissible under the public records exception are unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. That exception has already been invoked by lower federal courts to uphold Rule 902 authentications against confrontation challenges.

4) *Melendez-Diaz* appears to bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is ordinarily prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused's right to confrontation after *Melendez-Diaz.*

In light of the above, the Committee at its Fall 2010 meeting discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz.* The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).

The Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at the Spring meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances.

After consulting with the DOJ, the Reporter prepared a proposed amendment to Rule 803(10) that provided as follows:

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

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

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

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

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court, for good cause, sets a different time for the notice or the objection.

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

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

2. The rule should contain specific time periods.

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

4. A good cause provision should be added.

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

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

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

One member suggested that a good cause requirement was necessary because of unforeseen circumstances such as phones being out, computers crashing, and the like. But other members responded in two ways: 1) all the defendant has to do is make a demand within seven days of receiving the notice — there is no requirement of a substantial production or significant effort that would be forestalled by an emergency event; and 2) if the defendant truly has a justification for failing to timely comply, a court is likely to grant relief even without good cause language in the Rule.

The Committee then considered whether, if good cause language were cut from the proposal, the rule should still provide that the court could set a different time for the notice and demand.

Members generally agreed that it would be useful to retain such a provision. It was noted that many of the Civil and Criminal Rules provide specifically that a court can set a different time than the period provided by a particular rule. Moreover, courts may want to provide time periods at the outset of a case to require the government to provide notice before the time required by the rule.

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

After significant discussion, the Committee unanimously approved the following amendment to the text of Rule 803(10), to be transmitted to the Standing Committee with the recommendation that it be approved for public comment:

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

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

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

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

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

The Committee unanimously approved a Committee Note to accompany the proposed amendment to Rule 803(10). That Note provides as follows:

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and an opportunity to demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

The proposed amendment and Committee Note, in proper format, are attached as an appendix to Judge Fitzwater's report to the Standing Committee.

III. Possible Amendments to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in current form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

At the Fall 2010 meeting, the Advisory Committee was dubious about the need for an amendment that would clarify the burden of proof as to trustworthiness. Some members suggested

that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others noted that almost all courts impose the burden on the opponent and so there was really no serious problem worth addressing. Ultimately the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit the question of a possible amendment at the Spring meeting.

The Reporter sought input from the American College, the Litigation Section, and the Department of Justice. All came out in favor of an amendment to clarify that the opponent has the burden of showing untrustworthiness of business and public records. Those organizations thought the amendment would provide a useful clarification and would assist courts and litigants in structuring arguments and admissibility determinations for business and public records.

But at the Spring meeting, Committee members were opposed to any amendment to the trustworthiness language of Rules 803(6)-(8). Members stated that any problem in the application in the rule was caused by a few wayward cases; that an amendment could simply invite parties to raise trustworthiness arguments that would not otherwise be raised; that courts need flexibility to deal with trustworthiness arguments; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.

The Committee noted for the record that the burden of proving untrustworthiness is on the opponent and that this is clear enough in the existing language of the rule, so that clarification is unnecessary.

A motion was made against publishing an amendment to the trustworthiness clauses of Rules 803(6)-(8). Eight members voted in favor of the motion. One member abstained.

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

At the Spring meeting the Committee considered a proposed amendment that had been tabled a number of years earlier when the Committee was involved in Rule 502 and then restyling. The proposal — made by Judge Bullock, then a member of the Standing Committee — was to amend Evidence Rule 801(d)(1)(B). That is the hearsay exemption for certain prior consistent statements. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are

also admissible substantively under the hearsay exemption. But other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of bad memory — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, as Judge Bullock noted, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

The Committee unanimously agreed with Judge Bullock's argument that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow and makes no practical difference. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee was cognizant of the Supreme Court's concern in *Tome v. United States*, 513 U.S. 150 (1995): that under an expansive treatment of prior consistent statements "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

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

Both the Department of Justice representative and the Public Defender representative noted that they had not yet had the opportunity to vet the proposed amendment with their interested parties. Committee members also noted that it might be useful to determine how the practice has gone under the states that already have a rule that is similar to the possible amendment.

Accordingly, after extensive discussion, the Committee resolved to further consider the proposal to amend Rule 801(d)(1)(B) at the next meeting. The working language for the proposed amendment is as follows:

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

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

* * *

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

The Committee requested the Department of Justice representative and the Public Defender representative to solicit the views of their interested parties. The Reporter was directed to research the practice in the states with similar rules. And Justice Appel offered to solicit the views of other state supreme court justices.

V. Proposed Amendment to Rule 806

In 2001, the Evidence Rules Committee directed the Reporter to review all the Evidence Rules and report on which rules were the subject of a conflict in interpretation in the courts. The goal of the project was to allow the Committee to consider whether to propose an amendment to any such rule in order to rectify the conflict. One rule subject to such a conflict was and is Rule 806 — the rule allowing impeachment of hearsay declarants. The Reporter prepared a memorandum discussing the conflict and providing language for a possible amendment. But by the time the Committee considered the conflict regarding Rule 806, it had become involved in developing Rule 502, and then restyling, and so consideration of a possible amendment was tabled.

At the Spring meeting, the Committee considered the possibility of two separate changes to Rule 806. One change addressed the conflict in the case law over whether a hearsay declarant may be impeached by extrinsic evidence of bad acts bearing on character for truthfulness. If the declarant were to testify as a witness, he could be questioned about pertinent bad acts, but Rule 608(b) would prohibit extrinsic evidence of those acts. Rule 806 is designed to allow an opponent to impeach a hearsay declarant in the same way that he could be impeached on the stand. But the problem is that a hearsay declarant ordinarily cannot be asked about bad acts — so the only way to raise the act would be through extrinsic evidence. Rule 806 currently does not provide for an exception to Rule 608(b), but at least one court has read such an exception into the Rule, in order to allow the opponent a means of attacking the credibility of a hearsay declarant through bad acts. The rationale of that court is that the goal of Rule 806 is to allow the opponent to impeach the declarant as fully as if he were on the stand. Other courts, however, read the rule literally and refuse to add an extrinsic evidence exception that is not in the text.

The possible amendment to the Rule — considered by the Committee at the Spring meeting — would have provided that "the court may admit extrinsic evidence of the declarant's conduct when offered to attack or support the declarant's character for truthfulness."

Committee members discussed the proposal and unanimously determined that the amendment should not proceed. Members noted that it is impossible to treat impeachment with bad

acts exactly the same when the person to be impeached is a hearsay declarant. That is because extrinsic evidence would have to be admitted, where it would be barred if the declarant were to testify. Given that impossibility of exactly equal treatment, the Committee considered whether it was good policy to allow extrinsic evidence of bad acts to impeach a hearsay declarant. It concluded that the policy of barring extrinsic evidence was a good one, as it prevented minitrials on collateral bad acts — minitrials that would require discovery by the parties. Because impeachment of witnesses and impeachment of hearsay declarants can never be exactly the same, the Committee saw no need to open up the costs of admitting extrinsic evidence to impeach hearsay declarants.

The other possible amendment to Rule 806 would deal with a narrow issue. Under the rule, a criminal defendant in a multi-defendant trial could end up being impeached with a prior conviction even if he never took the stand. This could occur when his hearsay statement is admitted against himself and his co-defendants (e.g., as a co-conspirator statement), and the co-defendants seek to attack the declarant's credibility. Some have argued that Rule 806 should be amended to prohibit the impeachment of an accused whose hearsay statements are admitted in a multiple defendant trial where the declarant-defendant does not testify. But the Committee determined that the solution to the problem of impeaching an accused who does not testify does not lie in the rules of evidence but rather in the law of severance. The Committee also noted that there was no easy answer to whether such impeachment should be permitted — while the declarant/defendant's rights are obviously at stake, so are the rights of the impeaching party to challenge the credibility of a hearsay declarant. The Committee unanimously determined that the proper resolution to these problems should be left to the trial judge considering the circumstances of the particular case, with the possible remedy of severance.

The Committee unanimously determined that there was no sentiment to move forward with any amendment to Rule 806.

VI. *Crawford* Developments

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

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), discussed supra — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The digest contained an extensive discussion of the Supreme Court's recent decision in *Michigan v. Bryant,* which considered whether a hearsay statement admitted as an excited utterance was testimonial. The Court's decision in *Bryant* makes it very unlikely that a statement admitted under Rule 803(2) — the Federal Rules hearsay exception for excited utterances — will be found testimonial. The Reporter observed that the Supreme Court is currently considering the case of *Bullcoming v. New Mexico,* in which it will address whether lab results can be introduced by a witness other than the person who conducted the test. The Court's

decision in *Bullcoming* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Privilege Project

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

At the Spring meeting, Professor Broun submitted materials on the attorney-client privilege and the psychotherapist-patient privilege. Committee members praised his work and predicted that the final product, when published, would be extremely useful to the bench and bar. The Committee resolved unanimously that the privilege project should be continued.

Professor Broun stated that the goal of the project was to provide a textual "restatement" of the federal law of privilege, with an explanatory section setting forth the case law. Professor Broun sought guidance on which privileges should be addressed as the project goes forward. After discussion, the Committee determined that the project should cover the basic privileges: attorney-client; interspousal; psychotherapist; clergy; journalist; informant; deliberative process; and other governmental privileges. In addition, the Committee agreed with Professor Broun's suggestion that there should be a separate section on waiver — analogous to the separate rule on waiver proposed by the original Advisory Committee.

Committee members stated for the record that the project was intended only as a restatement of the federal common law of privilege — a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

At the suggestion of the Chair, Judge Rosenthal agreed to check on whether the American Law Institute might be working on any project involving privileges.

Professor Broun stated that at the next meeting he would provide materials on the attorney-client privilege and the interspousal privileges.

VIII. Restyling Symposium

The Chair reported to the Committee on plans being made for a Symposium on the Restyled Rules of Evidence, to take place on the morning before the scheduled Fall meeting of the

Committee. The Symposium and the Committee meeting will take place at William and Mary Law School on Friday October 28, 2011.

The Chair explained that the Fall meeting will be an opportune moment for the Committee to take pride in the restyling effort, as the Restyled Rules are scheduled to go into effect on December 1, 2011 (if all goes well). The Chair and the Reporter have begun to put together two panels for the Symposium. One is a retrospective panel that will look at the process and protocol of restyling, problems encountered by the Committee, and how those problems were addressed in the Restyled Rules. The second panel will discuss how the Restyled Rules are likely to be received by the bench and bar; any questions about meaning that may exist; and what problems if any there might be in applying the Restyled Rules.

The proceedings of the Symposium will be published. Standing Committee members are enthusiastically invited to attend. Members of the William and Mary community will also be invited to attend.

The following people have agreed to make a presentation at the symposium — with subject matter of each presentation to be determined:

- Judge Robert Hinkle, Chair of the Committee during the restyling effort
- Professor Joe Kimble, style consultant
- Judge James Teilborg, Chair of the Style Subcommittee of the Standing Committee
- Judge Marilyn Huff, Member of the Style Subcommittee of the Standing Committee
- Professor Steve Saltzburg (Litigation Section representative on the restyling project).
- Judge Reena Raggi (Standing Committee member who provided very helpful comments on restyling)
- Judge Harris Hartz (former Standing Committee member who provided very helpful comments on restyling)
- Justice Andy Hurwitz, member of the Committee during restyling
- Judge Joan Ericksen, member of the Committee during restyling
- Professor Deborah Merritt, Ohio State (comment on Rule 1101)
- Professor Roger Park, Hastings (provided public comment)
- Judge S. Allan Alexander, Federal Magistrate Judges' Association
- Professor Katherine Schaffzin, Memphis (provided public comment)
- A representative from the National Center for State Courts.

The Chair invited Committee members to suggest any other individuals who should be invited to make a presentation, and to propose any other topics that might be covered by the panels.

IX. Next Meeting

The Fall 2011 meeting of the Committee is scheduled for Friday, October 28 in Williamsburg. It will take place after the Restyling Symposium.

Respectfully submitted,

Daniel J. Capra
Reporter

TAB II.

FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Proposed Amendment to Rule 803(10)
Date: October 1, 2011

At its last meeting, the Committee approved an amendment to Rule 803(10), which has been rendered unconstitutional as applied by the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009). The Committee voted to recommend that the Standing Committee release the proposed amendment for a period of public comment. The Standing Committee agreed with the Advisory Committee, and the proposed amendment was released for public comment in August. The public comment period ends as a practical matter around March 1, 2012. To date, no comments have been received on the proposal. Thus, there is no action or review that the Committee needs to take at the Fall 2011 meeting.

The proposed amendment to Rule 803(10) and Committee Note read as follows:

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(10)

1 **Rule 803. Exceptions to the Rule Against Hearsay — Regardless**

2 **of Whether the Declarant Is Available as a Witness**

3

4 The following are not excluded by the rule against hearsay,

5 regardless of whether the declarant is available as a witness:

6 * * *

7 **(10)** ***Absence of a Public Record.*** Testimony — or a
8 certification under Rule 902 — that a diligent search
9 failed to disclose a public record or statement if ~~the~~
10 ~~testimony or certification is admitted to prove that~~:
11
12 (A) the testimony or certification is admitted to prove
13 that
14
15 (~~A~~ i) the record or statement does not exist;
16 or
17 (~~B~~ ii) a matter did not occur or exist, if a
18 public office regularly kept a record or
19 statement for a matter of that kind; and
20 (B) in a criminal case, a prosecutor who intends to
21 offer a certification provides written notice of that
22 intent at least 14 days before trial, and the defendant
23 does not object in writing within 7 days of receiving
24 the notice — unless the court sets a different time for
25 the notice or the objection.
26
27

28 **Committee Note**

29 Rule 803(10) has been amended in response to *Melendez-*
30 *Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009). The *Melendez-Diaz*
31 Court declared that a testimonial certificate could be admitted if the
32 accused is given advance notice and does not timely demand the
33 presence of the official who prepared the certificate. The amendment
34 incorporates, with minor variations, a "notice-and-demand"
35 procedure that was approved by the *Melendez-Diaz* Court. See Tex.
36 Code Crim. P. Ann., art. 38.41.

TAB III.

FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Evidence Rule 801(d)(1)(B)
Date: October 1, 2011

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

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

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

> The Committee unanimously agreed with Judge Bullock's argument that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow and makes no practical difference. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements. * * *
>
> One member agreed with the point that the current rule was problematic in treating some rehabilitative prior consistent statements differently from others, but suggested that the proper result is that *none* of them should be admissible substantively — i.e., the Committee should propose deleting Rule 801(d)(1)(B). But this suggestion was rejected by other Committee members, who found no good reason for upsetting the current practice in this

way. The Department of Justice member was also opposed to any proposal to limit the current substantive admissibility of prior consistent statements.

Both the Department of Justice representative and the Public Defender representative noted that they had not yet had the opportunity to vet the proposed amendment with their interested parties. Committee members also noted that it might be useful to determine how the practice has gone under the states that already have a rule that is similar to the possible amendment.

Accordingly, after extensive discussion, the Committee resolved to further consider the proposal to amend Rule 801(d)(1)(B) at the next meeting. * * *

The Committee requested the Department of Justice representative and the Public Defender representative to solicit the views of their interested parties. The Reporter was directed to conduct research into applications of State versions of the Rule that are similar to the amendment. And Justice Appel offered to solicit the views of other state supreme court justices. [1]

This memorandum is in four parts. Part One sets forth the existing rule and describes the problems created by that rule. Part Two sets forth the proposed amendment and Committee Note, and some explanatory background. Part Three sets forth the positions of the DOJ and the Public Defender on the proposed amendment, and the Reporter's responses. Part Four discusses some of the case law under Minnesota Rule 801(d)(1)(B), which is the only state rule that approximates the approach taken by the proposed amendment.

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[1]. Justice Appel will report orally on his enquiries at the October Advisory Committee meeting.

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

There are two basic practical problems with the distinction between substantive and credibility use as applied to prior consistent statements. First, as Judge Bullock noted, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. *See, e.g., United States v. Simonelli,* 237 F.3d 19, 27 (1st Cir. 2001) ("[T]he line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors."). Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case. This is in contrast to prior *inconsistent* statements under

Rule 801(d)(1)(A), where the prior statement can have an important substantive effect as it by definition does not duplicate the witness's trial testimony.

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

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

Case Law Inconsistency

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

> Consistent statements may be introduced for reasons other than their truth. Suppose a witness testifies on direct examination to fact X and then on cross-examination is asked about his statement, made sometime before trial, suggesting that he believed not-X. Could the party who called the witness ask him to verify his prior consistent statements even though the witness made them after he had a motive to shade the truth? We think the answer is yes, and so do other courts of appeals. *See United States v. Simonelli,* 237 F.3d 19, 26-27

(1st Cir. 2001); *United States v. Ellis,* 121 F.3d 908 (4th Cir. 1997); *United States v. Pierre,* 781 F.2d 329, 331-33 (2d Cir. 1986); *United States v. Harris,* 761 F.2d 394, 399-400 (7th Cir. 1985). * * * These prior statements would not be offered for the truth of the matter asserted - fact X - and therefore would not need to satisfy Rule 801(d)(1)(B). They would be introduced to show that the witness did not give statements on direct that were inconsistent with what he had said before. * * * The prior statements would be admissible on this basis because of the cross-examination. They would be relevant, under Fed.R.Evid. 401, to a matter of consequence – namely, that the witness made inconsistent statements about fact X, which would tend to undermine his credibility. * * *

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

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

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

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

> The court here instructed the jurors to use the boy's prior consistent statements solely to evaluate his credibility. However, if they concluded the boy was telling the truth at trial, they also must have concluded that the substance of his statements - that Beltran gave him the heroin - was true as well. The credibility/substance distinction is illusory in this context.

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

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

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

* * *

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

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

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

therefore concluded that the consistent statements were admissible because they helped to "amplif[y] and clarif[y]" the alleged inconsistent statements, and because they helped to "cast doubt . . . on whether the impeaching statement[s] [were] really inconsistent with the trial testimony." 798 F.2d at 589. *See also Harris*, 761 F.2d at 400 (despite presence of motive to fabricate, which barred admission under Rule 801(d)(1)(B), government was permitted to rehabilitate witness with consistent statements made during same interview as allegedly inconsistent ones; statements were relevant to "whether the impeaching statements really were inconsistent within the context of the interview"); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986) (prior consistent statement that is inadmissible as substantive evidence under Rule 801(d)(1)(B) is admissible for limited purpose of rehabilitation where it "tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony" or where it "will amplify or clarify the allegedly inconsistent statement.").

We believe that these cases interpret the requirement of no motive to fabricate too strictly. The requirement should not be applied as a rigid *per se* rule barring all such prior consistent statements under Rule 801(d)(1)(B), without regard to other surrounding circumstances that may give them significant probative value. Indeed, our conclusion that the requirement emerges from the relevancy concerns of Rules 402 and 403 implies that trial judges should consider motivation to fabricate as simply one of several factors to be considered in determining relevancy-albeit a very crucial factor. Thus, the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant "probative force bearing on credibility apart from mere repetition." *Pierre*, 781 F.2d at 333. This determination rests in the trial judge's sound discretion.

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

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

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

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

Conclusion on the Case Law

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

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

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

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

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

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

* * *

(B) is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ <u>rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness;</u>[2]

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

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

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

[2]. For discussion of the bracketed alternatives to using the word "rehabilitates" see pages 14-15, infra.

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

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

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

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

DOJ Position:

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

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

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

Reporter's Comment:

The DOJ's position that the current distinction is unworkable received strong support at the last Standing Committee meeting. During the Evidence Committee presentation Judge Schiltz, a Standing Committee member (and an Evidence professor), stated that he was strongly in favor of the proposed amendment. He essentially said — to knowing nods from his fellow judges — that he was tired of watching jurors' eyes glaze over when being given the impossible and illogical instruction that they were to use some prior consistent statements for their truth but others only for credibility.

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

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

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

Another alternative: A statement is not hearsay if it:

is consistent with the declarant's testimony and is otherwise admissible to rehabilitate~~s~~ the declarant's credibility as a witness.

It can be argued that adding "is otherwise admissible" is a better and more explicit reference to the existing law on rehabilitation. It sounds a bit stronger, more stringent, than simply "rehabilitates." In other words, compared to the alternatives, it seems to sound more like a Rule 403 standard.

Public Defenders' Position:

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

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Professor Daniel J. Capra
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Fordham University School of Law
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New York, New York 10023

via email

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

Dear Professor Capra:

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

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

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

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

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

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

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

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

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

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

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

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

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

I look forward to seeing you in October.

Very truly yours,

Marjorie A. Meyers

Federal Public Defender
Southern District of Texas

Reporter's Comment:

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

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

Finally, it should be remembered that the question before the Committee at this point is only whether the proposed amendment should be referred to the Standing Committee with the recommendation that it be released for public comment. Given the Committee's expressed desire to get the proposed amendment properly vetted, it would seem to follow that the Committee might wish to seek public comment on whether the amendment will be seen as an invitation to expand admissibility of prior consistent statements, despite text and Committee Note to the contrary. Especially given the apparent interest of at least some members of the Standing Committee in the proposed amendment, the Committee might wish to consider sending the amendment to the next step in the process.

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

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

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

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

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

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

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

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

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

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

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

Minnesota courts have rejected admission of prior consistent statements under Rule 801(d)(1)(B) if the witness's credibility has not been attacked. There is no indication that the Minnesota courts are using the exception to expand admissibility of prior consistent statements. Because prior consistent statements, under *Nunn* and the terms of the rule, must truly rehabilitate to be admissible for their truth, there is no evidence that consistent statements are being admitted that would not have been admitted to rehabilitate under the old rule. *See, e.g., State v. Miller*, 754 N.W.2d 686, 702-3 (Minn. 2008):

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

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

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

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

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

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

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

TAB IV.

ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(a) Definitions. As used in this rule:

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

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

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

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

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

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

(b) General Rule of Privilege.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client. The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

(d) Standards for Organizational Clients

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

(1) is otherwise privileged within this rule;

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

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

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

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

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

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

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

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client concerning the compensation or reimbursement that the attorney reasonably claims the client owes the attorney;

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

(5) relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) between a trustee of an express trust or a similar fiduciary and an attorney or other privileged person retained to advise the trustee concerning the administration of the

trust, if relevant to a beneficiary's claim of breach of fiduciary duties;

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

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

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

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

COMMENTARY ON ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(a) Definitions. As used in this rule:

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

The definition in part (a) (1) is taken from the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 (2000).

The definition of a communication within the meaning of the rule provides an essential limiting parameter of the rule. In addition to providing a guideline as to what is within the rule, the definition necessarily and perhaps more importantly delineates what is not a communication.

Confining the privilege to "expressions" is consistent with the federal cases. For example, a client's appearance is not regarded as a communication, *see United States v. Kendrick,* 331 F.2d 110, 113-114 (4th Cir. 1964); *Provenzano v. Singletary,* 3 F.Supp. 2d 1353, 1367 (M.D. Fla. 1997) *aff'd,* 148 F.3d 1327 (11th Cir. 1998), nor is his or her demeanor, *In re Walsh,* 623 F.2d 489 (7th Cir. 1980). A characterization of a client as a "sly fox" is not a communication protected by the privilege. *United States v. Sayan,* 968 F.2d 55, 64 (D.C. 1992). There is some authority that the mental competency of a client is within the privilege, *see Gunther v. United States,* 230 F.2d 222, 223-224 (D.C. Cir. 1956), but this is clearly a minority position. *See* EDWARD J. IMWINKELRIED, THE NEW WIGMORE§6.7.1 739 (2d ed. 2010). Even in the *Gunther* case, the court does not quarrel with the definition of a communication as an expression, but rather expresses concern that testimony with regard to competency would necessarily open the inquiry into the "factual data," *i.e.,* the actual communications between lawyer and client.

The federal courts have consistently held that the identity of a client is not itself a communication. *E.g., United States v. Blackman,* 72 F.3d 1418, 1425 (9thCir. 1995); *Lefcourt v. United States,* 125 F.3d 79,86 (2d Cir.l997); *In re Shargel,* 742 F.2d 61, 62 (2d Cir. 1984). Whether the revelation of identity is tantamount to the disclosure of a communication is another question and is addressed in the commentary to part (b).

The definition recognizes that a communication need not be oral, but may be contained in a record intending to convey information between lawyer and client. *See* 1 MCCORMICK ON EVIDENCE, § 89 at 402 (6th ed. 2006). This does not mean that any information contained in a document passed between lawyer and client is a communication. Indeed, the courts have consistently held that a preexisting document does not become privileged simply because it is passed from client to lawyer. *See, e.g., Fisher v. United States,* 425 U.S. 391,404 (1976); *In re Grand Jury Proceedings,* 616 F.3d 1172 (10th Cir. 2010) (attorney was mere conduit for non-confidential information). Rather, the record itself must be an expression of information from the client to the lawyer or vice versa.

The definition does not distinguish between communications coming from the client and communications coming from the lawyer. A communication meets the definition so long as it is

between privileged persons – defined later in the rule as both lawyer and client – regardless of which one is speaking. Some federal cases take a narrow view of the privilege and confine its application either to expressions made by the client or to attorney communications that reveal client confidences. *See, e.g., In re Fischel,* 557 F.2d 209,212 (9th Cir. 1977); *Potts v. Allis-Chalmers Corp.,* 118 F.R.D. 597, 602 (N.D. Ind. 1987). The court in *Potts* criticized the extension of the privilege to all communications from the attorney as "contrary to the expressed intention of the Seventh Circuit to confine the privilege to the narrowest limits consistent with the privilege's purpose." *Id.*

However, there is also support in the federal cases for the broad extension of the privilege to all communications from lawyer to client. *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1369-70 (10th Cir. 1997); *United States v. Amerada Hess Corp.,* 619 F.2d 980, 986 (3d Cir. 1980). *See also* Timothy P. Glynn, *Federalizing Privilege*, 52 AM.U.L.REV. 59, 100-101 (2002). The Court in the *Sprague* case gives the topic extended discussion, setting forth the rationale for both the narrow and the broad approach to the issue. In deciding upon a broad application of the rule, the Court relies upon the reasoning of the district court in *In re LTV Securities Litigation,* 89 F.R.D. 595, 602 (N.D. Tex. 1981). In *LTV,* the court rejected the narrower view, emphasizing that predictability of confidence is central to the role of the attorney and that "[a]doption of such a niggardly rule has little to justify it and carries too great a price tag." The court also relied upon an earlier Tenth Circuit case, *Natta v. Hogan,* 392 F.2d 686, 692-93 (10th Cir. 1968) where the court noted: "The recognition that privilege extends to statements of a lawyer to a client is necessary to prevent the use of the lawyer's statements as admissions of the client." The operation of the privilege to protect communications going both from the lawyer and from the client is also consistent with Proposed Federal Rule 503 and Uniform Rule 502. Thus, despite some authority to the contrary, the Survey Rule adopts the broader approach to the definition of communications.

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

This definition is based on Proposed Federal Rule 503(a)(1) and Uniform Rule 502(a)(1), with some language changes.

The definition is in accord with the law generally, *see* 1 MCCORMICK ON EVIDENCE, § 88 (6th ed. 2006). The federal cases confirm that the payment of a fee is not essential. *United States* v. *Costanzo,* 625 F.2d 465, 469 (3d Cir. 1980). However, the consultation must be for legal services, not as a friend, *Modern Woodmen of America* v. *Watkins,* 132 F.2d 352,354 (5thCir. 1942), as a business advisor, *United States* v. *United Shoe Machinery Corp.,* 89 F.Supp. 357,360 (D. Mass. 1950), or as an accountant, *Olender*v. *United States,* 210 F.2d 795,806 (9thCir. 1954). The court in *Modern Woodmen,* stated (132 F.2d 352):

> If the statement is about matters unconnected with the business at hand, or in a general conversation, or to the lawyer merely as a personal friend, the matter is not privileged. The fact that a person is a lawyer does not disqualify him as a witness, for he, like any other person, may testify to any competent facts except those which came to his knowledge by means of confidential relations with his client.

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

This definition is consistent with Proposed Federal Rule 503(a)(1), Uniform Rule 502 and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73-74 (2000), although none of those sources contain a separate definition of organization.

The definition is supported by federal case authority. Despite some musings to the contrary, *see Radiant Burners, Inc.* v. *American Gas Assn.,* 207 F. Supp. 771, 772-73 (N.D.IlI. 1962), the privilege has consistently been applied to corporations. *See Upjohn Corp.* v. *United States,* 449 U.S. 383, 389-92 (1981); *Radiant Burners, Inc.* v. *American Gas Assn.,* 320 F.2d 314, 322-24 (7th Cir. 1963). The few cases dealing with the issue have extended the privilege to unincorporated associations. *See United States* v. *Rowe,* 96 F.3d 1294, 1296 (9thCir. 1996) (law firm); *Kneeland*v. *National Collegiate Athletic Ass 'n,* 650 F. Supp. 1076, 1087 (W.D. Tex. 1986), *rev'd on other grounds,* 850 F.2d 224 (5thCir. 1988) (unincorporated association). *See also Nesse*v. *Shaw Pittman,* 206 F.R.D. 325, 329-30 (D.D.C. 2002) (privilege applied to communications to law firm's general counsel but not to member of management committee). For the view that the privilege should not extend to unincorporated entities, *see* 24 C. Wright & K.Graham, Federal Practice & Procedure § 5477 (2011).

The applicability of the privilege to governmental entities has also been recognized by the federal courts, including the Supreme Court. In *U.S. v. Jicarilla Apache Nation,* 131 S.Ct. 2313 (2011), the Court upheld a claim of attorney-client privilege by the government with regard to legal advice given to the federal administrators of trust concerning Indian lands. The court rejected the application of the fiduciary exception to the privilege under these circumstances. (*See* (f)(6) *infra). See also Town of Norfolk v. Corps of Engineers,* 968 F.2d 1438,1457-58 (1st Cir. 1992) (Army Corps of Engineers); *Coastal Corp.* v. *Duncan,* 86 F.R.D. 514, 520 (D. Del. 1980) (Department of Energy, *dictum).* Again, some writers have argued against such an extension of the privilege. *See discussion in* 24 Wright & Graham *supra,* at § 5475. This is not to say that the privilege applies to communications between federal officials and government attorneys in all instances. For example, in the context of grand jury subpoenas, the courts have held that the privilege will not apply where one federal government arm, *i.e.,* the grand jury, seeks information from counsel for another federal government agency. *See, e.g., In re Grand Jury Subpoena DucesTecum,* 112 F.3d 910,915-16 (8th Cir. 1997); *In re Lindsey,* 158 F.3d 1263, 1278 (D.C. Cir. 1998). The issues involved in applying the privilege in the governmental context are more fully discussed in the Appendix to this Commentary, Part 1. S*ee also* the discussion in connection with the Standard for Organizations Clients, part (d).

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

This definition is based upon PROPOSED FEDERAL RULE OF EVIDENCE 503(a)(2) and UNIFORM RULE OF EVIDENCE 502(a)(3).

The few federal cases dealing with the issue have held that the privilege applies when the client reasonably believes that the person consulted is a lawyer, even if that belief is incorrect. *See United States* v. *Tyler,* 745 F. Supp. 423, 435 (W.D.Mich. 1990) (reasonable belief that fellow prisoner was a lawyer); *United States* v. *Boffa,* 513 F.Supp. 517, 523 (D.Del. 1981) (reasonable belief is sufficient, but not established under the facts of case); *United States* v. *Ostrer,* 422 F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice).

The courts have also held that communications with an individual licensed as an attorney in a foreign jurisdiction are within the privilege, *Renfield Corp.* v. *E. Remy Martin &Co., S.A.,* 98 F.R.D. 442, 444 (D.Del. 1982). Because of licensing arrangements and titles of lawyers vary significantly from nation to nation, there has been some dispute as to who is qualified as a lawyer in a particular country. In the *Renfield* case, the court stated that the requirement is a functional one of whether the individual is competent to render legal advice and is permitted by law to do so. The corporate in-house counsel in *Renfield* was found to be so authorized under French law. In *Honeywell, Inc.* v. *Minolta Camera Co., Ltd.,* 1990 WL 66182, 2-4 (D.N.J. 1990), the court took issue with the functional test, finding that communications to a Japanese individual who had never been licensed as an attorney in Japan or elsewhere were not within the privilege, despite the fact that the person sought to give legal advice. The language of this definition takes an approach consistent with both *Renfield* and *Honeywell.* The test is whether the person in question was *authorized* to practice law in the foreign jurisdiction. The lawyer in *Renfield* was; the person in *Honeywell* was not. Whether an individual is in fact authorized to practice will necessarily be dependent on the court's analysis of the facts and the law of the foreign jurisdiction. The definition gives as much general guidance as is warranted.

A question related to the application of the privilege to persons authorized to practice law in foreign jurisdictions is the issue of whether the court's should recognize as privileged communications with non-lawyers who are covered by a comparable privilege in other countries. However, this question is more appropriately viewed as a choice of law problem. The question is whether the foreign privilege should be recognized, not whether the federal attorney-client privilege should apply. *See, e.g., In re Rivastigmine Patent Litigation,* 237 F.R.D.. 69 (S.D.N.Y. 2006) (Swiss law governed issue of privilege for patent agents and in-house counsel); *Golden Trade, S.rL*v. *Lee Apparel Co.* 143 F.RD. 514, 51819 (S.D.N.Y. 1993)(communications between attorney and foreign patent agent assisting him come within ambit of the privilege); *SmithKline Beecham Corp.* v. *Apotex Corp.,* 193 F.RD. 530,535-36 (N.D. Ill. 2000) (question was the application of the privilege by law of the United Kingdom).

There is also the related issue of the application of the privilege to communications with United States patent agents. A number of cases have held that communications between a patent agent and a client may be privileged where the proceeding is before the patent office and the agent is registered with that office. *See, e.g., In re Ampicillin Antitrust Litigation,* 81 F.RD. 377,391 (D.D.C. 1978); Daiske Yoshida, *The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals*, 66 FORDHAM L.REV. 209 (1997). There are certainly instances in which a patent agent is acting as the agent either of an attorney or the client and the communications are privileged under the usual application of the attorney-client privilege. *See Foseco Int'l Ltd.* v. *Fireline, Inc.* 546 F.Supp. 22, 25 (N.D. Ohio 1982); *see also* discussion in

connection with definition (a) (5). However, some courts, such as in both *Ampicillin* and *Foseco,* have the recognized the existence of privileged communications beyond the situation where the patent agent is acting for the attorney. The definition in this Survey Rule would not recognize such an extension. However, the exclusion of patent agents from the definition of attorney within the rule does not mean that such communications are not privileged. There may well be a separate privilege governing patent agents subject to its own rules and limitations. It is simply not the attorney-client privilege and thus not covered by this Survey Rule.

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

This definition is based upon RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000). It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

The issues involved in this definition concern the question of who is an agent of either the client or the attorney. The definition itself provides only a broad rule, stating that the agent be "reasonably necessary to facilitate communications."

The words "reasonably necessary" are added to the definition in the Restatement § 70 in dealing with the agents of either the client or the lawyer. However, the Comment to the Restatement section notes that "a person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person." Although the same language is not used in either Proposed Rule 503 or Uniform Rule 502, the addition of the words "reasonably necessary" is not inconsistent with those rules.

The language is also consistent with the federal cases. The leading case on the issue involved communications made by a client to an accountant in his attorney's employ. *United States* v. *Kovel,* 296 F.2d 918, 922 (2d Cir. 1961). The court noted that what was "vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." The court compared the role of the accountant to that of a foreign language interpreter:

> [T]he presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not to destroy the privilege, any more than would that of the linguist ...; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

See also United States v. *Alvarez,* 519 F.2d 1036, 1045-46 (3d Cir. 1975) (privilege extended to client communication with psychiatrist); *Mendenhall* v. *Barber-Greene Co.,* 531 F. Supp. 951, 953-54 (N.D. Ill. 1982) (privilege applied to communications with foreign patent agents who were agents of the attorney); *Cedrone*v. *Unity Sav. Ass'n.,* 103 F.R.D. 423, 429 (E.D.Pa. 1984) (internal memoranda and conversations between lawyers in the same firm were

within the privilege).

A leading case setting forth limits on the privilege where agents are involved is *United States* v. *Ackert,* 169 F.3d 136, 139 (2d Cir. 1998), where the court found that there was an insufficient showing that an investment banker was hired to translate or interpret information given to the attorney by the client. Rather, the consultant was sought out for information about a proposed transaction and its tax consequences. It was not sufficient that the information was of assistance to the attorney.

The party claiming the privilege has the burden of showing that the person with whom the communications took place was the agent of either the lawyer or the client for the purpose of facilitating legal services. Where that burden is not met, the privilege fails. *See United States* v. *Adlman,* 68 F.3d 1495, 1500 (2d Cir. 1995) (insufficient showing that auditor was consulted to assist in giving legal as opposed to tax advice); *Von Bulow* v. *Von Bulow,* 811 F.2d 136, 146 (2d Cir. 1987) (party failed to meet burden to show that person claiming to be a paralegal was assisting lawyer in representation of the client); *FTC* v. *TRW, Inc.,* 628 F.2d 207, 213 (D.C. Cir. 1980) (party failed to meet burden of showing that the report prepared by a credit reporting agency was done as an agency for attorneys); *Dabney* v. *Investment Corp. Of America,* 82 F.R.D. 464, 464-65 (E.D. Pa. 1979) (law student not found to been acting as agent or associate of attorney; no privilege).

The same considerations apply where it is the client, rather than the lawyer, who has employed or used the agent. *See In re Bieter,* 16 F.3d 929, 938-40 (8thCir. 1994) (business consultant found to be agent of client); *In re Grand Jury Proceedings,* 947 F.2d 1188, 1190-91 (4th Cir. 1991) (clients' conversations with accountant immediately before consulting lawyer were privileged; earlier conversations not found to be for purpose of assisting client in communicating with his lawyer); *Miller* v. *Haulmark Transport Systems,* 104 F.R.D. 442, 444-45 (E.D.Pa. 1984) (presence of insurance agent instrumental in arranging coverage that was the subject of the lawsuit did not destroy privilege where presence was the limited purpose of aiding the attorney).

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

This definition is based on RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 (2000), although it differs from the Restatement section as discussed below. It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

There are primarily two kinds of situations in which the confidentiality of a communication may come into question. First, is where someone other than the lawyer or client was present and in a position to hear the communication. Second, is where the client may have intended that the communication be relayed to another person.

In the first scenario, the presence of a third person will not destroy confidentiality where the other person is an agent of either the lawyer or the client for the purpose of assisting in the

rendering of legal services. *See* discussion in the commentary to part (a)(5). *Compare Kevlik v. Goldstein,* 724 F.2d 844, 849 (lst Cir. 1984) (confidentiality not destroyed by presence of client's father) *with Cafritz*v. *Kolslow,* 167 F.2d 749 (D.C. Cir. 1948) (presence of client's sister destroyed confidentiality where no sufficient reason shown for her presence). *See also Cavallaro v. United States,* 284 F.3d 236, 247 (lst Cir. 2002) (presence of accountants who were not acting to aid in obtaining legal advice destroyed confidentiality of the communications); *Jenkins v. Bartlett,* 487 F.3d 482 (7th Cir. 2007) (presence of police officer association liaison did not destroy privilege where liaison was present to assist attorney in his representation of the officer); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, §§5:14. 5:15. 5:18 (2011)

The phrase "reasonably believe that no one except a privileged person will learn the contents of the communication" is consistent with federal cases holding that reasonable precautions must be taken to assure confidentiality. *United States v. Gann,* 732 F.2d 714, 723 (9thCir. 1984) (no privilege where statement made by client to attorney on telephone within hearing of law enforcement personnel); *United States v. Waller,* 581 F.2d 585, 585-86 (6thCir. 1978) (leaving notepad in prominent place in a public courtroom was not consistent with a claim of confidentiality). *But see U.S v. DeFonte,* 441 F.3d 92 (2d Cir. 2006) (prison inmate's journal may have been intended to remain confidential for purposes of the attorney-client privilege even though she had no reasonable expectation of privacy for Fourth Amendment purposes); *Gomez v. Vernon,* 255 F.3d 1118, 1133 (9th Cir. 2001) (prisoners did all as they could to secure documents' confidentiality within the context of a prison situation).

The second situation in which confidentiality is in doubt is where the client may have intended the communication to be communicated to another person. Under the definition, if the communication is made with the intention of it being conveyed publicly, there is no confidentiality. This result is consistent with a great number of federal cases. *See, e.g., Colton* v. *United States,* 306 F.2d 633, 638 (2d Cir. 1962) (information given for inclusion in tax return not confidential); *In re Grand Jury Proceedings,* 33 F.3d 342, 355 (4th Cir. 1994) (matters were communicated to attorneys for use in connection with public disclosures); *U.S. v. Ruehle,* 583 F.3d 600 (9th Cir. 2009) (statements made for purposes of disclosure to auditors and government authorities not confidential).

Federal cases have held that matters communicated to an attorney where the client is seeking advice on the possibility of disclosure may still be privileged. *In re Grand Jury Proceedings,* 33 F.3d 342,354 (4th Cir. 1994); *United States* v. *(Under Seal),* 748 F.2d 871, 878 (4th Cir. 1984). However, these same cases conclude that once there is a decision to disclose the privilege no longer exists. Furthermore, as stated in *Under Seal,* all of the details underlying the data which was to be published is outside the privilege. The court noted (748 F.2d at 875, n. 7):

> The details underlying the published data are the communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation of the document. Copies of other documents, the contents of which were necessary to the preparation of the published document, will also lose the privilege.

Not all federal courts have followed the Fourth Circuit in this respect. Thus, the court in *Schenet* v. *Anderson,* 678 F. Supp. 1280, 1283-4 (E.D. Mich. 1988), relying in large measure on *United States* v. *Schlegel,* 313 F. Supp. 177, 179 (D. Neb. 1970), declined to follow that authority, stating:

> [T]he attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons. With regard to preliminary drafts of documents intended to be made public, the court holds that preliminary drafts may be protected by the attorney-client privilege. Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney client privilege. The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.

The Survey Rule definition of “in confidence" does not deal directly with this split in authority. The language can be interpreted as supporting either line of case authority. A more expansive discussion of this issue is contained in the Appendix to this Commentary, Part 2.

The definition of “in confidence" found in Restatement § 71 differs from the definition in this Survey Rule in that the Restatement section adds that the communication may be in confidence if made either to a privileged person or "another person with whom communications are protected under a similar privilege." The Restatement Comment supplies no authority for this addition. The additional clause is contrary to cases that find that communications made by one spouse to a lawyer in the presence of the other spouse are not confidential unless the non-client spouse is found to be an agent of the client. *See discussion in State* v. *Gordon,* 504 A.2d 1020, 1024-26 (Conn. 1985) (issue was whether wife, who participated in conferences and assisted husband's defense counsel was really agent of the State).

(b) General Rule of Privilege.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client. The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.

The general rule of privilege set out in Section (b) is derived from several sources including RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000), PROPOSED FEDERAL RULE OF EVIDENCE 503 and UNIFORM RULE OF EVIDENCE 502. However, the second sentence of the section, dealing with identity and fee, is not contained in any of those sources and is intended to reflect and emphasize the prevailing holdings of federal cases.

The first sentence of the rule draws upon the definitions contained in Section (a)(1)-(6). The discussion in this commentary concerning the case law supporting those definitions is also pertinent to the general rule. Thus, cases such as *United States v. Ostrer,* 422 F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice) support the general rule as well as the definition of "attorney" in Section (a)(4). *See generally* 1 MCCORMICK ON EVIDENCE § 88 (6th ed. 2006).

Other significant federal cases ruling on whether a communication was for the purpose of obtaining or providing legal assistance include: *United States v. Wilson,* 798 F.2d 509, 513 (1st Cir. 1986) (no privilege where lawyer's services sought as a negotiator or messenger rather than as a lawyer); *In re County of Erie,* 473 F.3d 413 (2d Cir. 2007) (communications privileged where predominant purpose of communications between county attorney and county officials was to give legal advice); *United States v. Knoll,* 16 F.3d 1313, 1322 (2d Cir. 1994) (papers relating solely to business transactions not privileged); *United States v. Aramony,* 88 F.3d 1369, 1387-90 (4th Cir. 1996) (executive's communications to internal investigators and corporate counsel were not privileged where executive did not seek legal advice on his own behalf); *United States v. Tedder,* 801 F.2d 1437, 1442-43 (4th Cir. 1986) (communications not privileged where lawyer consulted as a friend and not for legal advice); *Regional Airport Authority of Louisville v. LFG, LLC,* 460 F.3d 697 (6th Cir. 2006) (communication with lawyer not for the purpose of obtaining legal advice); *Sandra T.E. v. South Berwyn School Dist. 100,* 600 F.3d 612 (7th Cir. 2009) (lawyer hired by school board to investigate allegations of sexual abuse by a teacher was providing legal services); *Simon v. GD. Searle & Co.,* 816 F.2d 397, 402-04 (8th Cir. 1987)(documents intended to apprise lawyers of business matters will be privileged only if they embody an implied request for legal advice based on the documents); *United States v. Johnston,* 146 F.3d 785, 794 (10th Cir. 1998) (no privilege where lawyer was acting as a messenger for drug dealers rather than as a lawyer).

The court's discussion in *United States v. Frederick,* 182 F.3d 496 (7th Cir. 1999) is particularly enlightening. In *Frederick,* the court considered communications made by a client to an individual who was both an accountant and a lawyer. The information concerned both tax returns and IRS audits. The court rejected the existence of a client-accountant privilege. 182 F.3d at 500.It then affirmed the trial court's rejection of an attorney-client privilege under the circumstances of the case, finding that the communications with the lawyer/accountant were in his capacity as an accountant. In the course of its discussion, the court considered the issue of documents prepared for use both in preparing tax returns and for use in litigation, stating (182 F.3d at 501-02):

> Put differently, a dual-purpose document –a document prepared for use in preparing tax returns *and* for use in litigation –is not privileged; otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns. And likewise if a taxpayer involved in or contemplating litigation sat down with his lawyer (who was also his tax preparer) to discuss both legal strategy and the preparation of his tax returns, and in the course of the discussion bandied about numbers related to both consultations: the taxpayer could not shield these numbers from the Internal Revenue Service. This would be not because they were numbers, but because, being intended (though that was not the only intention) for use

in connection with the preparation of tax returns, they were an unprivileged category of numbers. *(Emphasis by the court)*

See also *Montgomery County* v. *Micro Vote Corp.,* 175 F.3d 296,301-04 (3d Cir. 1999) (reversing trial court determination that lawyer acted as an "election consultant," finding instead. that the services were legal, applying Pennsylvania law but citing Federal authority); *United States* v. *Bauer,* 132 F.3d 504, 507-09 (9th Cir. 1997) (privilege attached where attorney not merely conveying public information as an officer of the court, but giving legal advice); *Rehling* v. *City of Chicago,* 207 F.3d 1009, 1019 (7th Cir. 2000) (police department counsel was giving legal advice to senior officers when he advised them concerning placement of disabled officer).

Although there do not seem to be federal cases directly on point, the modem trend, adopted by this section of the Survey Rule, is that the client may assert the privilege against an eavesdropper, provided that reasonable precautions were taken to preserve the confidentiality of the communication. *See* CHRISTOPHER B. MUELLER&LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, § 5:18 (2011).*See also Lively* v. *Washington County Dist. Court,* 747 P.2d 320, 321 (Okla. 1987)(phone conversation with attorney secretly videotaped). Both Proposed Federal Rule 503 and Uniform Rule 502 take this position.

The second sentence of this section of the rule, dealing with the identity of the client and the fee paid to the attorney, is not contained in any of the other rules that have served as the basis for this Survey Rule. As discussed in the commentary to section (a) (1) of this Survey Rule, the identity of the client is not itself a communication and is therefore ordinarily outside the rule. The sentence is intended to reinforce the holding of a majority of federal cases that clearly establish that rule, while making clear that the privilege may attach but only if the disclosure of such information would disclose a confidential communication.

A view at odds with this sentence of the rule was at least suggested by language in *Baird* v. *Koerner,* 279 F.2d 623, 632 (9th Cir. 1960). In that case, an attorney had paid back taxes on behalf of an undisclosed client. The court held that the disclosure of the client's identity would necessary convey information that would be conceded to be part of the usual privileged communication between attorney and client. The *Baird* case has been cited as creating what has come to be known as a "last link" rule, *i.e.,* that where "a strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought" the privilege will attach. *United States v. Hodge and Zweig,* 548 F.2d 1347, 1353 (9th Cir. 1977).*See also* discussion in 1 MCCORMICK ON EVIDENCE § 90 (6th ed. 2006).

The "last link" rule has been almost universally rejected in the federal courts. Instead, the courts have held that the identity or facts of retention of a lawyer are ordinarily not protected by the privilege, despite their incriminating nature. Cases such as *In re Shargel,* 742 F.2d 61 (2d Cir. 1984), are representative of the prevailing view. In *Shargel,* the government sought information as to whether an attorney had represented certain defendant and the amount of fees pays as evidence of “unexplained wealth." 742 F.2d at 62. In finding that no privilege protected the identity and amount offers, the court stated (742 F.2d at 64):

> It seems evident to us that a broad privilege against the disclosure of the identity of clients and of fee information might easily become an immunity for corrupt or criminal acts. [citation omitted] Such a shield would create unnecessary but considerable temptations to use lawyers as conduits of information or of commodities necessary to criminal schemes or as launderers of money. The bar and the system of justice will suffer little if all involved are aware that assured safety from disclosure does not exist.
>
> We adhere to our prior decisions, therefore, and define the limits of the privilege in terms of the goal of enabling lawyers to render informed legal advice and advocacy. We of course continue to recognize that "there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communications," [citation omitted]. However, we find no such circumstances here.

See also In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986) (court rejects "last link" analysis); *Reiserer v. U.S.,* 479 F.3d 1160 (9th Cir. 2007) (no privilege where revealing clients' identities in investigation of lawyer would not constitute an acknowledgement of guilt by the clients); *Clarke v. American Commerce Nat'l Bank,* 974 F.2d 127 (9th Cir. 1992) (identity not privileged where records did not reveal communications); *Vingelli v. United States,* 992 F.2d 449,452 (2d Cir. 1992) (same). Several federal cases refusing to protect the identity of clients involved situations where a lawyer seeks to shield the name of clients making fee payments in excess of $10,000 in cash. *See, e.g., Lefcourt v. United States,* 125 F.3d 79, 86 (2d Cir. 1997); *United States v. Leventhal,* 961 F.2d 936, 941 (11th Cir. 1992).

What is required in order for the privilege to apply is a link to communications, including the motive of the client. Such circumstances may occur, for example, where revelation of the client's identity would necessarily link the client to already disclosed communications. *See, e.g., In re Grand Jury Proceedings,* 517 F.2d 666, 672 (5th Cir. 1975); *United States v. Liebman, 742* F.2d 807, 810 (3d Cir. 1984). The privilege may also exist where the disclosure of identity would necessarily reveal the client's motive. For example, in *In re Subpoenaed Grand Jury Witness,* 171 F .3d 511, 514 (7th Cir. 1999), the court protected identity, stating:

> We will not go into detail as to why we make this finding – that would be showing the hand to the government – but we are sure that disclosure of this information would identify a client of Hagen's who is potentially involved in targeted criminal activity which, on this record, would lead to revealing that client's motive to pay the legal bills for some of Hagen's other clients. And motive, we think, is protected by the attorney--client privilege.

See also In re Grand Jury Proceeding, Cherney, 898 F.2d 565, 568 (7th Cir. 1990) (identity protected where revelation would reveal client's motive).

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

This section of the Survey Rule is based on RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 86 (2000), PROPOSED FEDERAL RULE OF EVIDENCE 503 (c) and UNIFORM RULE OF EVIDENCE 502(c).

The section is fully consistent with federal law. All authorities agree that the privilege is that of the client, not the attorney. *See* 1 MCCORMICK ON EVIDENCE § 92 (6th ed. 2006); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:32 (2011). *See also In re Grand Jury Subpoena,* 220 F.3d 406,408 (5th Cir. 1967) (in-house counsel had no right to assert privilege waived by corporate client).

The language in this section providing for implicit authority for the attorney to raise the privilege on behalf of the client is consistent with general laws well as with Proposed Federal Rule 503(c) and Uniform Rule 502(c). *See Fisher* v. *United States,* 425 U.S. 391,402 n. 8 (l976). The attorney is duty bound to assert the privilege in the client's absence. *Republic Gear Co.* v. *Borg-Warner Corp.,* 381 F.2d 551, 556 (2d Cir. 1967).*See also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, § 5:32 (2011).

Most of the federal cases dealing with authority to invoke the privilege involve the question of who is the client. Thus, in *Commodity Futures Trading Comm'n* v. *Weintraub,471* U.S. 343,350-51 (1985) the Supreme Court held that the trustee in bankruptcy, not the debtor's directors had the right to claim the privilege. *But see In re Foster,* 188 F.3d 1259, 1265-66 (10th Cir. 1999) (individual debtor may hold privilege as opposed to trustee in bankruptcy). *See also United States* v. *International Bhd. of Teamsters,* 119 F.3d 210,215 (2d Cir. 1997) (campaign organization in union election, not campaign manager, held privilege); *In re Bevill, Bresler & Schulman Asset Mgt. Corp.,* 805 F.2d 120, 126 (3d Cir. 1986) (corporation, not officers, held privilege); *In re Grand Jury Subpoenas,* 144 F.3d 653, 658-59 (10th Cir. 1998) (corporate officer could claim privilege for communications on his own behalf but not on behalf of corporation). The language of this section providing that the privilege may be claimed by "a person succeeding to the interest of a client" is consistent with these cases, although it does not elaborate on the issue.

As set forth in this section, a personal representative of an incompetent or deceased may claim the privilege. There is no longer any doubt that, in the federal court, the privilege survives the death of the client. *Swidler & Berlin v. United States,* 524 U.S. 399, 405-06 (1998). The privilege in that case was claimed by the attorney on behalf of the deceased client. Because the issue was not raised in the case, there was no discussion of the question of who can raise the privilege on behalf of the deceased person and, perhaps more controversially, who, if anyone, would have the ability to waive it.

The issue of who actually holds the privilege after death has not been addressed in the federal cases. Both Proposed Federal Rule 503(c) and Uniform Rule 502(c) provide that the privilege may be claimed by the client's personal representative. Neither rule expressly states that the personal representative also has the right to waive the privilege. However, states with statutory or rule privileges containing similar language have held that the right to claim the privilege necessarily entails the right to waive it. *See, e.g., In Curtis' Estate,* 394 P.2d 59, 62 (Kan. 1964); *Scott v. Grinnell,* 161 A.2d 179, 183 (N.H. 1960). It seems probable that the federal courts will go in the direction that gives the personal representative the right both to claim and waive the privilege, but that matter has not yet been resolved.

(d) Standards for Organizational Clients

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

(1) is otherwise privileged within this rule;

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

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

Section (d) is not contained in this form in any of the standard sources. Itis derived in part from RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 73-74 (2000), but differs from the Restatement in at least two important respects. First, unlike Restatement §73, the Survey Rule requires, consistent with *Upjohn Corp. v. United States,* 449 U.S. 383 (1981), that the communication concern a legal matter "within the scope of the agent's agency or employment."

Section (d) also differs from the Restatement in that it provides, through its definition of organization in Section (a) (3), that communications between attorneys and agents of private organizations and governmental agencies are to be analyzed under the same test. Specific problems in connection with the application of the privilege in the governmental context are discussed below.

Neither Proposed Federal Rule 503 nor Uniform Rule 502 has a specific section dealing with the organizational client. However, Survey Rule Section (d) is consistent with those rules. Proposed Rule 503(b) makes privileged communications between the client "or his representative." Uniform Rule 502(a)(4) includes a person "who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."

The language of this section is an attempt to articulate the Supreme Court's holding in the *Upjohn* case. As stated in 1 MCCORMICK ON EVIDENCE § 87.1 at 349 (6th ed. 2006), the basic

principles of the holding are that information communicated by corporate agents to an attorney or representative of an attorney will be privileged if (1) it is communicated for the express purpose of securing legal advice for the corporation; (2) it relates to the specific corporate duties of the communicating employee; and (3) it is treated as confidential within the corporation itself. *Upjohn Corp. v. United States,* 449 *U.S. at* 394. Although the Court in *Upjohn* cautioned that it was not stating a rule for all cases, the court's opinion in that case has been widely regarded as doing so. The rule is firm in the federal courts. *See, e.g., Admiral Ins. Co. v United States Dist. Court,* 881 F.2d 1486, 1492-93 (9thCir. 1989) (employee's communications to lawyer concerning matters within the scope of his employment even though the company planned to terminate the employee after the interview); *James Julian, Inc. v. Raytheon Co.,* 93 F.R.D. 138, 141-42 (D. Del. 1982) (privilege upheld against claim that corporation did not adequately maintain confidentiality); *Leucadia, Inc. v. Reliance Ins. Co.,* 93 F.R.D. 674, 678 (S.D.N.Y. 1983)(communications between employees of predecessor company made in confidence for the purpose of legal advice were privileged).

Although Section (a) (3) defines organizations as including government entities and, as stated above, Section (d) applies the same standard to government entities as to other organizations, there may be a significant difference in the application of the test in the government situation. The key portion of the standard in this respect is Section (d) (1) requiring that the communication be "otherwise privileged." Federal courts have held that there is no privilege for communications made to a government attorney in the course of that attorney's duties in the face of a grand jury subpoena. In so holding, the court in *In re Lindsey,* 158 F.3d 1263, 1272 (D. C. Cir. 1998) stated:

> When any executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar.

To the same effect is *In re Grand Jury Subpoenas Duces Tecum,* 112 F.3d 910,915-16 (8th Cir. 1997) (President Clinton and his wife could not claim privilege for communications to White House lawyers as against a grand jury subpoena). The same holding has been applied where a federal grand jury seeks information from attorneys for state agencies. *In re Witness Before the Special Grand Jury 2000-2,* 288 F.3d 289,294 (7th Cir. 2002) ("[I]nterpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinate to the public interest in good and open government, leaving the government lawyer duty-bound to report internal criminal violations, not to shield them from public exposure”).

Thus, the test for privilege with regard to communications between corporate and government employees and their corporate or government lawyers may be the same, but the privilege will not exist at all in the government context where the information is sought in a criminal case. *See also* Appendix to this Commentary, Part 1.

Specific exceptions to the privilege in dealing with claims against trustees and disputes between organizations and their shareholders, members or other constituents are considered in connection with Sections (f) (5) and (6) of the Survey Rule.

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

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

Section (e) is based on RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 75-76 (2000), although it is modified in some respects. It is also consistent with Proposed Federal rule 503(b) and Uniform Rule 502(b).

The portion of the rule covering situations where two or more clients consult a single lawyer or law firm has not been the subject of much controversy in the federal or state courts. Communications among the lawyer and joint clients are privileged as against the rest of the world; they are not privileged as between or among the parties. *See Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 F.2d 823, 835 (6th Cir. 1941); 1 MCCORMICK ON EVIDENCE § 91.1 (6th ed. 2006).

Most of the federal court decisions, however, involve the other scenario addressed by Section (e), where two or more clients with a common interest in a matter are represented by separate attorneys and agree to pursue a common interest and to exchange information concerning the matter.

The language of the survey differs from Restatement § 76, dealing with common interest arrangements, in that it states specifically that the clients must not only have a common interest, but agree to pursue it together before they communicate in confidence. *See, e.g., United States v. Melvin,* 650 F.2d 641,646 (5thCir. 1981) (conversations including party who had not yet agreed to the joint representation not privileged).

The common interest privilege applies whether or not a litigated matter is involved, *see U.S. v. BDO Seidman, LLP,* 492 F.3d 806 (7th Cir. 2007) (common interest privilege applied even though there was no threat of litigation); *In re Regents of Univ. of California,* 101 F.3d 1386, 1389-90 (Fed. Cir. 1996) (patent application) and to plaintiffs in litigation as well as defendants, *see Schachar v. American Academy of Ophthalmology, Inc.,* 106 F.R.D. 187, 191 (N.D. Ill. 1985) (plaintiffs involved in different lawsuits). However, the rule makes clear, as do the cases that the

communications must otherwise be privileged. Thus, information supplied by the client must be shown to be communicated for the purpose of obtaining legal advice. If not, it is not privileged, irrespective of the existence of a joint defense or common interest. *See United States v. Bay State Ambulance & Hosp. Rental Serv.,* 874 F.2d 20, 29 (lst Cir. 1989) (client failed to show that communication was for purposes involving the joint defense).

A common interest privilege may not arise even though clients jointly consult lawyers with regard to related matters. For example, in *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910,922 (8thCir. 1997), the court held that matters discussed in connection with the Whitewater investigation between Hilary Rodham Clinton and her lawyers and lawyers representing the Office of the President were not within the common interest doctrine. Mrs. Clinton's interests were in avoiding personal liability, criminal or civil; the White House as a governmental institution did not have a similar interest.

The last sentence of the Survey Rule, dealing with communications between clients or their agents outside the presence of an attorney or her agent is not found in the Restatement, Proposed Federal Rule 503 or Uniform Rule 502. Although there is no direct authority on the point, by way of dictum, the court in *United States v. Gotti,* 771 F. Supp. 535, 545 (E.D.N.Y. 1991) stated that such communications would not be protected. *See also* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, § 501.02[5][e] at 501-29 (9th ed. 2006)

As in the case of the joint defense, the common interest privilege does not apply in later actions between or among the parties. *E.g., Simpson v. Motorists Mut. Ins. Co.,* 494 F.2d 850, 854 (7th Cir. 1974) (statement made by insurer defending an insured not privileged in a coverage action against the insurer).

The sentence in section (e) providing that any client may invoke the privilege "unless the client making the communication has waived" it is consistent with the federal cases. *See., e.g., In re Grand Jury Subpoenas,* 89-3 &89-4, 902 F.2d 244, 248, 249 (4thCir. 1990) (no unilateral waiver of privilege); *In re Grand Jury Subpoenas Duces Tecum,* 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (waiver of privilege by one co-client did not destroy privilege as to communications by other co-clients).

This section of the Survey Rule includes the language of Restatement §§ 75-76, providing that the communication is not privileged as between clients *"unless the clients agree otherwise."* The rule adopts the language based upon the considerations set forth the Reporter's Note to Restatement § 75 (at 583):

> No direct authority has been found for giving effect to agreements among co-clients that the privilege shall be preserved in subsequent adverse proceedings between them. The approach taken [in the Restatement section and Comment] is consistent with the theory of the co-client privilege and with the basis for removing the privilege in subsequent adverse proceedings, the presumed intent of the co-clients and fairness considerations. [citation omitted] The result is similar to that which would obtain if the parties contracted on other

> matters. Perhaps most obviously, the result is the same that would be reached if, during litigation itself, adversary parties agreed to a confidentiality obligation as part of an effort to expedite pretrial discovery or for other reasons.

Various issues with regard to the co-client and community of interest situations involving a parent corporation and its subsidiaries engaged in subsequent adverse proceedings were discussed in *In re Teleglobe Communications Corp.,* 493 F.3d 345 (3d Cir. 2007). The thorough treatment of the issues in that case may be significant for the federal courts even though the court was applying Delaware rather than federal common law. The court noted that the application of the co-client or community of interest doctrines was a complex matter involving several issues including the ownership of the subsidiaries, the involvement of in-house counsel and the particular legal issues addressed by counsel. The court held that the parent corporation must produce communications with counsel in subsequent adverse proceedings only if the court finds that the corporation and its debtors "were jointly represented by the same attorneys on a matter of common interest that is the subject-matter of those documents." (493 F.3d at 386-87)

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

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

This subsection is taken from RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 81 (2000). A similar provision is found in Proposed Federal Rule 503(d)(2) and Uniform Rule 502(d)(2).

The provision is supported by cases from a number of jurisdictions. *See* 1 MCCORMICK ON EVIDENCE, § 94 at 426 (6th ed. 2006). The Supreme Court, while deciding that the privilege generally survives the death of the client, noted the existence of this exception. *Swidler & Berlin v. United States,* 524 U.S. 399, 404 (1998). Indeed, the Court looked to cases applying the testamentary exception as affirming the survival of the privilege under other circumstances. In addition to a number of state cases, the Court also cites *Glover v. Patten,* 165 U.S. 394 (1897) for its recognition of the testamentary exception in the federal courts. In *Glover,* the Court stated (165 U.S. at 406):

> [W]e are of opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin.

The Court in *Glover* goes on to note that it would be arbitrary to hold that the privilege belongs to one and not to others claiming from the deceased. The same considerations would seem to apply regardless of whether the litigation involves testate or intestate succession or inter vivos transactions.

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

This exception is based on the language of RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000), with one significant difference. Restatement § 82 requires that the criminal or fraudulent purpose for which a client seeks assistance be "later accomplished." This exception does not require the fulfillment of the criminal or fraudulent purpose. The exception is consistent with Proposed Federal Rule 503(d)(I) and Uniform Rule 502(d)(1),neither of which requiresthat the crime or fraud actually take place.

The elimination of the requirement of actual fulfillment of the criminal or fraudulent purpose is consistent with most, but not all, federal authority. For cases holding that there is no such requirement *see United States* v. *Collis,* 128 F.3d 313, 320 (6thCir. 1997) (crime or fraud need only have been the objective of the client); *In re Grand Jury Proceedings,* 87 F.3d 377,381 (9thCir. 1996) (since government need not prove that the crimes succeeded, it is not required to prove that the communications in fact helped the targets commit the crime); *In re Grand Jury Subpoena Duces Tecum (Marc Rich &Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984) ("the client need not have succeeded in his criminal or fraudulent scheme for the exception to apply;" court finds documents unprivileged without resolving the issue of whether a crime or fraud had in fact been committed); *In re Rigby,* 199 B.R. 358, 361-62 (Bankr. E.D. Tex. 1995) (finding that "whether or not there has been an actual harm caused . . . is irrelevant. 'No harm, no foul' . . . is not the standard. It is the intent of the client that controls and not the success of the fraudulent act").

To the contrary is *In re Sealed Case,* 107 F.3d 46,49 (D.C. Cir. 1997). In that case, the court stated that the client must have carried out the crime or fraud, citing the Comment to the Restatement arguing that to hold otherwise would "penalize a client for doing what the privilege is designed to encourage consulting a lawyer for the purpose of achieving law compliance." However, in that case, there was no question that the crime had in fact been committed by a corporate vice-president. The only issue was whether the corporation itself had consulted its counsel for a criminal purpose and the court found the evidence insufficient to support the invocation of the crime-fraud exception under these circumstances.

By requiring that the consultation be "for the purpose of obtaining assistance to engage in a crime or fraud," the exception set out in this subsection takes into account the federal cases that state that communication must be made "in furtherance of a crime or fraud."*See, e.g., In re Grand Jury Investigation,* 445 F.3d 266 (3d Cir. 2006) (communication must have been in furtherance of the crime); *In re BankAmerica Corp. Securities Litigation,* 270 F.3d 639, 642 (8thCir. 2001) ("legal advice was obtained in furtherance of the fraudulent activity and was closely related to it"); *In re Spalding Sports Worldwide, Inc.,* 203 F.3d 800,808 (Fed. Cir. 2000)(communication not "in

furtherance" where disputed conduct actually lowered the chance of fraud). *See also* CHRISTOPHER B. MUELLER &LAIRD C.KIRKPATRICK, FEDERAL EVIDENCE,§ 5:27 (2011). A statement that is merely relevant to a criminal or fraudulent act, and not in furtherance of it, is not within the exception. *In re Richard Roe, Inc.* 68 F.3d 38, 40 (2d Cir. 1995) (lower court improperly used relevancy test). Again, the crime or fraud need not actually have been completed so long as the client intended the communications to be in its furtherance. *E.g., In re Grand Jury Subpoena Duces Tecum (Marc Rich &Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984).

The exception is also consistent with virtually all of the federal cases in that it looks only to the client's intention. The attorney's intention is irrelevant. *See, e.g., In re Sealed Case,* 754F.2d 395 (D.C. Cir. 1985); *In re Grand Jury Investigation,* 445 F.3d 266, 279 n. 4 (3d Cir. 2006) (attorney need not have been aware that the client is engaged in or planning a crime); *United States* v. *Friedman,* 445 F.2d 1076 (9th Cir. 1971) (attorney need not be aware of the illegality involved). *But see In re Sealed Case,* 107 F.3d 46, 47 n. 2 (D.C. Cir. 1998) ("there may be rare cases . . . in which the attorney's fraudulent or criminal intent death a claim of privilege even if the client is innocent").

The language in this subsection referring to statements made for the purpose of aiding a third person to commit a crime or fraud is also consistent with the federal cases. *See, e.g., In re Doe,* 551 F.2d 899, 900-902 (2d Cir. 1977) (client informed lawyer of scheme by third persons to bribe juror in client's case; crime/fraud exception applied); *United States* v. *Hodge & Zweig, 548* F.2d 1347, 1354-55 (9thCir. 1977) (consultation for the purpose of carrying out agreement of members of drug conspiracy to furnish bail and pay legal expenses for arrested members).

The language of this exception is limited to statements to obtain assistance to engage in crime or fraud. Itdoes not include other tortious conduct. However, several federal cases that have looked at the issue have expanded the exception to include intentional torts. Virtually all are district court opinions. *E.g., Recycling Solutions, Inc.* v. *Dist. of Columbia,* 175 F.R.D. 407, 409 (D.D.C. 1997); *Horizon of Hope Ministry* v. *Clark County, Ohio,* 115 F.RD. 1, 5 (S.D. Ohio *(1986).See also the dictum in United States* v. *United Shoe Machinery Corp.,* 89 F. Supp. 357, 358 (D. Mass. 1950) (communications not privileged if made "for the purpose of committing a crime or tort") The District of Columbia Circuit uses language that includes "other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re Sealed Case,* 754 F.2d 395, 399 (D.C. Cir. 1989); *In re Sealed Case,* 676 F.2d 793, 812 (D.C. Cir. 1982). However, these District of Columbia Circuit cases both involved activities that were criminal or fraudulent, rather than simply tortious.

Several other federal cases have refused to extend the exception beyond fraud or crime. Most prominent is *Motley v. Marathon Oil Co.,* 71 F.3d 1547, 1551 (10th Cir. 1995) (crime/fraud exception did not apply to statements even if in furtherance of illegal racial discrimination if not criminal or fraudulent). *See also Bulk Lift Int'l.*v. *Flexon & Systems, Inc.,* 122 F.RD. 493, 496 (W.D.La. 1988) (fraud, not mere inequitable conduct must be involved).*See also Cooksey* v. *Hilton Int'l Co.,* 863 F.Supp. 150, 151 (S.D.N.Y. 1994) (exception may apply to "intentional torts moored in fraud"). The rationale of such cases is perhaps best reflected in the Comment to Restatement (Third) of the Law Governing Lawyers, §82, p. 616-17: "[L]imiting the exception to crimes and frauds produces an exception narrower than principle and policy would otherwise

indicate. Nonetheless, the prevailing view limits the exception to crimes and frauds. The actual instances in which a broader exception might apply are probably few and isolated, and it would be difficult to formulate a broader exception that is not objectionably vague."

There is an old Supreme Court case, *Alexander v. United States,* 138 U.S. 353, 360 (1891), in which the Court stated that the crime/fraud exception "should be limited to cases where the party is tried for the crime in furtherance of which the communication was made." However, the *Alexander* case involved a situation in which the consultation with the lawyer had nothing to do with any future crime. The murder in question, if had been committed by the client, had already taken place. The consultation had to do with business advice dealing with the ownership of horses. At most, the communications had relevancy to the past crime, but were not made to obtain assistance to engage in a crime or fraud. The federal courts have generally not hesitated to apply the exception despite the fact that the criminal or fraudulent conduct is not directly involved in the case in which the privilege is claimed. One case clearly applying the privilege to a case not involving the subject of the communication is *Petition of Sawyer,* 229 F.2d 805, 808-09 (7th Cir. 1956). The court in *Sawyer* refused to apply the Supreme Court's statement in *Alexander,* finding it dictum. Instead, it held that the crime/fraud exception applied to remove the privilege from communications made by a non-party witness in the case to his attorney because the statements were made in connection with a proposal to give false testimony. *See also United States v. Reeder,* 170 F.3d 93, 106 (1st Cir. 1999) (consultations with attorney not privileged under the crime/fraud exception even though consultations involved conduct that covered up rather than directly involved the crimes involved in the case); *In re Berkeley & Co.,* 629 F.2d 548, 554-55 (8th Cir. 1980) (court doubts validity of statements in *Alexander,* but finds applicability of exception based upon related nature of the subject of the communication and the crimes under investigation); *SECv. Harrison,* 80 F.Supp. 226, 230-31 (D.D.C. 1948) (exception applicable in investigatory proceedings in which no charge of fraud was made; *Alexander* case distinguished as involving communications concerning a past crime). In all of these instances, the statements related in some way to the conduct involved in the litigation. However, it could hardly be otherwise in order for the communications to be relevant.

Ordinarily, the key factor under the crime/fraud exception is the intent of the client to engage in the crime or fraud at the time of the consultation with the lawyer. Indeed, there is language in federal cases limiting the exception to situations where it is shown that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *In re Sealed Case,* 754 F.2d 395, 399 (D.C. Cir. 1985). However, there are also cases applying the exception where the evidence does not really show the client's state of mind at the time of the consultation with the attorney. The second sentence of the exception is intended to deal with the situation where the client uses the lawyer's advice to engage in or assist a crime or fraud, irrespective of the client's intention at the time of consultation. The language is taken from Restatement § 82 (b) and is supported by federal cases as well as cases from other jurisdictions. *See United States v. Ballard,* 779 F .2d 287, 292-93 (5th Cir. 1986) (conversations with attorney concerning the disclosure of transfer of assets prior to bankruptcy filing not within privilege where client hired another lawyer who filed bankruptcy without disclosing assets); *Fidelity-Phenix Fire Ins. Co. v. Hamilton,* 340 S.W.2d 218 (Ky. 1960)(no privilege where client consulted lawyer who told him that insurance policy did not cover a fire because of coverage limitations; client then had another lawyer file suit on policy relating a different set of facts) . These cases must be

distinguished from situations where the proof simply shows that the client committed a crime or fraud after consulting the lawyer. *See, e.g., Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277,281-82 (8thCir. 1984) (that communications with attorneys may help prove that a fraud occurred does not mean that the communications were used in perpetrating the fraud); *In re Sealed Case,* 107 F.3d 46,50 (D.C. Cir. 1997) (mere fact that a person commits a crime after consulting with counsel does not establish a prime facie case that the consultation was in furtherance of the fraud; showing "temporal proximity between the communication and a crime is not enough"). The distinction between these cases and cases such as *Ballard* and *Fidelity-Phenix,* reflected in the second sentence of this subsection, is, in the latter instance, the existence of evidence of the use of the consultation with the attorney in the perpetration of the crime of fraud.

Issues with regard to the procedural aspects of asserting the crime-fraud exception to the attorney-client privilege are discussed in the Appendix to this Commentary, Part 3.

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client concerning the compensation or reimbursement that the attorney reasonably claims the client owes the attorney;

This subsection is based upon RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §83(1). Itis covered in Proposed Federal Rule 503 (d)(3) and Uniform Rule 502(d)(3) by language excepting from the privilege communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." The Restatement language is used in this section as well as the next (Section (1) (4)) because it more specifically states the rule as found in the case law. Inboth this subsection and subsection (4), the Restatement language, unlike that of the Proposed Federal rule or the Uniform Rule, makes clear that there is an exception from the privilege only insofar as the communications are relevant and reasonably necessary to resolve the dispute. The Restatement language also follows the case law in that it limits breaches of duty by the client to instances involving compensation or reimbursement.

There is federal case authority for an exception to the privilege where an attorney is in a fee dispute with a client. *Cannon v. U.S. Acoustics Corp.,* 532 F.2d 1118, 1120 (7thCir. 1976) (recognizing exception).

Although there are few cases on the issue, the federal courts have been open to the possibility of use of a client/employer's confidential information in a retaliatory discharge action. In *Willy v. Administrative Review Board,* 423 F.3d 483 (5th Cir. 2005), the court held that an Administrative Review Board improperly applied the attorney-client privilege to prevent a fired in-house counsel from using an adverse environmental report in his retaliatory discharge action. The court suggested that limitations on the disclosure of such information might be applied were the case to involve a jury or a public proceeding. The use of protective measures in a public proceeding were also suggested in *Van Asdale v.International Game Technology,*577 F.3d 989 (9th Cir. 2009) (retaliatory discharge action may go forward) and *Kachmer v. Sun Gard Data Systems, Inc.,* 109 F.3d 173, 178 (3d Cir. 1997) (possibility of revelation of confidential communications did not preclude retaliatory discharge action). Possibly to the contrary is*Siedle v. Putnam Investments, Inc.* 147 F.3d 7, 11 (1st Cir. 1998) (lawyer may not use confidential information as a sword to make out a claim of defamation against client). However, as noted in

the *Willy* case, the court in *Siedle* applied Massachusetts, not federal law, and was dealing with the unsealing of an order brought by a newspaper.

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

This subsection is based upon RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83(2). Like subsection (f)(3), the same concept is covered in Proposed Federal Rule 503 (d)(3) and Uniform Rule 502(d)(3) by language excepting from the privilege communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." Again as in subsection (3), the Restatement language is used to make clear that the exception to the privilege applies only to the extent that the information is relevant and reasonably necessary to reveal in the attorney's defense.

The exception as set forth is consistent both with the general law, *see* 1 MCCORMICK ON EVIDENCE, § 91.1 at 415 (6th ed. 2006), and the federal cases, *see* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, §§ 501.02[5][l][i], 501.03 [i][ii] (9th ed. 2006). Cases dealing with the exception include *Tasby v. United States,* 504 F.2d 332,336 (8th Cir. 1974) (privilege inapplicable where ineffective assistance of counsel alleged); *In re National Mtg. Equity Corp. Mtg. Pool Certificates Secs. Litig.,*120 F.R.D. 687, 691-92 (C.D. Cal. 1988) (attorney-client privilege did not prevent attorney from revealing client confidences to defend against third-party allegations of fraud against the attorney); *First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon &Co.,* 110 F.R.D. 557 (S.D.N.Y. 1986) (attorney entitled to disclose information to defend himself against charges brought by a third party, although exception would be limited to protect against unnecessary violation of the client's interest). *See also United States v. Ballard,* 779 F.2d 287 (5thCir. 1986) (exception recognized but court holds that bringing of malpractice action against attorney did not operate as a waiver of the privilege in subsequent criminal action against client).

This rule is properly treated as an exception to the privilege rather than as a waiver by the client. As illustrated by the *In re National Mtg. Equity Corp. Mtg. Pool Certificates Secs. Litig.* and *First Fed. Sav. & Loan* cases cited above, the exception may be invoked by counsel even though the client has taken no action that might be construed as a waiver.

(5) relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

This subsection is taken from Proposed Federal Rule 503(d)(4) and Uniform Rule 502(d) (5).

Although there do not appear to be any federal cases dealing with the issue, the rationale of the Advisory Committee in proposing the exception to the Federal Rule seems sound:

> When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communication is a proper result.

Anargument can be made that the exception is unnecessary. The communications are arguably not intended to be confidential.

(6) between a trustee of an express trust or a similar fiduciary and an attorney or other privileged person retained to advise the trustee concerning the administration of the trust, if relevant to a beneficiary's claim of breach of fiduciary duties;

Subsection (6) is based upon RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 84 (2000). Sometimes referred to as the fiduciary doctrine, this exception is most often supported by the argument that the fiduciary acts for the beneficiaries and that the attorney is seeking advice for their benefit. For example, the court in *Washington-Baltimore Newspaper Guild Local* 35 *v. Washington Star Corp.,* 543 F. Supp. 906, 909 (D.D.C. 1982), dealing with the privilege in the context of a claim by beneficiaries of an ERISA plan against their employer, stated:

> When an attorney advised a fiduciary about a matter dealing with the administration of an employee's benefit plan, the attorney's client is not the fiduciary personally, but rather, the trust's beneficiaries.

Professor Imwinkelried states the rationale somewhat differently and less dependently on the theory that the fiduciary acts for the beneficiary in communicating with the attorney. He states simply that "the rationale for overriding the fiduciary's privilege is that the fiduciary's duty to the beneficiary is paramount to the fiduciary's right to the privilege." EDWARD J. IMWINKELRIED, THE NEW WIGMORE, §6.13.2 at 960 (2d ed. 2010).

The leading case with regard to the fiduciary exception is *Riggs Nat. Bank of Washington, D.C.v. Zimmer,* 355 A.2d 709 (Del. Ch. 1976) which bases the rule on the trustee's fiduciary obligation to the beneficiaries.

Whatever is the best articulation of the rationale for the rule, the rule as set forth in this subsection is consistent with the federal cases. *See, e.g., In re Long Island Lighting Co.,* 129 F.3d 268,271,273 (2d Cir. 1997)(employer, as fiduciary under employee benefit plan covered by ERISA, could not claim privilege as to matters concerning the administration of the plan);*Solis v. Food Employees Labor Relations Ass'n,* 644 F.3d 221 (4th Cir. 2011) (exception applied where Department of Labor sought to enforce subpoenas for documents dealing with possibility of mismanagement of ERISA funds); *In re Occidental Petroleum Corp.,* 217 F.3d 293 (5th Cir. 2000) (no privilege where breaches of fiduciary duty relating to Employee Stock Ownership Plan alleged); *United States v. Evans,* 796 F.2d 264, 265-66 (9thCir. 1986) (no privilege as between pension trustee and attorney advising the trustee with regard to administration of the trust).

In *U.S. v. Jicarilla Apache Nation,* 131 S. Ct. 2313, 2318 (2011), the Court recognized the exception but refused to apply it to the government as trustees for Indian lands. The court noted that "the trust obligations of the United States to the Indian tribes are established and governed by

statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." Similarly, in *Wachtel v. Health Net, Inc.,* 482 F.3d 225 (3d Cir. 2007), the court refused to apply the exception to an insurance company selling and maintaining health insurance benefits holding that it was not a fiduciary within the meaning of the exception.

Under this subsection, there is no requirement that the beneficiary be required to show "good cause," such as must be done in order for the communications to come within the exception set forth in subsection (7), below. *See Helt v. Metropolitan Dist. Comm 'n,* 113 F.R.D. 7, 10 n.2 (D. Conn. 1986)*(dictum).*

The exception does not apply where the fiduciary is communicating with an attorney with regard to his or her personal liability. *See, e.g., Wildbur v. ARCO Chemical Co,* 974 F.2d 631 (5th Cir. 1992); *United States v. Mett,* 178 F.3d 1058, 1064-66 (9th Cir. 1999).

In *Solis v. Food Employers Labor Relations Ass'n, supra,* the court noted (644 F.3d at 228):

> In now recognizing the fiduciary exception, we acknowledge that it is not without limits. The exception will not apply, for example, to a fiduciary's communications with an attorney regarding her personal defense in an action for breach of fiduciary duty. . . . Similarly, communications between ERISA fiduciaries and plan attorneys regarding non-fiduciary matters, such as adapting, amending or terminating an ERISA plan, are not subject to the fiduciary exception.

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

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

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

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

This subsection is based on RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 85 and the case of *Garner* v. *Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970). The rationale of this exception is similar to that articulated in support of the fiduciary doctrine: management of an organization acts for the benefit of the organization's shareholders or other constituents or, to

paraphrase Professor Imwinkelried's statement in connection with the fiduciary doctrine, management's duty to the shareholders is paramount to management's right to the privilege.

Nevertheless, there are some significant differences between fiduciaries, as in the case of employers acting for their employees with regard to an ERISA plan, and corporate management. As stated in Jack P. Friedman, *Is the* Garner *Qualification of the Corporate Attorney-Client Privilege Viable after* Jaffee v. Redmond*?,*55 BUS. LAW. 243,272-73 (1999):

> Notwithstanding the fiduciary duty that corporate management owes to corporate shareholders, modern scholarship suggest that corporate directors and officers do not manage exclusively for the benefit of shareholders. Corporate directors owe a fiduciary duty primarily to the corporation itself and a corporation may have interests that differ from those of its shareholders.

Thus, the courts do not always find an exception to the privilege in actions brought by shareholders against corporate management. The exception as stated in the leading case of *Garner* v. *Wolfinbarger* would apply only if certain criteria were met. The court in *Garner* imposed a "good cause" criteria on the shareholders seeking the benefit of the exception. The court articulated the criteria as follows(430 F.2d at 1104):

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

As in the case of the Restatement, the list of nine factors in *Garner* is reduced and embellished in subsection (f)(7). *See* Comment c. to Restatement §85. For example, one criterion that is not articulated in the exception is whether the communication is "of advice concerning the litigation itself." The Restatement comments also notes the elimination of a specific statement of such a criterion, stating (RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 85, Comment at 631):

> The factor can be misunderstood. It does not mean that all communications that might also be immunized under the lawyer work-product doctrine [internal cross-reference omitted] should be immune from discovery by a beneficiary, particularly if the communication also is subject to a "good cause" exception as work product. The factor instead refers to situations in which a second lawyer has been retained to defend the organization or its managers against the beneficiary's claim and thus the communications were not contemporaneous with the acts being challenged by the

beneficiary. Itis important that *Garner* be applied in a way that recognizes the legitimate interest of an organization in resisting a derivative or similar claim.

For a case discussing the distinction between the exception as applied with regard to pre-litigation communications from corporate management to counsel and communications between management and litigation counsel, as to which the work product privilege applies, see *In re Int'l Systems &Controls Corp. Securities Litigation,* 693 F.2d 1235, 1239 (5th Cir. 1982) (communications between management and counsel involved in litigation considered under work product privilege).

The *Garner* doctrine has been followed by many federal courts that have considered the question, usually irrespective of whether the action is derivative or brought by shareholders in their own right. *See, e.g., Fausek v. White,* 965 F.2d 126, 130-31 (6thCir. 1992)(exception applies where shareholder brought action in his own right); *In re Gen. Instrument Corp. Sec. Litig.,* 190 F.RD. 527,529 (N.D. Ill. 2000) (applies exception in derivative action); *Bailey v. Meister Brau,* 55 F.RD. 211, 213 (N.D. Ill. 1972) (conversations between corporate officer and counsel not privileged in securities law action brought by shareholder); *Valente v. PepsiCo, Inc.,* 68 F.RD. 361, 367-68 (D.Del. 1975) (communications by corporate directors owing fiduciary duties to minority shareholders not privileged in class action brought by minority shareholders). Cases have also extended the doctrine beyond the corporation to other organizations. *E.g., Nellis v. Air Line Pilots Ass 'n* 144 F.R.D. 68 (E.D. Va. 1992) (labor union).

Other courts have put limitations on its applicability. *See, e.g., Weil v. Investment/Indicators Research &Management, Inc.,* 647 F.2d 18, 23 (9th Cir. 1981)(doctrine limited to derivative actions; shareholders did not own stock at time of the suit); *In re LTV Securities Litigation,* 89 F.RD. 595,607-08 (N.D. Tex. 1981) *(Garner* exception does not apply where the communications took place after the alleged wrongdoing was completed).

Some courts have rejected the *Garner* holding and its good cause limitation. *See Shirvani v. Capital Investing Corp.,* 112 F.R.D. 389, 390-91 (D.Conn. 1986) (shareholder interests can be protected by application of the crime/fraud exception).

The Friedman article, cited above, takes the position that *Garner* establishes a balancing test for the privilege and that balancing in connection with privilege was rejected by the United States Supreme Court in cases such as *Jaffee v. Redmond,* 518 U.S. 1, 18 (1996) (psychotherapist-patient privilege must be absolute in order to be effective in promoting a free flow of information between patient and psychotherapist). Friedman would provide an absolute exception applicable in shareholder derivative actions, such as *Garner* itself, arguing that in such cases the shareholders are acting in the role of management. But he would reject the exception entirely where in non-derivative actions. Friedman, *supra* at 281.

Other writers are critical of the exception generally as inhibiting the free flow of information between management and corporate counsel. *See, e.g.,* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, § 50l.02[5][l][ii] (9th ed. 2006). The authors of that text state that if *Garner* is to apply at all, it

should be limited to shareholders derivative litigation. One of the authors of that text, Stephen A. Saltzburg, took a somewhat different position in a law review article, Stephen A. Saltzberg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases:* Garner*Revisited*, 12 HOFSTRAL. REV. 817 (1984). In that article, Saltzburg is critical of the doctrine as inhibiting the flow of information from corporate officers to the corporation's attorney. However, he is also critical of the limitation of the doctrine to derivative cases, arguing that the rationale should be the same whether the shareholders sue on behalf of the corporation or in their own right.

Like the drafters of Restatement § 85, this Survey Rule adopts what can be discerned as the prevailing federal rule there is an exception to the attorney-client privilege for communications between management and corporate or organizational counsel in actions brought by shareholders or other constituents under the circumstances set forth in subsection (f)(7). The exception applies both in derivative and non-derivative cases.

The argument that the *Garner* doctrine creates a qualified privilege, bringing in a balancing test and thus created uncertainty in the application of the privilege certainly raises a valid concern. However, one could also look at the exception not as creating a balancing test for the application of the privilege but rather as applying the exception unless the shareholder fails to bring himself or herself within the policy of the exception. In other words, the exception is absolute once the shareholder demonstrates that the cause of action he or she brings and their status entitle them to it. Similarly, although the argument that the exception should be limited to derivative actions has some appeal, one could argue that the analogy to the fiduciary doctrine is such that the shareholder himself or herself is entitled to the benefit of the communications, whether or not the suit is brought on behalf of the corporation.

This is one of the areas of the Survey Rule whose full parameters will have to await future judicial development.

APPENDIX -- SOME SIGNIFICANT ISSUES FOR FUTURE RESOLUTION

1. Government Attorneys

Proposed Federal Rule of Evidence 503 was drafted with the clear intent of including communications between government officials and government lawyers. Rule 503(a)(1) included within its definition of a "client" "a person, public officer, or corporation, association, or other organization or entity, either public or private."

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 extends the privilege to communications between government officials and their attorneys. UNIFORM RULE OF EVIDENCE 502 also covers such communications but with a significant limitation discussed below.

The federal cases confirm the existence of the privilege in at least civil cases, although limiting its application in significant ways. The application of the privilege in criminal cases, certainly in its application to grand jury subpoenas, is even more circumscribed.

Recognizing the general application of the privilege to government lawyers in many federal cases, the Survey Rule includes governmental entities within the definition of organizations in Part (a) (3). However, the full dimensions of the privilege will have to await further case development.

A. Civil cases As noted in the commentary (a)(3), the Supreme Court has upheld the privilege in a case in which a government lawyer advised federal administrators of a trust involving Indian lands. *U.S. v. Jicarilla Apache Nation,* 131 S.Ct. 2313 (2011).

The issue of attorney-client privilege as applied to a government agency in civil cases frequently occurs in the application of Exemption 5 to the Freedom of Information Act (5 U.S. § 552)(FOIA). The FOIA requires federal agencies to make public their rules, opinion, order, records and proceedings. Exemption 5,5 U.S.C. § 552(b)(5) states:

> This section does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

A significant number of opinions have stated that the attorney-client privilege protects at least some agency communications from disclosure under Exemption 5.

An example of a case in which the courts applied the privilege to government activities is *Green v. IRS,* 556 F. Supp. 79 (N.D. Ind., 1982) (privilege applied to protect communication from IRS District Counsel to U.S. Attorney requesting him to initiate proceedings to enforce an IRS summons). *See also Brinton v. Dep't of State,* 636 F.2d 600 (D.C. Cir. 1980) (privilege recognized but not applied where no showing that the attorney's communications were based on or related to confidences from the client); *Mead Data Cent., Inc. v. United States Dep't of Air Force,* 566 F.2d 242, 252-55 (D.C. Cir. 1977) (privilege recognized but not applied where insufficient showing

that it involved confidential information).

Cases applying the privilege other than in an Exemption 5 context include *Town of Norfolk v. Corps of Eng 'rs,* 968 F.2d 1438, 1457-58 (1st Cir. 1992) (privilege applied to communications between Army Corps of Engineers and United States Attorney) and *Department of Econ. Develop. v. Arthur Andersen & Co.,* 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (existence of possibility of privilege with regard to communications by a British government agency to its attorneys).

The application of the privilege to governmental operations is, however, limited by the unique nature of those operations.

For example, in *Tax Analysts v. I.R.S.,* 117 F.3d 607 (D.C. Cir. 1997), the court recognized that the attorney-client privilege may apply where the client is a government agency and the attorney an agency lawyer. The court indicated that confidential information transmitted by field personnel regarding "the scope, direction, or emphasis of audit activity" would be protected by the privilege. 117 F.3d at 618. However, citing *Schiefer* v. *United States,* 702 F.2d 233 (D.C. Cir. 1983) and *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854 (D.C. Cir. 1980) , the court held that the privilege would not apply to legal conclusions containing "neutral, objective analyses of agency regulations" based solely on information supplied by persons outside the agency. Citing *Coastal States,* 617 F .2d at 863.Indistinguishing the privilege as applied to government officials from that applied where the client is a private person, the court noted (117 F.3d at 619):

> Private attorneys, one would hope, usually give objective advice to their clients. That does not deprive their communications of the privilege's protection. But no private attorney has the power to formulate the law to be applied to others. Matters are different in the governmental context, when the counsel rendering the legal opinion in effect is making law . . . FSAs [the Field Service Advice memoranda sought in this case] issued by the Chief Counsel create a body of private law, applied routinely as the government's legal position in its dealings with taxpayers. It is this quality, not the objective character of the legal analyses in the documents, that *Schiefer* and *Coastal States* deem significant. [citing cases] Under those decisions, FOIA exemption 5 and the attorney-client privilege may not be used to protect this growing body of agency law from disclosure to the public.

The articulation of the privilege in a governmental context may be best stated in UNIFORM RULE OF EVIDENCE 502. Uniform 502 broadly defines client in a way that would include government officials and their lawyers. Rule 502(a)(I) states:

> "Client" means a person for whom a lawyer renders professional legal services or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

However, under Uniform Rule 502(d)(7), the privilege as applied to government officials is limited in a significant way. There is no privilege under that section of the Uniform Rule

> as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court

determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

The exception to the privilege set out in the Uniform Rule is not precisely in accord with cases such as *Tax Analysts* and *Coastal States* but may be a justifiable extension of the policies expressed in those cases. Inthose cases, the courts were concerned that the communication involve confidential communications rather than simply opinions on agency rules or policies. Arguably, a communication, in order to meet the confidential information requirement of cases such as *Tax Analysts,* would have to involve the kind of pending investigation and impairment of ability of act upon that claim referred to in Uniform Rule 502(d)(7). The drafters of the Uniform Rule seem to have captured the factors that would call for the application of the privilege in some government contexts and not in others. Whether the Rule becomes a basis for future federal law remains to be seen.

Criminal Cases - Grand Jury Subpoenas

Despite the application of the privilege to at least a limited extent in civil cases, some federal circuits have refused to recognize the existence of a privilege in another context – where a grand jury has sought information concerning the activities of the official. Whether those cases have captured the policies behind the privilege in the government context as well as the courts and Uniform Rule 502have in civil cases is another question.

In re Lindsey, 158 F.3d 1263 (D. C. Cir. 1998) is one of the two cases holding that legal counsel to the Office of the President could not raise the attorney-client privilege to withhold information from the grand jury. *Lindsey* arose under the extended Independent Counsel's investigation of President Clinton. Although recognizing the general applicability of the attorney-client privilege to communications between government officials and government lawyers, the court found no privilege in the face of a grand jury subpoena to the President's legal counsel. The rationale for the *Lindsey* case is not entirely clear. Indeed it seems based on several different notions. One is that the grand jury and the office of the Independent Counsel both occupy positions within the federal government. As in the case of information sought by a corporate shareholder in *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970), the information is simply sought by the entity itself-in this case the federal government. *See* 158 F.3d at 1276. But the court is also heavily influenced by the fact that the attorney in this instance serves the Office of President and the unique nature of that office cuts against the operation of the privilege. The court has difficulty distinguishing communications with attorneys from other communications between the president and his advisors which are covered by the qualified Executive Privilege rather than the absolute attorney-client privilege. 158 F.3d at 1278. The court also points to the traditional adherence, although not necessarily compelled adherence, of the Office of the President to the precepts of 28 U.S.C. § 535(b), providing that information received relating to violations of the law be reported to the Attorney General. 158 F.3d at 1274. The court also noted that much of the communications concerned the possibility of the impeachment of the president. The court finds impeachments to be "fundamentally a *political* exercise"[emphasis by the court] rather than a legal one. 158 F.3d at 1277.

The other case arising from the extended Whitewater Independent Counsel investigation is *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910 (8th Cir. 1997). The court found in that case that the privilege did not protect communication between legal counsel to the president and the president's wife, Hillary Rodham Clinton, as against a grand jury subpoena. The court in that case articulates its reasoning a little more clearly than in *Lindsey.* It finds no privilege when "an entity of the federal government seeks to withhold information from a federal criminal investigation." Thus, the court presumably does not base its decision on anything unique about the Office of the President. The court relies, in part on the executive privilege case, *United States* v. *Nixon,* 418 U.S. 683 (1974), which it notes establishes the principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes. The court also relied on the statutory duty to report criminal wrongdoing by other employees to the Attorney General. 28 U.S.C. § 4344(b) (1994). The court concluded (112 F.3d at 921:

> We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.

Lindsey and *In re Grand Jury Subpoena* may well ultimately stand for the proposition that all government attorneys must yield to a grand jury subpoena. Certainly the court in *In re Grand* uses a rationale that would seem to require such a result. However, the facts of both these cases are sufficiently unique that they may be limited to the situations involving the Office of the President, or perhaps even more limited to the dynamic circumstances surrounding the investigation of President Clinton.

There is a split between the two circuits dealing with the application of the attorney-client privilege where a federal grand jury has sought communications between a state official and a state government lawyer.

In *In re A Witness Before Special Grand Jury 2000-2 (Ryan),* 288 F.3d 289 (7thCir. 2002) the legal counsel to the Illinois Secretary of State was subpoenaed to testify before a federal grand jury concerning the activities of future Governor George Ryan when he was Secretary of State. The court held that the privilege did not apply, relying heavily on the *Lindsey* and *In re Grand Jury Subpoena* cases. The court stated (288 F.3d at 294):

> In the final analysis, reason and experience dictate that the lack of criminal liability for government agencies and the duty of public lawyers to uphold the law and foster an open and accountable government outweigh any need for a privilege in this context.

The holding in the *Ryan* case was restated in *U.S. v. Warner,* 498 F.3d 666 (7th Cir. 2007).

The Second Circuit has reached a different result under similar circumstances. In *In re Grand Jury Investigation,* 399 F.3d 527 (2d Cir. 2005), the court applied the privilege to protect

communications between counsel to the Connecticut governor and the governor and his staff against a federal grand jury subpoena. The court acknowledged the existence of the *Lindsey, In re Grand Jury Subpoena,* and *Ryan* cases. The court noted:

> We . . . reject the idea that because government employees can confer with private counsel to represent their own, individual interests, the privilege is somehow less important when applied to government counsel. The privilege serves to promote the free flow of information to the attorney (and thereby to the client entity) as well as to the individual with whom he communicates. . . . The government attorney requires candid, unvarnished information from those employed by the office he serves so that he may better discharge his duty to that office. . .

The *Lindsey* and *In re Grand Jury Subpoena* cases have been criticized in the legal literature. For example, Todd A. Ellinwood, *"In the Light of Reason and Experience": The Case for a Strong Government Attorney-Client Privilege,* 2001 WIS. L. REV. 1291, argues that those cases create a situation in which communications between government officials are unduly chilled. The author argues that government will work better in the interest of the public if officials feel free to consult with attorneys. He would deny the privilege, even in the face of a grand jury subpoena, only in the instance where the official's conduct has been "clearly illegal." *See also,* Adam M. Chud, *In Defense of the Government Attorney-Client Privilege,* 84 CORNELL L. REV. 1682 (1999) (privilege should exist as against a grand jury subpoena except for communications regarding personal issues, ongoing criminal investigations or clearly criminal activity); *Note: Maintaining Confidence in Confidentiality: The Application of the Attorney - Client Privilege to Government Counsel,* 112 HARV. L.REV. 1995 (1999) (privilege to extend in both civil and criminal cases provided that the communications concerned official rather than personal conduct).

Is there a policy justification sufficient to deny attorney-client privilege protection to any government official as against a grand jury subpoena?

As expressed by the D.C., Eighth and Seventh Circuits, there are certainly valid reasons for refusing to recognize the privilege as against a grand jury subpoena. The fact that the information is being sought by another branch of the same government is at least a significant consideration. Aneven stronger policy consideration is the fact that the government attorney has an obligation to the government generally, rather than to a particular public agency or official. Certainly, that obligation is particularly strong where the government lawyer has learned of criminal wrongdoing. Arguably, the obligation to the public to disclose the information should supersede an obligation to the government client.

None of the proposals from the law review writers to substitute a different test for denial of the privilege to government officials seems compelling. Applying the privilege except where the conduct is "clearly illegal" creates a difficult inquiry for the courts. Similarly, distinguishing "personal" from "official activity" may also be troublesome. A balancing approach suggested by the dissenting Judge Kopf in *In re Grand Jury Subpoena,* suffers from the injection of uncertainty into the privilege, something that the Supreme Court found in *Jaffee* v. *Redmond, 518* U.S. 1, 17 (1996) would "eviscerate the effectiveness of [a] privilege."

Yet, the arguments put forth by the Second Circuit in *In re Grand Jury Investigation*case and in the various law review articles against denying protection entirely also make sense. The privilege exists in order to foster a free flow of information between attorney and client. Removing the privilege in the face of a grand jury subpoena is almost certain to stifle that flow of information.

There may be no one solution to the issue. Different fact patterns may result in different judicially crafted solutions.

2. Information Intended to be Divulged and Preliminary Drafts

One of the issues as which there is no definitive federal result is the privileged status of preliminary drafts of documents ultimately disclosed to the public.

A client may provide information to an attorney for the purposes of obtaining the attorney's assistance in preparing a document to be publicly disseminated, for example, a prospectus or a tax return. Most federal cases broadly hold that no privilege attaches to information given for such a purpose because the client does not intend the information to remain confidential. *See, e.g., United States v. Hubbard,* 16 F.3d 694, 697 (6th Cir. 1994) (information communicated to attorney to be conveyed to bankruptcy trustee and court via written pleading); *In re Grand Jury Proceedings,* 33 F.3d 342 (4th Cir. 1994) (information used by counsel to prepare SEC filings); *In re Grand Jury Proceedings,* 727 F.2d 1352 (4th Cir. 1984) (communications with attorney for purpose of private placement of limited partnership interests; fact that attorney never acted on information not controlling); *United States v. Cote,* 456 F.2d 142 (8th Cir. 1972) (information contained in working papers later transcribed into tax returns). *See also,* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE §5.13 (2011).

Based on similar considerations of lack of intent for confidentiality, some federal courts have gone further and held that material underlying the published information, including preliminary drafts of letters or documents which are to be published to third parties, lack confidentiality. *E.g., United States v. (Under Seal),* 748 F.2d 871,875 n. 7 (4th Cir. 1984) ("The details underlying the published data are the communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the documents, and any attorney's notes containing material necessary to the preparation of the document."). *See also North Carolina Elec. & Light Membership Corp. v. Carolina Power & Light Co.,* 110 F.R.D. 511,517 (M.D.N.C. 1986).

Other federal courts have reached different conclusions with regard to preliminary drafts as well as information supplied for the purpose of creating such drafts, at least to the extent that the information was not ultimately disclosed. The leading case is *Schenet v. Anderson,* 678 F. Supp. 1280, 1283 (E.D. Mich. 1988), relying in large measure on *United States v. Schlegel, 313* F. Supp. 177, 179 (D. Neb. 1970). In *Schenet,* the court stated:

> [T]he attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all

documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons. With regard to preliminary drafts of documents intended to be made public, the court holds that preliminary drafts may be protected by the attorney-client privilege. Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege. The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.

Taking the same general approach is *In re Grand Jury Subpoena Duces Tecum Dated Sept.* 15, 1983 *(Marc Rich* & *Co. A.G.),* 731 F.2d 1032, 1037 (2d Cir. 1984). The issue in that case involved whether information provided an attorney that may at some point be transmitted to the client's employees generally was privileged. The court stated:

> The possibility that some of the information contained in these documents may ultimately be given to AG employees does not vitiate the privilege. First, it is important to bear in mind that the attorney-client privilege protects communications rather than information; the privilege does not impede disclosure of information except to the extent that the disclosure would reveal confidential communications. [citing case] Thus, the fact that certain information in the documents might ultimately be disclosed to AG employees did not mean that the communication to [counsel] were foreclosed from protection by the privilege as a matter of law. Nor did the fact that certain information might later be disclosed to others create the factual inference that the communications were not intended to be confidential at the time they were made. If confidentiality were not intended, of course the privilege would not attach, [citing case]; but we see no indication that confidentiality was not intended. For example, although some of the documents appear to be drafts of communications the final version of which might eventually be sent to other persons, and as distributed would not be privileged, we see no basis in the record for inferring that AG did not intend that the drafts -which reflect its confidential requests for legal advice and were no distributed to be confidential. Confidentiality may also, of course be waived; but we see no indication that a waiver has yet occurred.

See also American Nat. Bank &Trust Co. of Chicago v. *AXA Client Solutions, LLC, 2002* WL 1058776 (N.D. Ill) (only parts of draft letters ultimately disclosed to third parties via final version of the letter must be disclosed); *Muller* v.*Walt Disney Prods,* 1994 WL 801529 (S.D.N.Y. 1994)(drafts of contract would be protected, but insufficient showing of what drafts contained).

The Second Circuit's opinion in *Marc Rich* &*Co., A.G.,* may be distinguishable from the other cases protecting preliminary drafts based upon the fact that there does not seem to have been a final decision on public dissemination of the information. Even the Fourth Circuit in the *Under Seal* case recognized that privilege may still exist where the attorney is asked only to research the *possibility* of filing public papers. The court in *Under Seal* stated; 748 F.2d at 875
76:

> Only when the attorney has been authorized to perform services that demonstrated the client's intent to have his communications published will the client lose the right to assert the privilege as to the subject matter of those communications.

At least one court has followed the precedent of the *Schenet* case in a limited way, holding that privilege may attach to preliminary drafts but only "if they were prepared or circulated for the purpose of giving or obtaining legal advice and *contain information or comments not included in the final version."* (Emphasis added)*Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.,* 174 F.R.D. 609,633 (M.D. Pa. 1997).

The result in *Andritz* is criticized by one author, PAUL R.RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 5:12(2d Ed.), who states:

> This limitation is questionable because the fact that the drafts contain no additional information or comments from either the client or the attorney reveals substantive information about the content of the attorney-client communication.

Professor Rice and others strongly support the position of courts in cases like *Schenet* providing privilege protection for drafts of those documents. Professor Rice comments(Attorney-Client Privilege in the United States, § 5.12 at 5-136:

> If drafts are prepared for client approval, it is illogical to conclude that the client relinquished all expectations of confidentiality in the communications relating to and disclosed in the drafts.

Rice would extend the protection even to drafts prepared by a client for review by the attorney, so long as the attorney's communication with the public does not reveal that the information contained in it was communicated to the attorney by the client. *See also,* Paul R.Rice, *Attorney-Client Privilege:Continuing Confusion About Attorney Communications, Drafts, Pre-existing Documents, and the Source of Facts Communicated*, 48 AM. U. L.REV. 967, 996 (1999).

Professor Edward J. Imwinkelried, in The New Wigmore, Evidentiary Privileges, § 6.8.2 b, at 817 (2d ed. 2010) also supports the protection of preliminary drafts.

> While there is contra authority, the better and prevailing view is that even if the client realized that a final draft of a document would be publicly disclosed, the client might have intended that the earlier tentative drafts would be confidential. If the client understood the document to be a preliminary draft, he or she would contemplate further discussions with the attorney to complete the draft by finalizing the decisions regarding which information to insert in the ultimate version of a legal document such as a pleading. The tentative drafts generated before the final decision to "go public" are thus protected. [footnotes omitted]

The view most limiting the application of the privilege in the preliminary draft situation seems to be confined to the courts in the Fourth Circuit. The prevailing view seems to be more

receptive to the application of the privilege, at least to the extent that the drafts differ from the final form or the information conveyed is not ultimately disclosed.

The direction of the federal law on the question of preliminary drafts and related information will depend upon where the courts come out on the fundamental decision to construe the privilege narrowly, so as to maximize the information ultimately admissible in courts, or broadly, so as to limit that admission in order to protect the free flow of information between lawyer and client. A reasonable conceptual and policy argument can be made in either direction.

If the attorney-client privilege is justified only when protecting information intended to be confidential, one could argue that there is no expectation of confidentiality for information intended to be made public. Therefore, if public disclosure is the ultimate goal of the representation, all of the details leading to that disclosure should also fairly be disclosed. Anopposing party and the justice system is entitled to know the background of information public disclosed when there was no intention to keep such information confidential. Protection should be denied even if there is ultimately no disclosure because it is the client's intention at the time of communication with counsel that should be controlling.

On the other hand, if the goal of the attorney-client privilege is to encourage a free flow of communications between attorney and client, one can argue that preliminary conversations and drafts reflecting those conversations ought to be protected. Even courts taking a hard line against the application of the privilege in connection with information to be publicly disclosed have held that the privilege should apply where the client is unsure as to whether there would ultimately be disclosure. *See United States* v. *(Under Seal),* 748 F.2d 871, 875-76 (4thCir. 1984). Based on the same notion, one could argue that the client and her attorney ought to be able to discuss the precise terms of disclosure without the risk that matters ultimately determined not to be disclosed, perhaps with the advice of counsel, would be unprivileged. Thus, a discussion of the precise terms with counsel, as well as information supplied for the possibility of disclosure but not disclosed ought to be protected. Similarly, drafts, at least those containing differences from the final draft and/or comments of counsel, ought similarly to be protected. Such protection would serve the goal of furthering communication between attorney and client. Even under this argument, drafts identical to the original should probably be unprotected, although, as Professor Rice argues, even those drafts may reflect communications. Such a view would be consistent with the generally recognized notion that the privilege protects communications not information. *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated Sept.* 15, 1983 *(Marc Rich &Co. A.G.),* 731 F.2d 1032 (2d Cir. 1984).

3. Determining the Existence of the Crime-Fraud Exception

Perhaps the most difficult issues facing the federal courts with regard to the crime-fraud exception to the attorney-client privilege involve the procedure and standards for determining its application. Although the standard for ordering an *in camera* review of allegedly privileged documents was clearly articulated in *United States* v. *Zolin,* 491 U.S. 554 (1989), questions and conflicts exist among the circuits with regard to several other important matters. Included in the issues not fully or consistently resolved by the case law are: 1) whether an *in camera* review is

required or whether the exception can be applied without such a review; 2) the ultimate showing necessary to vitiate the privilege; 3) whether and how the claimed privilege holder may rebut a prima facie showing that the communications were within the exception; 4) what evidence may be considered by the court in reaching either its threshold or ultimate decision; 5) how the court may discern the client's intent to commit a crime or fraud; and 6) whether the exception applies only to words that are themselves in furtherance of a crime or fraud or whether it applies to the entire conversation or document in which the words were spoken or appear.

The uncertainty and the seeming ease with which the exception may be used to abrogate the privilege have been of concern, especially to the criminal defense bar. The procedure for applying the exception came under particularly strong attack in a report of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* 27 (2002), where it is argued:

> The current rules allow prosecutors to obtain an *in camera* review based on unsubstantiated information that they may have collected through an unlawful intrusion into the privilege, without giving defendants an opportunity to challenge the reliability or validity of that evidence.

The report quotes with approval from H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling,* 87 Ky. L. J. 1191, 1259-60 (1999):

> The absence of notice of the basis of the crime-fraud claim further aggravates the inability of the privilege holder to meaningfully respond and to preserve the privilege. The court is also deprived of the robust factual development and legal argument necessary for an informed judicial decision.

As will be discussed, the case law seems to justify some concern. Whether, all factors being considered, the procedure needs changing is a question to be resolved elsewhere.

A. The threshold determination for *in camera* review

The Supreme Court in *Zolin* required a party seeking to apply the exception to show "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish that the crime-fraud exception applies." 491 U.S. at 572. Not surprisingly, virtually all circuits adopt this language verbatim. *See, e.g., In re Sealed Case,* 107 F.3d 46 (D.C. Cir. 1997); *United States v. Edgar,* 82 F.3d 499 (1st Cir. 1996); *Haines v. Liggett Group, Inc.,* 975 F.2d 81 (3d Cir. 1991); *In re Grand Jury Proceedings, Thursday Special Grand Jury September Term,* 1991,33 F.3d 342 (4th Cir. 1994); *In re Grand Jury Subpoena,* 190 F.3d 375 (5th Cir. 1999); *In re BankAmerica Corp. Secs. Litig.,*270 F.3d 639 (8th Cir. 2001); *United States v. Chen,* 88 F.3d 1495 (9th Cir. 1996); *Motley v. Marathon Oil Co.,* 71 F.3d 1547 (10th Cir. 1995); *Cox v. Administrator United States Steel &Carnegie,* 17 F.3d 1386 (11th Cir. 1994). Only the Second Circuit varies the formulation, describing the threshold showing as "a

factual basis [that] must strike 'a prudent person' as constituting 'a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.'" *United States v. Jacobs,* 117 F.3d 82, 87 (2d Cir. 1997)*(quoting in re John Doe,* l3 F.3d 633,637 (2d Cir. 1994)).

This threshold burden has been described as "sufficiently low to discourage abuse of privilege and to ensure that mere assertions of the attorney-client privilege will not become sacrosanct." *In re Grand Jury Investigation,* 974 F.2d 1068, 1072 (9th Cir. 1992). However, other courts have noted that the threshold is not so low as to allow the mere allegation of a crime or fraud to vitiate the privilege and thus "discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas." *In re Grand Jury Proceedings (Corporation),* 87 F.3d 377,381 (9th Cir. 1996). The burden requires that the proponent of the exception make a "specific showing that a particular document or communication was made in furtherance of the client's alleged crime or fraud." *In re Bankamerica Corp. Sees. Litig.,*270 F.3d 639, 642 (8th Cir. 2001). The burden required by the Court in *Zolin* is seen as striking "a balance between the intrusion imposed upon the privilege by the *[in camera]* review process and the likelihood that *in camera* review may reveal evidence to establish the applicability of the crime-fraud exception." *In re Grand Jury Investigation,* 974 F.2d 1068, 1072-3 (9th Cir. 1992) (citing *Zolin,* 491 U.S. at 572).

B. Is *in camera* review required?

Zolin established that, once the threshold showing is made, the decision to engage in *in camera* review rests in the "sound discretion of the district court." 491 U.S. at 572. The Court added:

> The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of additional evidence will not unduly disrupt or delay the proceedings. *Id.*

Zolin does not consider the question of whether *in camera* review is *required* before a decision is made to apply the crime-fraud exception. In *In re Bankamerica Corp. Secs. Litig.,*270 F.3d 639, 644 (8th Cir. 2001), the court reversed a decision in which the district court had found the crime-fraud exception applicable without an *in camera* review of the documents. The court stated that it had found no case "in which this court affirmed an order to produce documents under the crime-fraud exception where the district court did not first review the documents *in camera."* The court added:

> Requiring a threshold showing of facts supporting the crime-fraud exception followed by *in camera* review of the privileged materials helps ensure that legitimate communications

> by corporations seeking legal advice as to their disclosure obligations under the federal securities laws are not deterred by the risk of compelled disclosure under the crime-fraud exception. Therefore, district courts should be highly reluctant to order disclosure without conducting an *in camera* review of allegedly privileged materials. In this case, given the above-described shortcomings of plaintiffs' threshold showing, the district court abused its discretion in ordering disclosure without *in camera* review of the eleven documents. *Id.*

In *In re Grand Jury Proceedings,* 417 F.3d 18 (1st Cir. 2005), the government withdrew its request for *in camera*review, relying only on the other evidence it had produced. The district court applied the crime-fraud exception, finding the factual basis sufficient. The Court of Appeals upheld the application of the exception, stating:

> Despite *Zolin's* mention of discretion, conceivably on some facts a district court might abuse its discretion by declining toconduct an *in camera* review prior to piercing the privilege. But a categorical rule would be unwise . . . (417 F.3d at 22, n. 3)

In *In re Grand Jury Proceedings #5 Empanelled January 28, 2004,* 401 F.3d 247 (4th Cir. 2005), the district court had reviewed other evidence without examining the privilege documents *in camera.*Although it did not hold that *in camera* review was required, the Court of Appeals remanded the matter finding that the evidence was insufficient for the court to have concluded that there was a close relationship between the privileged communications and an existing or future scheme. The court ordered that the district either examine the "actual documents (or summaries thereof) *in camera* or to otherwise determine" whether they show the close relationship required.

C. The ultimate showing required

Once the threshold showing has been made and *in camera* review undertaken, what test is to be applied by the court in determining the applicability of the exception – the ultimate showing? The court in *Zolin* expressly declined to address that issue as not being before it. *Zolin,* 491 U.S. at 564-65.

A commonly cited phrasing of the ultimate showing was articulated in *In re Grand Jury Proceedings,* 183 F.3d 71, 75 (1999):

> [T]he party invoking [the crime-fraud exception] must make a prima facie showing: (1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.

As noted by the Supreme Court in *Zolin,* the term *"prima facie,"* although commonly used to describe the ultimate showing for the application of the crime-fraud exception, is confusing when used in this context. *See Zolin,* 491 U.S. at 565, n. 7. The more common use of the term *"prima facie"* is to connote a shifting or at most a preliminary satisfaction of a burden of going forward, rather than a determination of an issue. Yet, as used in this context, the showing is sufficient to dispel the privilege altogether without necessarily affording the client an opportunity

to rebut the *prima facie* showing. Id. *(citing* Note, 51 Brooklyn L. Rev. 913,918-19 (1985)). The Court declined to resolve the confusion and the use of the term persists. *See, e.g., United States* v. *Davis,* 1 F.3d 606, 609 (7th Cir. 1993); *United States* v. *Chen,* 99 F.3d 1495, 1503 (9th Cir. 1996); *In re Sealed Case,* 107 F .3d 46, 50 (D.C. Cir. 1997).

How much proof is sufficient to establish such a *prima facie* case? While it is clear that the standard is not "beyond a reasonable doubt," *see, e.g., United States* v. *Chen,* 99 F.3d 1495, 1503 (9th Cir. 1996) ("[P]roof beyond a reasonable doubt is not necessary to justify application of the crime fraud exception."), courts have pondered whether "[i]n terms of the level of proof, . . .a 'prima facie showing' [is] a preponderance of the evidence, clear and convincing evidence, or something else." *In re Sealed Case,* 107 F.3d 46, 50 (D.C. Cir. 1997).

The burden is less than "clear and convincing evidence" and almost as certainly less than even a "preponderance of the evidence." The Third Circuit, for example, has stated that the ultimate showing "requires presentation of evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met." *In re Grand Jury Subpoena,* 223 F.3d 213, 217 (3d Cir. 2000). The Seventh Circuit, on the other hand, has described the evidentiary showing necessary to satisfy the ultimate showing burden as "something to give colour to the charge [that the crime-fraud exception applies]; there must be 'prima facie evidence that it has some foundation in fact.'" *United States* v. *Davis,* 1 F.3d 606,609 (7th Cir. 1993) *(quoting Matter of Feldberg,* 862 F.2d 622, 625 (7th Cir. 1985)). The Court went on to state that "'prima facie evidence' [does] not mean 'enough to support a verdict in favor of the person making the claim,'" but rather "evidence sufficient 'to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation.'" *Id.* Finally, the Court noted that "if the district court finds such an explanation satisfactory 'the privilege remains.'" *Id.See also,U.S. v. BDO Seidman, LLP,* 492 F.3d 806 (7th Cir. 2007) (no requirement that the opponent of the privilege make out a prima facie case of each element of a particular crime or common law fraud the invoke the crime-fraud exception. The evidence need only “give colour to the charge” by showing “some foundation in fact.”).

The Sixth Circuit stated that the ultimate, or prima facie, showing "is the same as that for demonstrating probable cause--such that 'a prudent person [would] have a reasonable basis to suspect the perpetration of a crime or fraud' --and not as demanding as the ‘clear and convincing' threshold." *United States* v. *Clem,* 2000 U.S. App. LEXIS 6395 at *1 0 (6th Cir. Mar. 31, 2000).

The Ninth Circuit described the ultimate showing burden in a criminal case as requiring evidence creating '"reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme,” ‘United *States* v. *Chen,* 99 F.3d 1495, 1503 (9th Cir. 1996) *(quoting In re Grand Jury Proceedings (The Corporation),* 87 F.3d 377, 381 (9th Cir. 1996)). and then defined "reasonable cause" as "more than suspicion but less than a preponderance of the evidence." The Ninth Circuit has also held that in a civil case the burden is on the opponent of the privilege to show the elements of the crime-fraud exception by a preponderance of the evidence. *In re Napster, Inc. Copyright Litigation,* 479 F3d 1078 (9th Cir. 2007).

One court sought to review the tests in the various courts, stating in *In re Grand Jury Subpoenas,* 144 F.3d 653,660 (10th Cir. 1998):

> Although the exact quantum of proof necessary to meet the prima facie standard has not been decided by the Supreme Court, see *Zolin*, 491 U.S. at 563-64 &n. 7, 109 S.Ct. 2619, several circuits have attempted to define precisely what the standard requires. See, e.g., *In re Richard Roe, Inc.,*68F.3d 38, 40 (2d Cir.1995)(probable cause to believe a crime or fraud has been committed);*Haines* v. *Liggett Group Inc.,* 975 F.2d 81, 95-96 (3d Cir.1992)(evidence that if believed by the fact finder would be sufficient to support a finding that the elements of the crime-fraud exception were met); *In re International Sys. & Controls Corp. Sec. Litig.,* 693 F.2d 1235,1242 (5th Cir. 1982) (evidence such as will suffice until contradicted and overcome by other evidence);*United States* v. *Davis,* 1 F.3d 606, 609 (7th Cir. 1993) (evidence presented by the party seeking application of the exception is sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege); *In re Grand Jury Proceedings (Appeal of Corporation),* 87 F.3d 377, 381 (9th Cir.1996)(reasonable cause to believe attorney was used in furtherance of ongoing scheme); *In re Grand Jury Investigation (Schroeder),* 842 F.2d 1223, 1226 (llth Cir. 1987)(evidence that if believed by the trier of fact would establish the elements of some violation that was ongoing or about to be committed);*In re Sealed Case,* 107 F.3d 46, 50 (D. C.Cir. 1997) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud). We need not articulate the exact quantum of proof here because under any of these announced standards, the government has made a prima facie showing.

Similarly, in *In re Grand Jury Proceedings,* 417 F.3d 18, 23 (1st Cir. 2005), the court stated:

> As we read the consensus of precedent in the circuits, it is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud. The circuits although divided on articulation and on some important practical details all effectively allow piercing of the privilege on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud. This is a compromise based on policy but so is the existence and measure of the privilege itself.

At some point, the Supreme Court is likely to weigh in on the issue of the ultimate showing establishing what exactly is meant by *prima facie* in this context and how much proof is necessary to satisfy that burden. Until then, each circuit is committed to a test that is at least slightly different from each of its sister circuits.

D. Rebuttal by the Proponent of the Privilege

At least some of the cases seeking to set a standard of proof for the ultimate application of the crime-fraud privilege assume that once the *prima facie* showing has been made, the proponent of the privilege will have an opportunity to come forward with its own evidence to support the privilege. *See, e.g., United States v. Davis,* 1 F.3d 606, 609 (7th Cir. 1993). The reality is not so clear. Although the courts have recognized that the "crime-fraud standard does seem to contemplate the possibility that the party asserting the privilege may respond with evidence to

explain why the vitiating party's evidence is not persuasive," *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 352 (4th Cir. 1994), whether this opportunity for rebuttal is actually given will probably depend upon the nature of the case and the context of the inquiry. Cases that involve grand jury inquiries are in a different category from those that do not.

Grand jury cases present a unique struggle for the courts, as the ideals of protecting the secrecy of grand jury proceedings on the one hand, and protecting the due process rights of a criminal defendant on the other, come squarely into conflict. When faced with this conflict, the First Circuit stated:

> The law seems well-settled that, in the context of grand jury proceedings, the government may proffer ex parte the evidence on which it bases its claim that a particular privilege does not apply, and that the court may weigh that evidence, gauge its adequacy, and rule on the claim without affording the putative privilege holder a right to see the evidence proffered *or an opportunity to rebut it.*

In re Grand Jury Proceeding (Violette), 183 F.3d 71, 79 (1st Cir. 1999) (emphasis added) *(Violette* dealt with the crime-fraud exception in the context of the psychotherapist-patient privilege, but relied upon the established law regarding the crime-fraud exception in the realm of attorney-client privilege as the basis for its decision).

A ruling such as that in the *Violette* case does not translate to an absolute lack of opportunity to ever rebut the prima facie case in a criminal proceeding involving a grand jury. For example, the district court provided the defendant in that case an opportunity to provide argument on why the privilege should not be vitiated. *Violette* 183 F.3d at 73. Rather, the position of the First Circuit was that a defendant does not have the right to see, and therefore specifically rebut, the government's submission in support of the crime-fraud exception *if* that submission warrants protection due to the secret nature of the grand jury. The Second,[1] Third,[2] Fourth[3] Eighth,[4] and

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[1]*See* John Doe, Inc. v. United States (In re John Doe, Inc.), 13 F.3d 633 (2d Cir. 1994) ("Appellants were thus properly denied access to the sealed affidavit, and *any resultant limit on their ability to rebut the government's submission was of marginal importance* and not violative of due process." *Id.* at 636. (emphasis added)).

[2]*See* In re Grand Jury Proceeding Impounded, 241 F.3d 308, 318 n.9 (3d Cir. 2001). The Court stated that "[b]ecause the need for secrecy in grand jury proceedings prohibits an adversarial proceeding regarding ex parte, *in camera* evidence, courts may rely exclusively on ex parte materials in finding sufficient prima facie evidence to invoke the crime-fraud exception." The Court went on to say that our judicial system must place reliance '"on the district court's discretion and appellate review of the exercise of that discretion to ensure that the power of the grand jury is not abused while preserving the secrecy that is a necessary element of the grand jury process.'" *Id.*(quoting In re Grand Jury Subpoena, 223 F.3d 213,219 (3d Cir. 2000)).

[3]*See* United States v.Under Seal (In re Grand Jury Proceedings), 33 F.3d 342, 352-53 (4th Cir. 1994). Faced with the defendant's argument that he should have been allowed access to the *in*

Tenth'[5] Circuits are in accord with this decision, refusing to require an opportunity to review and rebut evidence presented to establish a prima facie case that the crime-fraud exception applies when confronted with the need to protect the secrecy of grand jury proceedings. *See also In re Grand Jury Proceeding Impounded*, 241 F.3d 308, 318 n9 (3d Cir. 2001) ("Because the need for secrecy in grand jury proceedings prohibits an adversarial proceeding regarding ex parte, *in camera* evidence, *courts may rely exclusively on exparte materials in finding* sufficient prima facie evidence to invoke the crime-fraud exception ..." (emphasis added).

The problem for the defendants in these grand jury criminal cases is that an opportunity to rebut the government's assertion that the crime-fraud exception applies is severely limited if the court relies solely on material protected as grand jury material, as the court is entitled to do, because the defendant will have no access to the material and, therefore, little or no idea what type of evidence, or the strength of that evidence, he is trying to rebut.

The limitations on rebuttal by the defendant in grand jury inquiries ordinarily do not apply in other criminal cases. For example, the Third Circuit has noted that "[w]here there are no secrecy or confidentiality imperatives ...there would seem to be no impediment to permitting the attorney to challenge the government's prima facie evidence, subject also to the Supreme Court's admonition to avoid 'minitrials.'" *In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 n9 (3d Cir. 2001). Similarly, the Fourth Circuit has recognized the opportunity for rebuttal envisioned by the crime-fraud exception. *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 352 (4th Cir. 1994) ("The crime-fraud standard does seem to contemplate the possibility that the party asserting the privilege may respond with evidence to explain why the vitiating party's evidence is not persuasive.").

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camera submission of the government and, following that review, a chance to rebut the evidence, the Court stated that "[h]owever appealing [the argument] may sound, we have [previously] rejected such an argument ...the government has the right to preserve the secrecy of its submission because it pertains to an on-going investigation." *Id.* at 353.

[4]*See* In re Grand Jury Subpoena as to C97-216, 187 F.3d 996 (8th Cir. 1999). The district court informed defendant's attorney that the defense "could also file an argument or brief concerning the application of the crime-fraud exception ...appellant's counsel did neither." *Id.* at 997.The Eighth Circuit, in response to defendant's argument that he should have been allowed to "inspect and rebut the [ex parte] affidavit," *id.*at 997-98, agreed with the government that there was no error in refusing to allow the defendant access to the ex parte submission., *See id.* at 998.

[5]*See* Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653 (10th Cir. 1998). The Court stated that "[t]he district court did not abuse its discretion in refusing to allow Intervenor to review the contents of the government's ex parte, *in camera* submission and in refusing to hear rebuttal evidence," *id.* at 663, and went on to note that the district court had in fact "entertained some of counsel’s arguments intended to rebut the government's prima facie showing." *Id.*

Language in Ninth Circuit cases casts some doubt on the uniformity of an approach to be taken in non-grand jury cases. Although the Ninth Circuit cases involve grand jury proceedings, the opinions in those cases seem to reach beyond that context. *In re Grand Jury Proceedings (Doe),* 1993 U.S. App. LEXIS 1247 at *3-4 (9th Cir. Jan. 22, 1993) was an appeal from the district court's refusal to hold "an adversarial evidentiary hearing on whether the crime-fraud exception applie[d] to the information that the government [sought] from Roe's attorney, Doe." After reviewing the case law from its sister circuits, the Ninth Circuit held "that an adversarial minitrial is not required to determine whether the government shows a prima facie foundation for application of the crime-fraud exception." *Id. at* *8. This holding is in line with the decisions of the other circuits. *See, e.g., In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 (3d Cir. 2001) ("...subject also to the Supreme Court's admonition to avoid 'minitrials'"); *In re Grand Jury Proceedings (Vargas),* 723 F.2d 1461, 1467 (10th Cir. 1983) (the case cited by the Ninth Circuit as support for its holding). However, the Court went on to state that while the district court could consider rebuttal evidence, there was no requirement that this be done so long as the district court judge was satisfied that the proponent of the exception had met its burden, adding:

> [I]t is difficult to see how specification of any further requirements [that that the judge may, in his discretion, take evidence from the proponent of the privilege into consideration] could reduce the chance of mistake. *Requiring the district court to hear the client's rebuttal to the government's prima facie proffer would in many cases serve no purpose because the government's proof is clear.* Furthermore, the Supreme Court has cautioned that needless 'procedural delays and detours' in grand jury proceedings frustrate the public's interest in 'fair and expeditious administration of the criminal laws. *Id. at* *11 (emphasis added) *(quoting* United States v. R. Enter., Inc., 498 U.S. 292, 298-99 (1991).

Although the court's remarks could well be limited to the grand jury context, they are also arguably applicable to other situations in both criminal and civil cases. The Ninth Circuit followed this case with *In re Grand Jury Subpoena* 92-1 *(SJ),* 31 F.3d 826, 830 (9th Cir. 1994), in which the court stated (without reference to *In re Grand Jury Proceedings (Doe),* that while it is not improper for a district court to consider evidence offered by the proponent of the attorney-client privilege, there is no requirement that such a hearing take place.

On the other hand, the Ninth Circuit has taken a very different stand with regard to the rebuttal of evidence of crime or fraud in a civil case. In *In re Napster, Inc. Copyright Litigation,* 479 F.3d 1078 (9th Cir. 2007), the court held that in civil cases where outright disclosure is requested the party seeking to preserve theprivilege has the right to introduce countervailing evidence.

The Ninth Circuit's approach to the determination of the existence of the privilege in civil cases is consistent with that of other circuits. As with the non-grand jury cases, the lack of secrecy imperatives in most civil cases removes the "impediment to permitting the attorney to challenge the government's prima facie evidence."*In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 n.9 (3d Cir. 2001) (noting that "[i]n the civil context, we have permitted" the opportunity to challenge the evidence constituting the prima facie case of the crime-fraud exception's applicability). Without the off-setting grand jury concerns, "fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and

argument, at the hearing seeking an exception to the privilege." *Haines v. Liggett Group, Inc.,* 975 F.2d 81, 96 (3d Cir. 1992). The court in *Haines* added that adequate protection of the attorney-client privilege can only be assured "when the district court undertakes a thorough consideration of the issue, *with the assistance of counsel on both sides of the dispute." Id.* (emphasis added) (citing *Matter of Feldberg,* 862 F.2d 622 (7th Cir. 1988).

E. Evidentiary considerations at each stage of the crime-fraud analysis

Just as the burden place on the proponent of the crime-fraud exception is different at each stage of the two-step analysis, the evidence that may be present at each stage is also different.

a. The threshold inquiry

The rule controlling this difference is found in *Zolin,* where the Court described the evidence that may be used during the threshold showing as "any relevant evidence, lawfully obtained,[6] that has not been adjudicated to be privileged." *United States v. Zolin,* 491 U.S. 554, 575 (1989). Although the proponent of the exception may not use privileged documents, communications, or other materials in making the threshold showing, the *Zolin* court held that "evidence directly but incompletely reflecting the content of the contested communications, generally will be strong evidence of the subject matter of the communications themselves," *id.* at 573, and that so long as the material submitted by the proponent of the exception "has not itself been determined to be privileged, its exclusion does not serve the policies which underlie the attorney-client privilege," *id.* at 574 n.12. and the material may be used "not only in the pursuit of in camera review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies." *Id.*

The courts of appeals often give only a brief description of the material submitted by the proponent of the exception to make the threshold showing.[7] For example, the court may disclose that the proponent of the exception simply presented "an *in camera, ex parte* good faith statement of evidence as to the alleged criminal activity,"[8] without describing what information the statement actually contained. The descriptions, however, are nevertheless helpful as examples of materials the courts of appeals have found useful for threshold showings in the past. Examples of

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[6]Although this issue does not appear to arise often, the lawful obtaining of the proponent's evidence has nevertheless been challenged by some litigants. *See, e.g.,*In re Sealed Case, 162 F.3d 670,67374 (D.C. Cir. 1998) (in which Monica Lewinsky challenged as unlawful the obtainment of tape recorded conversations she had with Linda Tripp).

[7] One reason for the lack of information available is that many of these cases involve on-going grand jury investigations. Almost half of the federal courts of appeals cases that at least mention both the crime-fraud exception and the attorney-client privilege are set in the context of secret grand jury proceedings.

[8]Intervenor v. United States, 144 F.3d 653, 657 (10th Cir. 1998).

threshold submissions include: summaries of grand jury testimony;[9] grand jury documents;[10]government affidavits;[11] tape recordings;[12] affidavits of FBI and Customs agents;[13] sworn declarations of corporation "insiders;"[14]rulings and opinions of trial judges from previous proceedings in the same case;[15] exhibits created by the proponent of the crime-fraud exception;[16] transcripts of telephone conversations;[17] press releases;[18] company profit and loss statements;[19] telephone records;[20] and business invoices.[21] On the rare occasion that a more in-depth

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[9]*See* In re Sealed Case, 162 F.3d 670, 673-74 (D.C. Cir. 1998); In re Grand Jury Proceedings, 33 F.3d 342,345 (4th Cir. 1994); In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001); John Roe, Inc. v. United States, 142 F.3d 1416, 1419 (11th Cir. 1998).

[10]*See* In re Sealed Case, 162 F.3d 670, 673-74 (D.C. Cir. 1998); In re Grand Jury Proceedings, 33 F.3d 342,345 (4th Cir. 1994); John Roe, Inc. v. United States, 142 F.3d 1416, 1419 (11th Cir. 1998).

[11]*See* In re John Doe, Inc., 13 F.3d 633,635 (2d Cir. 1994); In re Grand Jury Subpoena, 223 F.3d 213,219 (3d Cir. 2000); In re Grand Jury Subpoena as to C97-216, 187 F.3d 996 (8th Cir. 1999); In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826,830 (9th Cir. 1994).

[12]*See* United States v. Jacobs, 117 F.3d 82, 87-88 (2d Cir. 1997).

[13]*See* In re John Doe, Inc., 13 F.3d 633, 635 (2d Cir. 1994); United States v. Clem, 2000 U.S. App. LEXIS 6395 at *2 (6th Cir. Mar. 31,2000).

[14]*See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[15]*See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[16]*See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[17]*See* United States v. Clem, 2000 U.S. App. LEXIS 6395 at *2 (6th Cir. Mar. 31, 2000).

[18]*See* In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001).

[19]*See* In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001).

[20]*See* In re Grand Jury Subpoena 92-1 (SJ), 31 F.3d 826, 830 (9th Cir. 1994) (government submitted an affidavit based, in part, on phone records of the subject of the grand jury investigation).

[21]*See* In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994) (government submitted an affidavit based, in part, on invoices of the subject of the grand jury investigation).

description of the contents of the threshold submission is given, the description clearly evinces the requirement that "it isn't enough for the government merely to allege that it has a *sneaking suspicion* the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney,"[22] as in each case the proponent of the exception made very specific allegations and statements of fact.[23]

b. The ultimate showing

Once the threshold showing has been made and the proponent of the exception attempts to make the ultimate showing that the exception applies, the evidence available for consideration expands. The Supreme Court, in *Zolin,* made clear that in the ultimate showing stage the court may take into account the contested communications in conjunction with the other evidence. 491 U.S. 554, 569 (1989) "In our view, the costs of imposing an absolute bar to consideration of the communications *in camera* for purpose of establishing the crime-fraud exception are intolerably high . . .A *per se* rule that the communications in question may never be considered creates, we feel, too great an impediment to the proper functioning of the adversary process.". *See also United States v. Edgar,* 82 F.3d 499, 509 (lst Cir. 1996); *John Doe, Inc. v. United States (In re John Doe, Inc.),* 13 F.3d 633, 637 (2d Cir. 1994); *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 350 (4th Cir. 1994); *In re BankAmerica Corp. Secs. Litig.,* 270 F.3d 639, 641-42 (8th Cir. 2001); *United States v. De La Jara,* 973 F.2d 746, 748 (9th Cir. 1992).

c. Non-documentary evidence

The evidence presented in support of, or in opposition to, application of the crime-fraud exception is not limited to documentary evidence. This principle is evident from the Supreme Court's language in *Zolin* that "the court is not required to avert its eyes *(or close its ears)." Zolin,* at 568. Not surprisingly, the court may hear and consider argument on the application of the crime-fraud exception at both the threshold stage[24] and the ultimate showing stage of the inquiry.[25] Additionally, it is permissible for the court to

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[22]In re Grand Jury Proceedings (Corporation), 87 F.3d 377, 381 (9th Cir. 1996) (emphasis added).

[23]*See* In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994); United States v. Jacobs, 117 F.3d 82, 87-88 (2d Cir. 1997); In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[24]*See, e.g.,* John Doe, Inc. v. United States (In re John Doe, Inc.), 13 F.3d 633,637 (2d Cir. 1994) ("The district court proceeded to an in camera review of the allegedly privileged communication only after oral argument and after the threshold showing required by Zolin was made. Then, on the basis of information garnered from the affidavit, oral argument and the in camera examination of the attorney, it determined that the crime-fraud exception had been established.")

[25]*See, e.g.,* Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 657 (10th Cir. 1998) (" ...the court did allow counsel for Intervenor to present arguments intended to rebut

conduct an *in camera* interview of a witness when determining whether the appropriate evidentiary showing in support of the exception's application has been made. *See, e.g., In re Grand Jury Subpoena as to C97-216,* 187 F.3d 996, 997 (8th Cir. 1999) ("The court informed them that based on its review of the affidavit and supporting materials, the government had made a threshold showing to justify *an in camera examination of the attorney to determine if the crime-fraud exception applied."* (emphasis added); *John Doe, Inc. v. United States (In re John Doe, Inc.),* 13 F.3d 633, 635 (2d Cir. 1994) ("The district court then concluded on the basis of the affidavit that the threshold showing bad been made, and it decided to question the attorney in camera."). As with other forms of evidence submitted by the proponent of the crime-fraud exception, there is no requirement in criminal grand jury cases that the proponent of the privilege be allowed access to the live testimony considered by the court. *See, e.g., John Doe, Inc. v. United States (In re John Doe, Inc.)* at 637 (noting first that the district court "decided to question the attorney in camera . . . because of a concern for preserving grand jury secrecy, [the district court] denied the requests of the attorney's and appellants' counsel that they be permitted to be present during the examination," and then that "[i]n light of the district court's legitimate concern that the secrecy of the grand jury be preserved, its in camera examination of the attorney was the most effective method of determining that the crime fraud exception bad been established"). Moreover, at least where the person questioned by the judge is a potential grand jury witness, it is permissible for a district court to order that the witness not be interrogated by the proponent of the attorney-client privilege after the *in camera* examination, *see John Doe, Inc. v. United States (In re John Doe, Inc.)* at 637 and to refuse a subsequent request by the proponent of the attorney-client privilege to review the *in camera* examination. *See In re Grand Jury Subpoena as to C97-216,* 187 F.3d at 998 (". . .appellant's counsel stated the relief he really was seeking was an opportunity to review the *in camera* examination . . .we know of [no] right appellant has to such review.").

d. Determining the intent of the client

Once the judge begins to consider the evidence presented by the proponent of the crime-fraud exception, the intent of the proponent of the privilege becomes a central issue. Specifically, the court must determine "whether the client made or received the otherwise privileged communication with the intent to further [or conceal] an unlawful or fraudulent act," *In re Sealed Case,* 223 F.3d 775, 778 (D.C. Cir. 2000), because the mere fact that "some communications may be related to a crime is not enough to subject the communication to disclosure." *In re Antitrust Grand Jury,* 805 F.2d 155, 168 (6th Cir. 1986).

In some cases, such as when the attorney is intimately involved in the crime or fraud with her client, the issue of intent will be clear-cut. However, in most cases the issue of intent will be more opaque. These crime-fraud cases, as with cases in other areas of the law in which intent is an issue, often require that the intent be inferred from other evidence and circumstances. *See, e.g.,*

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the prima facie showing.").

United States v. Wonderly, 70 F.3d 1020, 1023 (8th Cir. 1995) (stating that "[i]ntent to defraud need not be shown by direct evidence; rather, it may be inferred from all the facts and circumstances surrounding the defendant's actions."); *Florence Mfg. Co. v. Dowd,* 189 F. 44,46 (2d Cir. 1911) (stating, in an unfair competition case, that "in many of these unfair competition cases, the fraudulent intent is inferred from the facts"). As the Eighth Circuit noted, "since the condition of the mind is rarely susceptible to direct proof, recourse must be to all pertinent circumstances." *United States v. Hardesty,* 645 F.2d 612, 614 (8th Cir. 1981).

One circumstance considered by the courts is whether the attorney provided actual services at the behest of her client, such as the filing of documents or the making of statements to investigators, that served to further or conceal the crime or fraud. For example, in *In re Sealed Case,*754 F.2d 395, 402 (D.C. Cir. 1985), the court considered the clients' use of their attorneys to present perjured testimony and "file and verify the authenticity of false documents" as evidence of the client's intent. Similarly, in *United States v. Under Seal (In re Grand Jury Proceeding),* 102 F.3d 748, 752 (4th Cir. 1996), the Fourth Circuit considered the client's use of its attorneys to "file pleadings, documents, and to write letters" to legitimize an illegal loan as evidence of the client's intent. Finally, in *United States v. Chen,* 99 F.3d 1495,1503-04 (9th Cir. 1996), the Ninth Circuit considered as evidence of intent the defendants' use of their attorneys to prepare fraudulent customs corrective disclosures designed to further and conceal fraudulent Customs and income tax dealings. The court in *Chen* noted that the evidence tended to show that the defendants were "proposing to make a fraudulent corrective disclosure to Customs in order to evade income taxes," *id.* and "were using their lawyers to help prepare the paperwork for this fraudulent scheme, and using their prestige in the customs bar to hide it." *Id.*

Another circumstance considered by the courts of appeals is whether the client has already set upon a criminal course when she sought the assistance of counsel, which assistance served to further or conceal the crime or fraud. In *United States v. Jacobs, 117* F.3d 82, 88 (2d Cir. 1997), the defendant was involved in a fraudulent debt elimination program. Before engaging his attorney in an investigation of the program's merits, the defendant "had already agreed to host a seminar [for the fraudulent program] in Cincinnati and obtained a false driver's license, social security card and juristic identification in Mexico." *Id.* After receiving his attorney's evaluation, the defendant "used the communications to lend credibility to the scheme, by telling prospective customers that his attorney declared the program legal." *Id.* at 89. The Second Circuit court of appeals concluded, based on this evidence, that it was "reasonable to believe...that Jacobs' intent in securing Attorney Swob's opinion was to further his Debt Elimination Plan." *Id.*

The Ninth Circuit reached a similar conclusion in *United States v. Martin,* 278 F.3d 988,1001 (9th Cir. 2002). In *Martin,* the defendant established a sham company that posed as the United States division of a legitimate Hong Kong corporation, and that was "created solely to defraud legitimate businesses." *Id.* In holding that the crime-fraud exception vitiated the attorney-client privilege otherwise applicable to communications between the defendant and attorney, the Ninth Circuit stated that "[b]efore Defendant hired [the attorney], he had already researched the real CCM, [the Hong Kong corporation,] filed a false Dun & Bradstreet report that listed actual CCM officers as being affiliated with the bogus CCM, and obtained a $2 million line of credit from IBM claiming to be the real CCM." *Id.* The Court then concluded that the attorney "was hired as CCM's 'general counsel' *id.* to assist Defendant in continuing the CCM fraud," and

the crime-fraud exception therefore applied.

Some courts have held that the mere fact that a client sought advice regarding a legitimate legal issue, and then at some later time violated the law about which the advice was sought does not, without more, activate the crime-fraud exception. For example, in *In re Sealed Case,* 107 F.3d 46 (D.C. Cir. 1997), the president and vice president of a corporation met with its general counsel to discuss campaign finance laws. A few weeks later the vice president of the corporation supposedly violated the campaign finance laws by soliciting donations from corporate clients to a particular candidate, and then reimbursing those clients with corporate funds. *Id.* at 48. The court, in finding that the government had not met its burden of showing the crime-fraud exception's application, stated:

> Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters, ranging from their political activities to their employment practices to transactions that may have antitrust consequences. There is nothing necessarily suspicious about the officers of this corporation getting such advice. True enough, within weeks of the meeting about campaign finance law, the vice president violated that law. *But the government had to demonstrate that the Company sought the legal advice with the intent to further its illegal conduct. Showing temporal proximity between the communication and a crime is not enough. Id.* at 50 (emphasis added).

The Eighth Circuit reached the same conclusion in *In re BankAmerica Corporate Securities Litigation,* 270 F.3d 639, 643-44 (8th Cir. 2001) where the Court cited the Second Circuit's opinion in *Sealed Case* as support for its conclusion that "it is not enough to show that an attorney's advice was sought before a decision was made not to disclose information that is alleged, as a matter of hindsight, to have been material."

In determining intent, an issue may arise as to the identity of the client especially where corporations are involved. For example, in *In re Sealed Case,* discussed above, a corporation sought advice regarding campaign finance laws. The corporation's vice president was alleged subsequently to have violated those laws. In noting that the government had failed to carry its burden under the crime-fraud exception, the Second Circuit stated:

> The critical consideration is that the government's presentation had to be aimed at the intent and action of the client....The holder of the privilege is the client and, in this case, the client was the Company, not the vice president. Unless the government made some showing that the *Company* intended to further and did commit a crime, the government could not invoke the crime-fraud exception to the privilege. *In re Sealed Case,* 107 F.3d at 50 (emphasis added).

The Court then concluded that "there was no way of knowing or even guessing whether the vice president was on a frolic of his own, against the advice of Company counsel, when he reimbursed the donors with corporate funds," *id.* and that, although "there are circumstances under which corporations are responsible for the crimes of their agents," *id.* the government had not offered "anything in terms of evidence or law to support the idea that the Company bore criminal responsibility for the acts of this officer." *Id.* at 51.

e. What words are covered by the crime-fraud exception?

An issue may arise under the crime-fraud exception as to whether the exception applies only to words that are themselves in furtherance of a crime or fraud or whether it applies to the entire conversation or document in which the words were spoken or appear. Perhaps the clearest statement of the scope of the exception appears in *In re Grand Jury Subpoena,* 419 F.3d 329, 346 (5th Cir. 2005):

> After the party seeking disclosure meets its *prima facie* showing that the client intended to further an ongoing crime or fraud during the attorney-client relationship such that the crime-fraud exception applies, the only attorney-client communications and work product material falling with the scope of the crime-fraud exception are those shown to hold 'some valid relationship' to the *prima facie* violation such that they 'reasonably relate to the fraudulent activity.'

The relative clarity of the Fifth Circuit's statement quoted above is not often matched in other decisions and it is often difficult to discern a court's treatment of this issue. Often the exact communications are not reflected in the court's opinion and it is difficult to tell whether the court is referring simply to the words themselves or to an entire conversation or document. *See, e.g., In re Bankamerica Corporate Secs. Litig.,*270 F.3d 639, 642 (8thCir. 2001); *United States v. Under Seal (In re Grand Jury Proceedings),* 102 F.3d 748, 751-52 (4th Cir.1996). At least one court has held that "the crime-fraud exception does not operate to remove communications concerning past or completed crimes or frauds from the attorney-client privilege," *In re Federal Grand Jury Proceedings 89-10,*938 F.2d 1578, 1581-82 (11th Cir. 1991), even if the subsequent communication simply memorializes earlier communications that are themselves subject to the exception. *Id.* The Court in that case held that the exception is inapplicable even if the subsequent communications occur with the same lawyer whose advice was earlier sought by the client to further or conceal a crime or fraud. *Id.* at 1582-83. *See also In re Sealed Case,* 244 U.S. App. D.C. 11, 754 F2d 395,402 (D.C. Cir. 1985) (communications with attorneys who had been involved with the client's past crimes remained privileged).

But the issue is more in doubt with regard to statements that may not themselves be communications in furtherance of a crime or fraud but which are made in the same conversation or document. Although the cases are far from clear, there seems to be a distinction between oral and written communications. The courts seem more willing to parse oral conversations than written ones. For example, in *United States v. Davis,* 1 F.3d 606 (7th Cir. 1993), the Seventh Circuit approved the district court's "expressly limit[ing] the government's inquiry to 'asking [the attorney] whether, during the course of his representation of [the client], [the client] admitted lying to him about the existence of the pertinent document and his compliance with the grand jury's subpoena.'" *Id.* at 611. Neither the district court nor the court of appeals authorized delving into other topics that arose at or near the time of the exchange involving the existence of the pertinent document. Similarly, in *In re Grand Jury Proceedings (Doe),* 1993 *U.S. App. LEXIS 1247* at *13 (9th Cir. Jan. 15, 1993), the Ninth Circuit approved the district court's order limiting the attorney's testimony to very specifically identified transactions. In these cases, both the Seventh and the Ninth Circuits seems to treat an oral exchange between lawyer and client as composed of many small communications, some of which were subject to disclosure and some of which were not.

The same limiting language does not seem to appear in cases involving documents containing communications between lawyer and client. In *In re BankAmerica Corporate Secs Litig.,* 270 F.3d 639, 642 (8th Cir. 2001), the government sought production of eleven documents that "contain or reflect attorney-client communications *relevant to"* the corporate disclosure issues which were the subject of investigation. The court's language leaves it far from clear that the documents solely concerned the disclosure issues under investigation, yet the Eighth Circuit directed the district court to "determine, *separately for each document,* whether plaintiffs have made the threshold showing required in *Zolin." Id.* at 644 (emphasis added). Rather than directing the district court to determine whether some portions of the document in question were subject to the crime-fraud exception while some portions retained their privileged status, the Court's language treated these documents as items to be disclosed or protected as a whole. Similarly in *United States v. Richard Roe, Inc. (In re Richard Roe, Inc.),* 68 F.3d 38 (2d Cir. 1995), the Second Circuit remanded the case to the district court "for an examination of each document under the proper standard" *id.* at 41 and directed the court to "determine which, if any, of the documents ... were in furtherance of a crime or fraud." *Id.* Like the Eighth Circuit in *Bankamerica,* the Second Circuit appears to have treated each document as wholly subject to disclosure or wholly subject to protection, rather than treating the documents as composed of many smaller communications for which the crime-fraud exception may eviscerate the privilege as to only some portions of the non-oral exchange, while leaving the privilege intact as to other portions.

Conclusion

The future development of the law involving the crime-fraud exception to the attorney-client privilege will likely flesh out the issues set for forth in this section. The Supreme-Court may have to address some of them, especially the "ultimate showing" required for the application of the exception and the extent to which the proponent of the privilege can rebut the opponent's evidence. Without such a resolution, the fears expressed in the American College of Trial Lawyer's report referred to above may continue to plague this area of the law.

MARITAL COMMUNICATIONS PRIVILEGE

(a) Definitions. As used in this rule:

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

(2) A "spouse" is either partner to a marriage recognized as such under the law of the place where the couple lived at the time of the communication in question.

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

(b) General Rule of Privilege

The marital privilege may be invoked by either spouse with respect to a communication made between spouses in confidence during the existence of their marriage.

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

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

(2) if the communication concerned a crime or fraud in which both spouses were engaged;

(3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse.

(4) if the spouses were separated at the time of the communication in question and the marriage was irreconcilable.

COMMENTARY ON THE MARITAL COMMUNICATIONS PRIVILEGE

In General

This survey rule covers only the marital communications privilege. The privilege of a spouse not to testify against his or her spouse in a criminal case (the "spousal testimony privilege") is a separate rule of law. Questions such as the applicability of the spousal testimony privilege with regard to matters occurring prior to the marriage and the applicability of various exceptions to the rule call for separate treatment from the rule dealing with marital communications.

(a) Definitions. As used in this rule:

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

This definition is identical to the definition of "communication" in the survey rules dealing with the attorney-client and psychotherapist-patient privileges. The language was taken from the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §69 (2000).

By adopting this definition, the rule limits the privilege to expressions intended by one spouse to convey a meaning or message to the other. Some jurisdictions go beyond this to include acts done privately in the presence of the spouse. However, federal cases are unanimous in restricting the privilege to communications, thus adopting what the commentators believe to be the modern rule. *See* BROUN, MCCORMICK ON EVIDENCE, §79 (6th ed. 2006); MUELLER & KIRKPATRICK § 5.32 (4th ed. 2009). Federal cases include *U.S. v. Espino,* 317 F.3d 788 (8th Cir. 2003) (wife's testimony with regard to husband's sale and use of methamphetamine properly permitted; privilege limited to utterances or expressions intended by one spouse to convey a message to another); *UNITED STATES v. Lofton*, 957 F.2d 476 (7th Cir. 1992) (wife's testimony with regard to her observation of husband's use of cocaine and her knowledge that a package was sent to him properly admitted); *U.S. v. Estes,* 793 F.2d 465 (2d Cir. 1986) (wife's observation of husband hiding money); *U.S. v. Bolzer,* 556 F.2d 948 (9th Cir. 1977) (wife could identify pair of pants found with stolen items as the kind of pants worn by defendant, her ex-husband).

Acts without words may nevertheless be intended as communications within the meaning of the rule. *See, e.g., U.S. v. Bahe,* 128 F.3d 1440 (10th Cir. 1997) (husband's initiation of sex by placing his fingers in wife's vagina was a communication protected by the privilege). The language of used in the rule's definition of "communication" is intended to be consistent with the holding in cases such as *Bahe*.

(2)A "spouse" is either partner to a marriage recognized as such under the law of the place where the couple lived at the time of the communication in question.

All courts, including the federal courts, apply the marital communications privilege only to valid marriages. *See, e.g., U.S. v. Acker,* 52 F.3d 509 (4th Cir. 1995) (no valid marriage in either of the states in which couple had lived); *U.S. v. Rivera,* 527 F.3d 891 (9th Cir. 2008) (marital privilege does not cover conversations between unmarried persons who have children in common).

In determining the validity of a marriage, the courts have looked to the law of the state in which the couple lived at the time of the communication, thus following the same rule as the state courts. *See,* BROUN, MCCORMICK ON EVIDENCE, §81 (6th ed. 2006); *People v. Schmidt,* 579 N.W.2d 431 (Mich. App. 1998) (privilege recognized because communications made in Alabama, which recognized common law marriage, even though Michigan did not). Federal cases recognizing the rule, although finding no privilege because state law did not recognize common law marriage, include U.S. *v. Acker, supra* (neither state involved recognized common law marriage); *U.S. v. Lustig,* 555 F.2d 737 (9th Cir. 1977) (privilege depends on the existence of a valid marriage as determined by state law; common law marriage not valid under Alaska law).

Although there are few cases from any jurisdiction dealing with the issue, the same rules would almost certainly apply in the case of same-sex marriages. *See Greenwald v. H & P 29th St. Associates,* 659 N.Y.S. 2d 473 (App. Div. 1997) (homosexual couple not entitled to privilege where marriage not valid under state law).

It also follows from the requirement of a valid marriage that statements made in a bigamous marriage relationship are not protected by the privilege. *U.S. v. Neeley,* 475 F.2d 1136 (4th Cir. 1973) (no privilege where marriages were bigamous). The privilege has been denied in the case of a bigamous marriage even where the declarant spouse relied on his belief that the couple was validly married. *U.S. v. Hamilton,* 19 F.3d 350 (7th Cir. 1994).

The federal courts have refused to recognize the spousal testimony privilege where there has been a determination that the marriage is a fraud. *See Lutwak v. U.S.,* 344 U.S. 604, 73 S. Ct. 481 (1953) (no privilege to refuse to testify where the "relationship was entered into with no intention of the parties to live together as husband and wife but only for the purpose of using the marriage ceremony in a scheme to defraud, the ostensible spouses are competent to testify against each other"); *U.S. v. Apodaca*, 522 F.2d 568 (10th Cir. 1975) (spousal testimony privilege does not apply where marriage is a fraud); *In re Grand Jury Proceedings,* 777 F.2d 508 (9th Cir. 1985) (recognizing the rule but finding that the marriage was not a sham). Although there do not appear to be any cases applying the sham marriage rule to the marital communications privilege –probably confidential communications are less likely to occur where the marriage is a sham – it seems likely that the courts would apply a similar analysis in an appropriate situation. The "sham marriage" exception is not mentioned in the rule because of the absence of federal authority.

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

The United States Supreme Court has held that there is a presumption that communications between spouses are confidential. *Blau v. U.S.,* 340 U.S. 332, 71 S.Ct. 301 (1951). Therefore, the opponent of the privilege has the burden of showing an absence of confidentiality. *See also U.S. v. Montgomery,* 384 F.3d 1050 (9th Cir. 2004).

Various federal cases have dealt with the proof necessary to rebut the presumption of confidentiality. These cases support the definition of "in confidence" set out in the survey rule. For example, *Perieira v. U.S.*, 347 U.S. 1, 74 S.Ct. 358 (1954) (statements not confidential when made in the presence of others); *U.S. v. Dunbar*, 553 F.3d 48 (1st Cir. 2009)(conversation in the back of a police car not confidential); *U.S. v. Klayer,* 707 F.2d 892 (6th Cir. 1983) (no privilege where parties knew that a third person was participating in the telephone conversation); *U.S. v. Madoch,* 149 F.3d 596 (7th Cir. 1998)(no confidentiality where defendant/wife knew husband was talking to her on a telephone from jail); *U.S. v. Montgomery, supra* (note left by wife for husband in kitchen of home confidential where no showing that the note was likely to have been seen by the couple's children); *U.S. v. Marashi,* 913 F.2d 724 (9th Cir. 1990) (statements likely to be overheard by third parties are not privileged). *But see U.S. v. Irons,* 646 F. Supp.2d 927 (E.D. Tenn. 2009) (privilege still existed even though telephone calls between husband and wife were monitored by government agents where defendant did not know that they were being monitored).

(b) General Rule of Privilege

The marital privilege may be invoked by either spouse with respect to a communication made between spouses in confidence during the existence of their marriage.

The general rule of privilege varies from Uniform Rule 504 which limits the privilege to the communicating spouse. This survey rule vests the privilege in both spouses. In this respect, the rule is consistent with the approach taken in survey rule governing attorney-client privilege and with the views of modern commentators.

Almost all cases hold that either spouse may invoke the privilege – whether or not they were the communicator. A clear statement of that position is contained in *U.S. v. Montgomery*, 384 F.3d 1050 (9th Cir. 2004). In *Montgomery,* the defendant had objected to the introduction of a letter left for him by his wife. The lower court had refused to recognize the privilege, ruling that the privilege was the communicating spouse's to claim or waive. The Court of Appeals disagreed, holding that the privilege could be asserted by either spouse, citing language from other circuitsas well as the law of 33 states. The court said:

Vesting the privilege in both spouses recognizes that allowing the communicating spouse to disclose one side of a conversation would eviscerate the privilege. As one treatise has observed, permitting each spouse to testify as to his or her own statements "invites attempts to prove circumstantially the statement of one spouse by proof of what the other had said." 2 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 5.40 745 (3d ed. 2007).

The court rejected as dictum the language of an earlier Ninth Circuit case, *U.S. v. Figueroa-Paz,* 468 F.2d 1055 (9th Cir. 1972), which had stated that the privilege belonged only to the communicating spouse.

For more recent statements of this position *see,* Mueller & Kirkpatrick § 5.32 (4th ed. 2009); BROUN, MCCORMICK ON EVIDENCE, §83 (6th ed. 2006). Wigmore's views were to the contrary. 8 Wigmore, Evidence § 2340(1) (McNaughton rev. 1961).

Other federal cases describing the privilege as vested in both spouses include *U.S. v. Porter*, 986 F.2d 1014 (6th Cir. 1993); *U.S. v. Lea,* 249 F.3d 632 (7th Cir. 2001); *U.S. v. Westmoreland,* 312 F.3d 302 (7th Cir. 2002); *U.S. v. Bahe,* 128 F.3d 1440 (10th Cir. 1997).

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

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

Although there do not appear to be any federal decisions on the issue, this exception is well-recognized in the general law. *See* MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, § 5:40 757(3d ed. 2007); BROUN, MCCORMICK ON EVIDENCE, §84 (6th ed. 2006). The language is taken from UNIFORM RULE OF EVIDENCE 504(d)(1).

(2) if the communication concerned a crime or fraud in which both spouses were engaged;

Although recognizing an exception to the marital communications privilege in cases in which the spouses were participants in a crime, the circuits have expressed and applied the exception in very different ways.

Most federal courts have stated simply that the marital communications privilege does not apply where the communication concerned or related a crime in which the spouses were joint participants. *See, e.g., U.S. v. Hill,* 967 F.2d 902 (3d Cir. 1992) (communications "have to do" with commission of a crime in which both spouses are participants); *U.S. v. Savage,* 390 F.3d 823 (4th Cir. 2004) ("relate to" a crime in the course of the spouses' joint planning or participation) ; *U.S. v. Parker,* 834 F.2d 408 (4th Cir. 1987) ('have to do" with commission of a crime in which both spouses are participants); *U.S. v. Miller,* 588 F.3d 897 (5th Cir. 2009) (about "joint criminal activity"); *U.S. v. King,* 541 F.3d 1143 (5th Cir. 2008) ("conversations . . . about crimes"); *U.S. v. Mendoza,* 574 F.2d 1373 (5th Cir. 1978) ("about crimes"); *U.S. v. Short,* 4 F.3d

475 (7th Cir. 1993) ("concerning a joint criminal enterprise"); *U.S. v. Marashi,* 913 F.2d 724 (9th Cir. 1990) (communications "having to do with present or future crimes").

The language of this exception is intended to reflect those cases. There are a few cases that require that the exception be limited to "patently illegal activity." *See, e.g., U.S. v. Sims,* 755 F.2d 1239 (6th Cir. 1985). In *Sims,* the court noted that it narrowed the exception to patently illegal activity

> . . . to protect the privacy of marriage and encourage open and frank marital communication. Only where spouses engage in conversations regarding joint ongoing or future patently illegal activity does the public's interest in discovering the truth about criminal activity outweigh the public's interest in protecting the privacy of marriage.

The Eighth Circuit adopted the same narrower rule in *U.S. v. Evans,* 966 F.2d 398 (8th Cir. 1992) (exception applied only to communications "regarding patently illegal activity").

The rule requiring "patently illegal activity" in order for the exception to apply was expressly rejected by the courts in *U.S. v. Parker,* 834 F.2d 408 (4th Cir. 1987) and *U.S. v. Marashi,* 913 F.2d 724 (9th Cir. 1990). In light of this division of authority and the failure of courts in other circuits even to mention the possibility of a higher standard for assessing illegal activity, the survey rule does not require patently illegal activity.

A few courts discuss the exception in terms of statements made "in furtherance" of joint criminal activity, as opposed to simply relating to the activity. *See U.S. v. Picciandra,* 788 F.2d 39 (1st Cir. 1986); *U.S. v. Estes,* 793 F.2d 465 (2d Cir. 1986); *U.S. v. Marashi, supra, U.S. v. Neal,* 743 F.2d 1441 (10th Cir. 1984). Such a formulation of the rule is favored in at least one prominent text, SALTZBURG, MARTIN & CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, §501.02[8]:

> The confidential communications privilege is analogous to the attorney-client privilege, because it is communication-based. Like the privilege, there is good reason for a crime-fraud exception to the interspousal communications privilege. If the communication is in furtherance of crime or fraud, then it is not worthy of protection. However, a joint participant exception is not the same as a crime-fraud exception. The crime-fraud exception evaluates the intent behind the *communication*, while the joint participant exception looks solely to the *status* of the witness. The distinction is important where one spouse makes a confession concerning a past event to a joint participant. Assuming that such a confession does not further a plan of crime or fraud, and was made in confidence, it should be protected by the confidential communications privilege. But it would not be protected under a joint participant exception. [emphasis supplied]

There is much to be said for this analysis. However, the case law does not support a rule that requires an inquiry into whether the statement was "in furtherance" of the joint criminal

activity. Even those cases that phrase the exception as requiring a statement "in furtherance" of the crime do not analyze the communication in terms of whether it furthered the criminal objectives. In all instances in which the "in furtherance" language is used, the communications clearly both related to and were in furtherance of the crime.

The rule as expressed in **exception(2)** seems best to state the prevailing federal rule. There seems to be only one case that would be inconsistent with it. In *U.S. v. Bey,* 188 F.3d 1 (1st Cir. 1999) the court applied a joint participant exception to the marital communications privilege. The court applied the exception not only to statements relating to the joint activities but to other confidential communications made during the couple's joint criminal activity, stating:

> Our review of the case law, however, reveals that a court may admit relevant confidential marital communications that take place after the spouse has become a joint participant in the criminal activity.

The court cites *U.S. v. Short,* 4 F.3d 475 (7th Cir. 1993). However, the court in *Short* expressly stated the exception as applying to statements "concerning a joint criminal enterprise."

The current weight of federal authority would limit the exception to statements that at least relate to the joint criminal activity. It is possible that later developments may further limit the exception to those statements "in furtherance" of the crime or to "patently illegal activities" or expand it to all communications once joint criminal activities commence.

Exception (2) differs significantly from the comparable exception in UNIFORM RULE OF EVIDENCE 504(d)(2), which provides that there is no privilege on the rule "in any criminal proceeding in which an unrefuted showing is made that the spouses acted jointly in the commission of the crime charged."

There are no federal cases that limit the exception to criminal cases or refuse to apply the exception to cases involving fraud that does not rise to the level of crime. The commentators on the federal law dealing with marital privilege do not limit the rule to criminal cases or to criminal as opposed to fraudulent activities. *See, e.g,* MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, § 5:40 (3d ed. 2007); SALTZBURG, MARTIN & CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, §501.02[8]. In light of these analyses and the absence of authority to the contrary, **Exception (2)** is drafted to apply to all federal cases and to cases involving joint fraudulent activity, whether or not it rises to the level of crime.

Similarly, there is no requirement in any federal case of an "unrefuted" showing of joint criminal activity. The closest the federal authority comes to such a qualification is the requirement discussed above imposed by some courts that the activity be "patently illegal." However, that requirement goes to the characterization of the activity rather than to the level of proof about it.

(3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse.

An exception for crimes against the other spouse or against children somehow connected to the couple is well-recognized in most jurisdictions. *See* BROUN, MCCORMICK ON EVIDENCE, § 84 (6th ed. 2006). However, the exact form of the exception varies widely. Some courts extend the exception to the marital communications privilege broadly. *See, e.g., Stevens v. State,* 806 So.2d 1031 (Miss. 2001) (exception to marital communications privilege for crimes against children in case in which defendant charged with murder of unrelated children); *State v. Waleczek,* 585 P.2d 797 (Wash. 1978) (both marital privileges; term "guardian" in Washington statute included situation in which couple voluntarily assume care of child even without a legal appointment as guardian). Others apply a more limited exception. *See, e.g., State v. Anderson,* 636 N.W.2d 26 (Iowa 2001) (statutory exception to marital communications privilege for children limited to children within the care of the husband or wife).

Proposed Federal Rule 505, which dealt only with the Spousal Testimony Privilege, provided an exception "in proceedings in which one spouse is charged with a crime against the person or property of the other or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other . . ."

Uniform Rule 504 is similar although somewhat more expansive, providing an exception to both the spousal testimony privilege and the marital communications privilege. It provides:

> "in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse."

The language of exception **[3]**adopts the language of the Uniform Rule.

There are few federal cases dealing with this exception and no consensus on its dimensions.

In *U.S. v. Bahe,* 128 F.3d 1440 (10th Cir. 1997),the court refused to apply the marital communications privilege in a case involving the sexual abuse of an eleven-year-old relative visiting in the marital home. The court found a broad exception to the privilege, sufficient to apply to crimes against someone who was not a child or step-child of the couple, stating:

> We see no significant different, as a policy matter, between a crime against a stepchild living in the home or, as here, against an eleven-year-old relative visiting in the home. Child abuse is a horrendous crime. It generally occurs in the house . . . and is often covered up by the innocence of small children and by threats against disclosure. It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.

128 F.3d at 1446.

In *U.S. v. Banks,* 556 F.3d 967 (9th Cir. 2009),the court limited the exception to birth or step-children or their "functional equivalent." In that case, the court found that a grandchild was not the functional equivalent of a child or step-child despite extensive overnight visits and day care provided by the grandparents. The court expressly rejected the extension of the exception to any child within the household. 556 F.3d at 975, n. 3.

Other reported federal cases involving this exception to the marital communications privilege are *U.S. v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) (exception applied where defendant accused of killing his two-year-old stepdaughter); *U.S. v. Martinez*, 44 F. Supp.2d 835 (W.D. Tex. 1999) (exception applied in prosecution against mother charged with abusing her minor sons). *See also U.S. v. Allery,* 526 F.2d 1362 (8th Cir. 1975) (spousal testimony privilege; exception applied where defendant charged with the attempted rape of his twelve-year-old daughter; dissent would have extended the exception only to "a child of tender years" who was not competent to testify).

There is one case in which a federal court rejected an exception to the spousal testimony privilege (as opposed to the marital communications privilege). *U.S. v. Jarvison,* 409 F.3d 1221 (10th Cir. 2005). The court in that case ignored recent authority from its own circuit recognizing the exception to the spousal testimony privilege. *U.S. v. Castillo,* 140 F.3d 874 (10th Cir. 1998). The rejection of the exception in the *Jarvison* case has not been followed in any other case.

Congress, in an apparent reaction to *Jarvison,* included a reference to the exception with regard to crimes against spouses or children in Pub. Law No. 109-248, the Adam Walsh Child Protection and Safety Act of 2006, which was signed into law that same year. Section 214 of that Act provides:

> The Committee on Rules, Practice, Procedure and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse in charged with a crime against --
>
> (1) a child of either spouse; or

(2) a child under the custody or control of either spouse.

In 2006, the Advisory Committee on Evidence Rules recommended against amending the Federal Rules of Evidence to provide for such an exception. The Committee's decision was based in large measure on the fact that the great weight of authority would recognize such an exception to both the marital communications and spousal testimony privileges. *Advisory Committee on Evidence Rules*, Minutes of the Meeting of November 16, 2006.

Commentators on the federal law of privilege recognize the existence of the exception to the marital communications privilege. MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 5:40 at 758(exception "probably" applies to child "in the household" as long as "a child of either spouse is also a victim"); SALTZBURG, MARTIN & CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, §501.02[8] (exception recognized for an action brought against a spouse for victimizing a family member).

Although there is no federal case that apples the exception to actions in tort as opposed to criminal charges, based on state authority, the Uniform Rule and commentators on federal law, it is logical to assume that the exception would be expanded to tort cases. *See* UNIFORM RULE OF EVIDENCE 504; MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 5:40; SALTZBURG, MARTIN & CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, §501.02[8].

UNIFORM RULE OF EVIDENCE 504 also provides an exception where "the interests of a minor child of either spouse may be adversely affected by invocation of the privilege." The survey rule does not include such an exception due to the absence of any federal authority or comment indicating its existence.

(4) if the spouses were separated at the time of the communication in question and the marriage was irreconcilable.

The federal courts have consistently refused to apply the privilege when the spouses were separated at the time of the communication and the marriage was irreconcilable. The court in *U.S. v. Byrd,* 750 F. 2d 585 (7th Cir. 1984) refused to protect communications where the couple had "permanently" separated. *See also U.S. v. Porter,* 986 F.2d 1014 (6th Cir. 1993) (no privilege where the spouses had "permanently" separated; court should make a factual finding as to the permanency of the separation but no particular factors suggested). Other cases have been more specific as to the criteria for determining the permanency of the separation, *see, e.g., In re Witness Before the Grand Jury,* 791 F.2d 234 (2d Cir. 1986) (separation, even though not confirmed by a judicial decree, eliminated the marital communications privilege; either party may bring forward special circumstances that render more or less likely the objective possibility of reconciliation at the time of the communication); *U.S. v. Roberson,* 859 F.2d 1376 (9th Cir. 1988) (court should undertake a detailed investigation into the irreconcilability of the marriage,

including the duration of the separation and the stability of the marriage at the time of the communication; in determining irreconcilability the court should consider whether, at the time of the communication, a divorce action had been filed); *U.S. v. Murphy,* 65 F.3d 758 (9th Cir. 1995) (separation and irreconcilability are questions of fact).

Despite the differing language used in these cases, the ultimate inquiry seems to be the same: The permanency of the separation, as required in cases such as *Byrd* and *Porter*, is to be determined as a factual matter by the district court considering both the separation of the parties and the likelihood of reconciliation as discussed in cases such as *in re Witness Before the Grand Jury, Roberson,* and *Murphy.* The language of the rule is intended to set forth this ultimate inquiry. The particular factors used by the courts to determine likelihood of reconciliation may vary from circuit to circuit.

This exception to the marital communications privilege is added because of the relative consistency with which the federal courts have refused to recognize the privilege where the couple has separated without a likelihood of reconciliation. Cogent arguments against such an approach have been made (*see, e.g.,* Steven N. Gofman, *"Honey, the Judge Says We're History" Abrogating the Marital privileges via modern Doctrines of Marital Worthiness,* 77 CORNELL L. REV. 843 (1992); Mueller & Kirkpatrick § 5.32 (4th ed. 2009)) but have, as yet not proved persuasive in the federal courts.

TAB V.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: October 1, 2011

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases are grouped by subject matter, and sequentially by circuit within a particular topic.

Summary

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

Hearsay Found Testimonial:

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

2. Grand jury testimony.

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

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

5. Report by a confidential informant to a police officer, identifying the defendant as

involved in criminal activity.

6. Accusations made to officers responding to a 911 call, after any emergency or public risk has subsided.

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

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

9. False alibi statements made by accomplices to the police (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

10. A police officer's count of the number of marijuana plants found during the search of the defendant's premises.

11. Certificates of nonexistence of a record, prepared solely for litigation (after *Melendez-Diaz v. Massachusetts*).

Hearsay Found Not Testimonial:

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

2. Autopsy reports.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's interpretation of Rule 804(b)(3) in *Williamson v. United States*).

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

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

6. Warrants of deportation and other immigration documents.

7. Entries into a regulatory database.

8. Statements made for purpose of medical treatment.

9. 911 calls reporting crimes or emergencies.

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

11. Accusatory statements in a private diary.

12. Odometer statements prepared before any crime of odometer-tampering occurred.

13. A present sense impression describing an event that took place months before a crime occurred.

14. Business records — including certificates of authenticity of business records prepared for trial, even after *Melendez-Diaz*.

15. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

16. Judicial findings and orders entered in one case and offered in a different case.

17. Informal statements made with no law enforcement officers present.

Suggestions for Rulemaking:

It is clear that some types of hearsay will always be testimonial, such as grand jury statements, plea allocutions, etc. It is also clear that some types of statements will never be testimonial, such as personal diaries, statements made before a crime takes place, and informal statements to friends without any contemplation that the statements will be used in a criminal prosecution.

Between these two poles there is some uncertainty, though the Supreme Court's decision in *Michigan v. Bryant* as well as dicta in *Giles* (both discussed below) has been applied by the circuit courts to narrow the definition of "testimonial" and thus to resolve much of that uncertainty. Questions remain about whether statements to a person who is not a law enforcement official can ever be testimonial; whether and when statements made to law enforcement officials responding to an emergency become testimonial (because the Court's test for such statements is multi-factor and fuzzy); and whether testimonial statements violate the Confrontation Clause when they are offered only as part of the basis of an expert opinion.

There is now no question about the viability of *Roberts*. It is dead. The Court unanimously held in *Bockting, infra,* that the Confrontation Clause imposes no limitation on the admissibility of hearsay that is not testimonial. It could be argued, then, that rulemaking has become critical after *Bockting*, because rulemaking is the only way to regulate the reliability of hearsay if it is not testimonial. So for example, the amendment to Rule 804(b)(3), which went into effect on December

1, 2010, has renewed relevance after *Bockting,* as it requires an important showing of reliability that is no longer mandated by the Confrontation Clause.

The Committee has in the past proposed amendments when an Evidence Rule is subject to an application that would violate the Constitution. But many of the hearsay exceptions seem sound given the case law after *Davis* and now *Michigan v. Bryant*. For example, the cases have essentially held that if a statement fits the declaration against interest exception, it is for that reason non-testimonial after *Davis* — because to be admissible it will have to be made in informal circumstances with no law enforcement involvement. Courts have reached similar conclusions with respect to business records, public records, co-conspirator statements, state of mind statements, and others: the factors that make hearsay statements admissible under these exceptions by definition mean that the statements cannot be testimonial. The only glaring exception is Rule 803(10), which allows admission of certain certificates that are clearly testimonial under the Supreme Court's decision in *Melendez-Diaz v. Massachusetts.* As you know, the Committee has proposed an amendment to Rule 803(10) that would provide a notice-and-demand procedure approved by the Court in *Melendez-Diaz.* That amendment is currently out for public comment.

A sweeping integration of *Crawford* standards into the Federal Rules is therefore probably unwarranted. Moreover, the Supreme Court does not appear finished in developing its *Crawford* jurisprudence. *Bryant* represents a shift to a more reasoned, less radical application of the Confrontation Clause, indicative of the change in personnel since the Court's last visit to the Confrontation Clause in *Melendez-Diaz*. Justices Stevens and Souter were two of the strongest supporters of *Crawford*. One of the replacements, Justice Sotomayor, wrote an opinion on the Second Circuit that called for a limited application of *Crawford* — specifically a limited definition of testimoniality. And she wrote the very pragmatic majority opinion in *Bryant.* Moreover, the Supreme Court has taken a case for the next term that will consider whether the Confrontation Clause bars expert testimony that is based on testimonial hearsay. This activity in the Supreme Court cautions against any retooling of the hearsay rules at this time.

Cases Defining "Testimonial" Hearsay After Crawford, Arranged By Subject Matter

"Admissions" — Hearsay Statements by the Defendant

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

Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself.* If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. ***See also United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*).

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Bruton — Testimonial Statements of Co-Defendants

Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial: *United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth

Amendment right to confront the declarant in the first place."

Bruton* line of cases not altered by *Crawford*: *United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton,* not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause.

The defendant's own statements are not covered by *Crawford,* but *Bruton* remains in place to protect against admission against a non-confessing co-defendant: *United States v. Ramos-Cardenas,* 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant; nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court elaborated as follows:

> [W]hile *Crawford* certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton, Richardson* and *Gray.*

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Bruton* and its progeny survive *Crawford* — co-defendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper, 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The court concluded that because "the Supreme Court

has so far taken a 'pragmatic' approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Co-Conspirator Statements

Co-conspirator statement not testimonial: *United States v. Felton,* 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord *United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial).

Surreptitiously recorded statements of coconspirators are not testimonial: *United States v. Hendricks,* 395 F.3d 173 (3d Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. **Accord *United States v. Bobb,*** 471 F.3d 491 (3d Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument

that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that argument would mean that all hearsay is testimonial. The court observed that *"Crawford's* emphasis clearly is on whether the statement was 'testimonial' at the time it was made."

Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez,* 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford.* The court stated that "a reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused in investigating and prosecuting the crime." ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis,* "co-conspirators' statements made in pendency and furtherance of a conspiracy are not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); ***United States v. Damra,*** 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator "by their nature are not testimonial").

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,* 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that "*Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* — which as here involved a coconspirator's statement made to a government informant — to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

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

States v. Reyes**,** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators)**.**

Statements in furtherance of a conspiracy are not testimonial: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial).

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley,* 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*).

Statements made during the course and in furtherance of the conspiracy are not testimonial: *United States v. Underwood,* 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements "clearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place." The court concluded as follows:

> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 223 (2d Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends admissible under Rule 804(b)(3) and not testimonial).

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,* 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, be extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor,* 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued specifically that under *Davis,* a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution — and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the *husband's* primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is 'testimonial' only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception — but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

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

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

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

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: ***United States v. Johnson*****,** 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant. The defendant argued that the inquiry into testimoniality should focus on the questioner — in this case an informant encouraged by the government to obtain a statement from the declarant.

But the court stated that "our precedent makes clear that the intent of O'Reilly, the declarant, determines whether the statements on the tape-recording are testimonial."

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes."

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

Accomplice statements to cellmate are not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls,* 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder

of a government informant. The statements were not testimonial because they were not made with "the primary purpose * * * of establishing or proving some fact potentially relevant to a criminal prosecution." The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. Finally, the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,* 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, we do not hold the opposite – that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements**.**

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal investigation or prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 131 S.Ct. 1143 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter — and admitted as an excited utterance under a state rule of evidence — was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis*— whether the primary motive for making the statement was to have it used in a criminal prosecution — and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.
>
> 2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's "primary purpose." An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.
>
> 3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of

the emergency — unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators also provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, this dispute's potential scope and thus the emergency indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a "primary purpose" "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" — essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggests that their primary purpose was to address what they considered to be an ongoing emergency — apprehending a suspect with a gun — and the circumstances lacked

a formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that "under the *Davis* guideposts" the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The statements were not "testimonial" within the meaning of *Crawford v. Washington*. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

Note: While the *Brito* decision preceded the Supreme Court's decision in *Davis/Hammon,* the result appears to be completely consistent with the Supreme Court's application of *Crawford* to 911 calls. When the statement is in response to an emergency, it is not testimonial. It is especially consistent with the pragmatic approach to finding an emergency that the Court found in *Michigan v. Bryant.*

911 call — including statements about the defendant's felony status—are not testimonial: *United States v. Proctor,* 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the *Davis* "primary purpose" test and evaluated the call in the following passage:

> Viewing the facts of this case in light of *Davis*, Yogi's statements to the 911 operator were nontestimonial. Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency — not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: *United States v. Arnold,* 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within

minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said “a black handgun.” At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated “that’s the guy that pulled the gun on me.” A search of the vehicle turned up a black handgun underneath Arnold’s seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was properly concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold’s return for the third set of statements).

The court then concluded that none of Tamica’s statements fell within the definition of “testimonial” as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is non-testimonial under *Davis/Hammon: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements in light of *Davis/Hammon* as follows:

> When viewing the facts in light of *Davis*, we find that the anonymous caller's statement to the 911 operator was nontestimonial. In *Davis*, the caller contacted the police after being attacked, but while the defendant was fleeing the scene. There the Supreme Court stressed that, despite the immediate attack being over, the caller "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" Similarly, the caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person’s identification of a person with a gun was not testimonial: “In this case, the police were responding to a 911 call

reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

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

> **Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency that the Court found in *Michigan v. Bryant.***

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

statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> **Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to finding an emergency that the Court found in *Michigan v. Bryant.***

Expert Witnesses

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry,* 472 F.3d 910 (D.C. Cir. 2007): The court declared that *Crawford* "did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703." ***See also United States v. Law,*** 528 F.3d 888 (D.C. Cir. 2008)**:** Expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

Note: Justice Sotomayor's opinion concurring in the judgment in *Bullcoming v. New Mexico, infra,* lends support to the D.C. Circuit's holdings as well as those of other courts in this headnote. That is especially so given the likelihood that her opinion on the matter would be joined by the four dissenters in *Melendez-Diaz. See State v. Roach*, 2011 WL 3241467 (N.J.Super.A.D. 2011), in which the court relied on Justice Sotomayor's *Bullcoming* concurrence to hold that an expert's reliance on testimonial evidence does not violate the Confrontation Clause where the testimonial evidence is not admitted for its truth:

> [M]ost importantly for the present case, Justice Sotomayor made clear that the Court's holding in *Bullcoming* did not necessarily extend to a situation "in which an expert witness was asked for his [or her] independent opinion about underlying testimonial reports that were

not themselves admitted into evidence."...In this regard, Justice Sotomayor's concurrence alluded to Federal Rule of Evidence 703, which permits the discussion of "facts or data" that are not admitted into evidence, on certain conditions, by a testifying expert witness.

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly related to the jury*: United States v. Lombardozzi,* 491 F.3d 61 (2nd Cir. 2007): In an extortion case, the government called a criminal investigator who testified as an expert about the structure of La Cosa Nostra and the defendant's affiliation with organized crime. The expert based his opinion as to the defendant in part on testimony from cooperating witnesses and confidential informants. The defendant argued that the introduction of the expert's testimony violated *Crawford* because it was based in part on testimonial hearsay. The court observed that *Crawford* is inapplicable if testimonial statements are not used for their truth, and noted the circuit's previous determination "that it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Expert reliance on confidential informants in interpreting coded conversation does not violate the *Crawford: United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The Court noted that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts — as it was in this case. It stated that "[w]ere we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases." The Court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010): *Crawford* "does not prevent expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence." In this case, the court found that the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Note: The court's holding in *Moon* — and the cases immediately below — is not impacted by the Supreme Court's decision in *Bullcoming v. New Mexico,* discussed *infra*. In *Bullcoming* the certificate — which was testimonial hearsay — was admitted for its truth and the government did not offer expert testimony. The question of whether an expert may testify on the basis of testimonial hearsay is being taken up by the Supreme Court in the 2011-2012 term.

Expert reliance on drug test conducted by another does not violate *Melendez-Diaz:* *United States v. Turner,* 591 F.3d 928 (7th Cir. 2010): At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant — the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, holding that "the government's expert witness was properly allowed to rely on the information gathered and produced by a lab employee who did not testify at trial." The court emphasized that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own. It concluded that "the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." The defendant argued that the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), requires that any official involved in forensic testimony must be produced for cross-examination. But the court rejected that broad reading of *Melendez-Diaz*, reading the case as only prohibiting the introduction of *certificates* of forensic testimony, without any supporting testimony. The court observed that "*Melendez-Diaz* did not do away with Federal Rule of Evidence 703." ***See also United States v. Thornton,*** 642 F.3d 599 (7th Cir. 2011) (no error in allowing expert to testify on the place of manufacture of ammunition as he was relying on records prepared by manufacturers in the course of business).

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo,* 625 F.3d 1285 (10th Cir. 2010): The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results

were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. But the court found no plain error and affirmed the convictions. The court reasoned that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion — which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

Forfeiture

Constitutional standard for forfeiture — like Rule 804(b)(6) — requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: ***Giles v. California,*** 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial — presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: ***United States v. Martinez,*** 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding — rejecting the

defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Retaliatory Murder of Witnesses Who Testified Against the Accused in a Prior Case Is Not a Forfeiture in the Trial for Murdering the Witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against them. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2d Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2d Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2d Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2d Cir. 2005) (*Crawford* violation where the

trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

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

Implied Testimonial Statements

Testimony that a police officer's focus changed after hearing a statement impliedly included accusatorial statements from an accomplice and so violated the defendant's right to confrontation: *United States v. Meises,* 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it made no difference that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court noted that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form."

Informal Circumstances, Private Statements, etc.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2d Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between defendant and undercover informant was not testimonial under *Davis: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The court noted that under *Davis*, a statement is not testimonial unless it was made with the awareness of its possible use at trial. Therefore, the defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, the court reasoned that under *Davis* it is not enough that the declarant might anticipate that his statement could be used at trial — that is only one component of the definition of "testimonial." The court declared that a statement to be testimonial must also be "formalized" in the nature of the "core class" of statements identified by the court in *Crawford* and *Davis.* In this case, the informant's statements were not made under formal circumstances, and "anything he said was meant not as an accusation in its own right but as bait."

Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant's statement does not violate the confrontation clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context — therefore it does not violate the right to confrontation because it is not offered as an accusation

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles*

v. California that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: ***Miller v. Stovall,*** 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement — especially because the declarant was a former police officer.

> **Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis*. The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant.**

Statements made by an accomplice to a jailhouse informant are not testimonial: ***United States v. Honken,*** 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime — but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

> McNeese was acting as a government agent when he received the maps from Johnson. McNeese most likely anticipated Johnson's maps would be used at a later trial. However, we conclude that the proper focus is on Johnson's expectations as the declarant, not on McNeese's expectations as the recipient of the information. Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Statement from one friend to another in private circumstances is not testimonial: ***United States v. Wright,*** 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a conversation he had on the night of the shooting with the other victim. This was a private conversation before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: ***Parle v. Runnels***, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: ***United States v. Brown,*** 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Interrogations, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial", it clearly covers sworn statements by accomplices to police officers.

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez,* 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth — to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

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

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

Reporter's Note: In *Cromer,* discussed in *Pugh*, the court held that a statement of a confidential informant to police officers, identifying the defendant as being a drug dealer, was testimonial, because it was made to the authorities with the intent that it would be used against the defendant. *See also United States v. McGee,* 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house

for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

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

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to

confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Police officer's count of marijuana plants found in a search is testimonial: *United States v. Taylor,* 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer as to the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The Court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal

investigation." The court found that the only difference between the questioning in this case and that in *Crawford* was that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same." But the court found that this was "a distinction without a difference" because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

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

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

Note: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Davis*. There, the Court declared that it would find an excited utterance to be testimonial only if the *primary* purpose was to prepare a statement for law enforcement rather than to respond to an emergency.

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.").

Machines

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine — that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alchohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

> **Note: In her critical concurring opinion in *Bullcoming v. New Mexico,* Justice Sotomayor emphasized that the Court had not ruled on whether a simple printout from a machine was testimonial. A fair inference from the opinion is that Justice Sotomayor and the four dissenters in *Bullcoming* would hold that a machine printout is not testimonial even if prepared for purposes of litigation.**

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant

accused of sending the threats. The trial court admitted a cd of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the cd was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

Medical Statements

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,* 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Even under a broader definition of "testimonial", Taylor could not have reasonably expected that his statements would be used in a later trial, as they were made under a promise of confidentiality. Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* – as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's

right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Statements by informant to police officers, offered to prove the "context" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

> The government's articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

Accomplice statements purportedly offered for "context" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583

F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted to provide context. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements."

Accomplice's confession, when offered to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay — as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" — for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The

court concluded that "[w]hile there can be circumstances under which Confrontation Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case."

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

> **Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*, 433 F.3d 273 (2nd Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not

testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala,* 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3d Cir. 2005) (relying on *Trala,* the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd. Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our

conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give limiting instruction was error: *Adamson v. Cathel,* 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplice confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford*. ***See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness — by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime — did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

Informant's accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz,* 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial — because it was an accusation made to a police officer — but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay — and so even though testimonial did not violate the defendant's right to confrontation — because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him.

Statement offered to prove the defendant's knowledge of a crime was non-hearsay and so did not violate the accused's confrontation rights: *United States v. Boyd,* 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had confessed to police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate *Crawford*, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: *United States v. Gibbs,* 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched."

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": *United States v. Nettles,* 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government arranged to put him in contact with an undercover informant who purported to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine, stating "[w]e note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication

that Mitchell tried to put words in York's mouth"); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation).

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

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth — that the witness saw the man he described pointing a gun at people — but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers' actions in the course of their investigation — "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the

defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to by crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

> The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context — even if the CI's statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

Statements by confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent — after defense counsel had questioned the connection of the defendant to the residence — the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and the propriety of the investigation was not disputed. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh."

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a

database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth — indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,* 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,* 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."**

Present Sense Impression

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in

admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Records, Certificates, Etc.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* — beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation — are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford* — these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded

that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case." Again, some lower courts after *Crawford* had distinguished between ministerial affidavits on collateral matters from Raleigh-type ex parte affidavits; this reasoning is in conflict with *Melendez-Diaz*.

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all — because a machine can't make a "statement" — and have also held that a machine's output is not "testimony" within the meaning of the Confrontation Clause. This case law appears to survive the Court's analysis in *Melendez-Diaz.*

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

6. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that merely authenticate proffered documents are not testimonial.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record.

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case is prohibited.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico,* 131 S.Ct. 2705 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Judge Ginsburg, writing for the Court, declared as follows:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Probably the most important part of the case is Justice Sotomayor's concurrence in the judgment, which emphasized the limits of the Court's holding:

> Although this case is materially indistinguishable from the facts we considered in *Melendez–Diaz*, I highlight some of the factual circumstances that this case does not present.
>
> First, this is not a case in which the State suggested an alternate purpose, much less an alternate primary purpose, for the BAC report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment. See *Giles v. California*, 554 U.S. 353, 376 (2008) ("[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules").
>
> Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. Razatos conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. * * * It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.
>
> *Third, this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. See Fed. Rule Evid. 703 (explaining that facts or data of a type upon which experts in the field*

*would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted). * * * [T]he State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration. * * * Here the State offered the BAC report, including Caylor's testimonial statements, into evidence. We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.*

> Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph. The State here introduced Caylor's statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the procedures used in handling the blood sample. Thus, we do not decide whether, as the New Mexico Supreme Court suggests, 226 P.3d, at 10, a State could introduce (assuming an adequate chain of custody foundation) raw data generated by a machine in conjunction with the testimony of an expert witness. (Emphasis added).

Justice Kennedy, joined by the Chief Justice and Justices Breyer and Alito, dissented in *Bullcoming* for essentially the same reasons that they dissented in *Melendez-Diaz.* If Justice Sotomayor would, as seems likely, come out differently on any of the factual scenarios she presented, then she would surely be joined by the four dissenters. Thus it appears likely that if an expert testifies to his own conclusions about the substance, and the test is not itself admitted, the defendant's Confrontation rights would not be violated. Also if the evidence is simply machine-generated, it seems likely that the Court would find no Confrontation violation in admission of the machine output.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti,* 519 F.3d 319 (D.C. Cir. 2007): The Court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Note: While 902(11) may still be viable after *Melendez-Diaz*, some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court seems to reject the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority rejected the government's argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

The *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. But while Rule 902(11) does have a notice and procedure, there is no provision for a demand for production of government production of a witness.

It can be argued that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial. But the problem with that argument is that the certificate does more than establish the genuineness of the business record.

Despite all these concerns, the lower courts *after Melendez-Diaz* have rejected Confrontation Clause challenges to the use of Rule 902(11) to self-authenticate business records. See the cases discussed under the next heading.

Warrant of deportation is not testimonial: *United States v. Garcia,* 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

Note: Other circuits before Melendez-Diaz have reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements

of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation s recorded routinely and not in preparation for a criminal trial").

> **Note: Warrants of deportation probably still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition the crime has not been committed at the time it's prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial.**

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,* 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> Although the Court has yet to articulate a precise definition of "testimonial," it is beyond debate that the Board minutes are nontestimonial in character and, consequently, outside the class of statements prohibited by the Confrontation Clause. The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.
>
> **Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved.**

Autopsy reports are not testimonial: *United States v. Feliz,* 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8). The court concluded that to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford*. Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6) cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and

Davis. The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial" but rather defines testimonial as requiring a "primary motivation" for use in litigation. With respect to Rule 803(8), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found inadmissible:

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

> **Note: The court's emphasis on a practical result is problematic under the majority's analysis in *Melendez-Diaz.* The dissenters in *Melendez-Diaz* argued vehemently that requiring live testimony of the analyst would be impractical and would impose substantial and sometimes insurmountable obligations on the government. The majority's response was that it had no authority to consider burdens, because the certificate was testimonial and admission of testimonial hearsay in the absence of cross-examination violates the Confrontation Clause.**

> **This does not mean, however, that autopsy reports are necessarily testimonial after *Melendez-Diaz.* The forensic report in *Melendez-Diaz* was prepared *solely* for litigation and so fit squarely within the Court's definition of "testimonial." Under *Davis*, it is not enough that a report might foreseeably be used in a litigation — use in litigation has to be the *primary purpose* of the report. Under that test, a good argument can still be made that autopsy reports are not testimonial. And notably, the *Melendez-Diaz* Court agreed with the argument that if a report is admissible under Rule 803(6) or (8), it is by that fact non-testimonial — because in order to be admissible under those exceptions, it can't be prepared primarily for purposes of litigation.**

Certificate of the non-existence of a public record found not testimonial: *United States v. Rueda-Rivera,* 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government

official specifically for this litigation. The court found that the record was not "testimonial" under *Crawford*, declaring as follows:

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

Note: Other courts have found that certificates proving the absence of public records are not testimonial. See, e.g.: United States v. Urqhart, 469 F.3d 745 (8th Cir. 2006) (arguing that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford*."); ***United States v. Cervantes-Flores,*** 421 F.3d 825 (9th Cir. 2005) (noting that while the *certificate* was prepared for litigation, the underlying records were not — though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence would still be so because the certificate is prepared solely for purposes of litigation).

> **Note: For reasons discussed in the analysis of *Melendez-Diaz, supra,* it is pretty certain that CNR's are testimonial, and that the above cases are no longer good law. Certificates offered to prove the absence of a public record are prepared solely for purposes of litigation. Nor is it relevant under *Melendez-Diaz* that the records are not about contested historical facts like the *ex parte* testimony in the Raleigh case. *See United States v. Norwood,* 595 F.3d 1025 (9th Cir. 2010) (after *Melendez-Diaz,* government concedes that certificate of the absence of a public record, prepared for trial, was testimonial).**

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

> **Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared for litigation and no certificate or affidavit was prepared for use in the litigation.**

Post office box records are not testimonial: *United States v. Vasilakos,* 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued

that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz.*

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

> **Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are certainly similar to those in *Melendez-Diaz.* That said, toxicology tests conducted by *private* organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz,* the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility.**

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.

The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. On the other hand, as discussed above, Rule 902(11) might well be upheld as a rule simply permitting the authentication of a record.

Note: The Tenth Circuit has held that the reasoning of *Ellis* remains sound after *Melendez-Diaz. See United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011), infra.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson,* 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or

anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation.

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that the her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

Note: **The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

Absence of records in database is not testimonial; and drug ledger is not testimonial: *United States v. Mendez,* 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible

under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford,* "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

> **Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is only about the absence of public records — records that were not prepared in testimonial circumstances. If that absence had been proved by a *certificate*, then the Confrontation Clause, after *Melendez-Diaz*, would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial.**

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "it appears from an examination of the files in this office" that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation — they "respond[ed] to a prosecutor's question with an answer."

> **Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk's letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**

> **Note: The case also highlights the question of whether a certificate qualifying a business record under Rule 902(11) is testimonial under *Melendez-Diaz.* The letters did not come within the narrow "authentication" exception recognized by the *Melendez-Diaz* Court because they provided "an interpretation of what the record contains or shows."**

Arguably 902(11) certificates do just that. But because the only Circuit Court case on the specific subject of Rule 902(11) certificates finds that they are *not* testimonial, there is certainly no call at this point to propose an amendment to Rule 902(11).

Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement — and because the accomplice was not produced to testify — admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

Note: **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record — the cohort's production of the records at a proffer session — was testimonial.**

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Masher,* 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, "*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see Melendez-Diaz,* 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial))." ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.").

Prior conviction in which the defendant did not cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic,* 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an

immigration matter — specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* the record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal — or, for that matter, any business or public record — could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction. ***See also United States v. Valdovinos-Mendez,*** 641 F.3d 1031 (9th Cir. 2011) (admission of CNR violated defendant's right to Confrontation, but harmless error; admission of A-file documents — including Warrant of Removal, Warning to Alien Ordered Reported, and Order from the Immigration Judge — were non-testimonial because prepared routinely and not in anticipation of litigation).

Documents in alien registration file not testimonial: ***United States v. Valdovinos-Mendez,*** 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents — a Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge — were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records are not testimonial: ***United States v. Yeley-Davis,*** 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

See also United States v. Keck, 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

Immigration forms containing biographical data, country of origin, etc. are not testimonial: ***United States v. Caraballo,*** 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records — the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in Melendez-Diaz), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *
>
> The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. See *Davis*, 547 U.S. at 828, 830 (focusing on the primary purpose of the 911 operator's interrogation in determining whether the answers elicited were testimonial). The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

Summary charts of admitted business records is not testimonial: ***United States v. Naranjo,*** 634 F.3d 1198 (11th. Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his Confrontation Rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[b]usiness records are not testimonial." And "[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial."

State of Mind Statements

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

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction — those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right

to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial — even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements."

Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) ("Although Gibson's statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey's counsel.").

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial — even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation."

Statement to Police Admissible as Past Recollection Recorded is Testimonial But Admission Does Not Violate the Right to Confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial and was subject to unrestricted cross-examination.

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

Supreme Court

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

See also United States v. Barraza, 576 F.3d 798 (8th Cir. 2009) (defendant could not rely on *Roberts* test to exclude non-testimonial hearsay admissible under Rule 803(3) as a statement of the victim's state of mind).

TAB VI.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Continuous Study of the Operation of the Evidence Rules
Date: October 1, 2011

Section 2073 of the Enabling Act requires the Judicial Conference to publish the procedures that govern the work of the Standing Committee and the Advisory Committees. Section 440.20.10 of the Rules of Procedure for the Standing Committee and Advisory Committees provides that each Advisory Committee "must engage in a continuous study of the operation and effect of the general rules of practice and procedure nor or hereafter in use in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary."

Judge Fitzwater suggested that the Reporter provide the Committee with a report on the process "continuous study" by the Advisory Committee — both in the past and for the future. This memo is divided into three parts. Part One is an account of the studies conducted by the Evidence Rules Committee since it was reconstituted in 1993, and the results of those studies. Part two discusses matters considered by the Advisory Committee that resulted from case law changes or suggestions by members of the public or Congress. Part Three describes the Reporter's top-to-bottom review of the Evidence Rules, case law, and scholarship — a new venture in the "continuous study" — and lists some areas that the Committee might wish to consider for future amendments.

I. Studies Conducted by the Advisory Committee Since 1993

A. 1993-6:

The Advisory Committee was reconstituted in 1993. At that time it undertook a comprehensive review of the Evidence Rules to determine the necessity for any amendments. One aspect of this review was to release a statement for public comment listing all of the Rules that the Committee, after consideration, had decided did *not* need amending. I was not the Reporter at that time, but my understanding is that no public comment was received suggesting the need for an

amendment of any Rule that the Committee had decided not to amend. At any rate, after its comprehensive review, the Committee proposed amendments to the following Rules, and these amendments became effective on December 1, 1997:

- Rule 407: providing that proof of product liability issues was barred, and also that changes made before the plaintiff's accident or injury are not covered by the Rule.

- Rule 801(d)(2): providing that a court must consider the hearsay statement itself in determining whether the proponent has provided sufficient evidence of agency or conspiracy.

- Rules 804(b)(5) and 803(24): abrogating these rules and reconstituting them as a single residual exception in a new Rule 807.

- Rule 804(b)(6): a new forfeiture exception to the hearsay rule.

- Rule 806: technical amendment.

B. 1997-2000

I became the Reporter in the Fall of 1996. In 1997 the Committee began another comprehensive review of the Evidence Rules. The review was thought to be necessary due to all the case law that was coming down after *Daubert* — so the major focus was on the expert rules. The systematic review of the Evidence Rules led to the following changes, effective December 1, 2000:

- Rule 103: providing that a party need not renew an *in limine* objection or offer of proof at trial, if the *in limine* ruling was definitive.

- Rule 701: providing that if a lay witness gives testimony on the basis of scientific, technical or other specialized knowledge, that testimony is governed by the requirements of Rule 702.

- Rule 702: providing a three-part test for assessing the reliability of all expert testimony, scientific and non-scientific.

- Rule 703: providing that if otherwise inadmissible evidence is used by an expert, it may not be disclosed to the jury unless its probative value in assessing the basis of the expert's opinion substantially outweighs its prejudicial effect.

- Rule 803(6): providing that a qualified witness could submit an affidavit in lieu of live testimony to qualify a business record.

● Rules 902(11) and (12): providing that a qualified witness's affidavit self-authenticates a business record.

C. 2002-2006

In 2002, the Committee once again embarked on a systematic review of the Evidence Rules, to determine whether any amendments were required. This time around, the Committee used specific criteria for determining whether any Evidence Rule would be usefully amended. Those criteria were: 1) the rule was subject to conflicting interpretations in the circuits, and that conflict was unlikely to be resolved by Supreme Court ruling or legislation; 2) the rule had become demonstrably unworkable in the view of courts and litigants; 3. there was a credible suggestion from the public for change.

The amendments that resulted from this comprehensive study — effective date December 1, 2006, were as follows:

● Rule 404(a): clarifying that evidence of character offered circumstantially to prove conduct is never admissible in a civil case.

● Rule 408: providing that the protections of the rule generally apply in subsequent criminal cases; that the rule prohibits compromise evidence even if proffered by the party who proposed the compromise; and that statements made in compromise cannot be offered to impeach a witness by way of prior inconsistent statement or contradiction.

● Rule 606(b): providing for a limited clerical error exception to the rule prohibiting juror testimony to impeach a verdict.

● Rule 609: providing that a conviction is not automatically admissible to impeach unless it can be readily determined that it involved dishonesty or false statement.

In addition:

1) an amendment to Rule 804(b)(3) was proposed to resolve a conflict on whether the prosecution must provide corroborating circumstances for a proffered declaration against penal interest. That amendment, for one reason or another, was delayed until December 1, 2010.

2) an amendment to Rule 806 was considered, to resolve a conflict on whether a hearsay declarant can be impeached with a bad act; but the Committee decided not to proceed with an amendment.

3) an amendment to Rule 410 was considered, that would have specifically protected prosecutors' statements made during guilty plea negotiations; but the Committee decided not

to proceed with an amendment because case law sufficiently protected such statements.

4) an amendment to Rule 412 was considered, that would have allowed evidence of false complaints to be excepted from the rape shield protection, but the Committee decided not to proceed with an amendment.

5) an amendment to Rule 803(4) was considered, that would have excluded statements made to doctors solely for litigation purposes, but the Committee decided not to proceed with an amendment.

D. 2007-2011

No systematic review was conducted during this period because the Committee became involved in two major time-consuming developments: Rule 502 and the Restyling Project. Nonetheless, the Committee did consider some other amendments based on 1) the Reporter's determination that certain rules had been subject to conflicting interpretations in the courts, or 2) possible substantive problems uncovered during the restyling project. Examples include:

- A possible amendment to Rule 804(b)(1) to clarify when and whether exculpatory grand jury testimony is admissible against the government as prior testimony.

- A possible amendment to resolve a conflict on who has the burden of proving trustworthiness or untrustworthiness under Rules 803(6) and (8).

- A possible amendment that would specifically cover vacated guilty pleas, and other matters, in Rule 410.

The Committee decided not to proceed on any of these proposed amendments.

II. Matters Considered by the Advisory Committee That Resulted from Case Law Changes or Suggestions By Members of the Public or Congress

Since 1996, the Committee has reviewed more than three dozen suggestions for amendments to the Evidence Rules by members of the public or by Congress, or by changes in case law.

Congress

The amendments that came from Congressional suggestion or action are:

- Rule 615: to recognize an exception to sequestration for victim-witnesses, made necessary by enactment of the Victims Rights Act — effective December 1, 1998.

● Rule 404(a): providing that if the defendant attacks the victim's character in a self-defense case, the government can attack the same character trait of the defendant — effective December 1, 2000, made necessary because Congress threatened to amend the rule directly.

● Rule 502: effective September 19, 2008.

Congress has provided a number of suggestions for change that the Committee has successfully opposed. Some of these include:

● An amendment to Rule 804(b)(6) that provides that the defendant forfeits a hearsay objection by joining a conspiracy in which a witness is made unavailable during the course and in furtherance of that conspiracy. (Opposed because courts had already construed the rule in accordance with the proposal.)

● An amendment to Rule 404(b) to accommodate hate crimes legislation. (Opposed because it would have altered the application of Rule 404(b) in a problematic way.)

● An amendment that would codify a harm-to-child exception for the marital privileges. (Opposed because there is no codified marital privilege.)

Public Comment

Public comment has provided a number of suggestions for changes to the Rules. The Committee has carefully considered each comment. One comment has resulted in an amendment:

● Rule 608(b): clarifying that the ban on extrinsic evidence applies only if the witness has been attacked for having a character for untruthfulness. Effective December 1, 2003.

Examples of proposals considered and rejected include: a) a package prepared by a group of doctors for changes to Rules 407 and 702-3); b) a proposal to amend Rule 803(18) to allow treatises to be used by the jury during deliberations over the objection of a party; and c) a proposal to turn Rule 703 into a hearsay exception; and 4) a proposal to reformulate and reorganize the "not hearsay" categories of Rule 801(d).

Of course, comments received during the public comment period have been instrumental in shaping amendments that have originated with the Committee.

Case Law

As to case law changes, the Committee has proposed an amendment, currently out for public comment, to respond to the Supreme Court's decision in *Melendez-Diaz v. Massachusetts.* That is the proposed amendment to Rule 803(10).

III. Reporter's Review of Case Law and Evidence Rules

This section sets forth those Evidence Rules that have been highlighted either by case law or scholarship as possible candidates for an amendment.

This memorandum carries several provisos:

1. Nothing here should be taken as a recommendation that any Rule should actually be amended. It is for the Committee to determine whether the substantial costs of amending a Rule are outweighed by the benefits of clarification or reformulation.

2. This memo does not contain a full-scale discussion of each, or any, of the Rules cited. It provides a concise explanation of the possible problem in the text of the particular Rule. If the Committee decides that the problem is one for which an amendment might be useful, then an in-depth memo on the particular Rule will be prepared for the Committee's consideration at the next meeting. To the extent that language for a possible amendment is set forth, it is only to give the Committee some perspective on what a change might look like. The language is not intended to be definitive, and it could undoubtedly be substantially improved.

3. Possible amendments that have been recently rejected by the Committee are not included, specifically: a) an amendment to Rule 806; b) an amendment to Rule 801(d) and possibly other rules to get rid of the "not hearsay" category; c) an amendment to Rule 804(b)(1) regarding grand jury testimony; and d) an amendment to Rules 803(8) and 803(6) to clarify who has the burden of showing trustworthiness.

4. Possible amendments to Rules 501 and 502 have not been included. There is an ambiguity in Rule 501 on whether state privilege rules apply when a state claim is joined with a federal claim. And there are some case law conflicts about the meaning of certain provisions of Rule 502. But any changes to either rule would have to be directly enacted by Congress and enough said about that.

Possible Amendments for the Committee to Consider

Rule 104(b)

Professor Allen, in *The Myth of Conditional Relevancy,* 25 Loy. L.A. L.Rev. 871 (1992), argues that Rule 104(b) is misguided because there is no such thing as conditional relevancy. Put another way, he contends that there is no distinction between relevance and conditional relevance. He explains as follows:

> No evidence is simply relevant in its own right. Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy.

Professor Allen also argues that there is no standard of proof for relevance that is clearly stated in the Rules–i.e., how much must the proponent show to prove that the evidence is relevant under Rule 401? If relevance (as opposed to conditional relevance) is governed by Rule 104(a), then there is the anomaly of applying a preponderance of the evidence standard to "pure" relevance questions, while using a prima facie standard for the more tenuous "conditional" relevance under Rule 104(b).

Because of all these conundrums, Professor Allen suggests that Rule 104(b) should be replaced with the following provision.

> *(b) Relevancy. – The court may admit evidence over a relevancy objection upon, or subject to, a finding that the evidence could rationally influence a reasonable person's assessment of any fact that is of consequence to determining the action.*

Rule 106

Rule 106 sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part * * * that in fairness ought to be considered at the same time." Rule 106 by its terms permits the adversary to introduce completing statements only where the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as a criminal defendant's oral confession. Some courts have found, however, that Rule 106, or at least the principle of completeness embodied therein, applies to require admission of omitted portions of an oral statement when necessary to correct a misimpression. See *United States v. Tarantino,* 846 F.2d 1384 (D.C. Cir. 1988) (prior oral statements of a government witness were properly offered on redirect examination since the defendant had used portions of the statements in cross-examination and the omitted portions placed

the statements in context). See also the discussion in *United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (noting the case law permitting criminal defendants to offer omitted parts of statements they make to law enforcement officers that provide exculpatory information). Compare *United States v. Harvey,* 914 F.2d 966 (7th Cir. 1990) (Rule 106 does not apply to oral statements).

Moreover, some courts have held that Rule 106 can operate as a de facto hearsay exception when the opponent opens the door by creating a misimpression by offering only part of a statement. In other words, completing evidence is found admissible under Rule 106 even if it would otherwise be hearsay. See *United States v. Sutton,* 801 F.2d 1346, 1369 (D.C.Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously"). See also C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (supporting this approach). Such a reading is not apparent from the text or Committee Note. See *United States v. Wilkerson,* 84 F.3d 692 (4th Cir. 1996) (interpreting Rule 106 as purely a timing device, not as a rule permitting the admission of otherwise inadmissible evidence).

Assuming that the Rule should cover oral statements, and also should permit the use of hearsay for completeness purposes, the Rule could be amended as follows:

> If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part — or any other ~~writing or recorded~~ statement — that in fairness ought to be considered at the same time, whether or not that statement is hearsay.

Rule 403

Rule 403 provides that a trial judge may exclude proffered evidence if its probative value is substantially outweighed "by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Of the negative factors listed that would support exclusion, only one refers to the jury directly — the danger of "misleading the jury". This would seem to indicate that other negative factors mentioned in the Rule, specifically the danger of unfair prejudice and confusion of the issues, must be taken into account in a bench trial. Yet courts have held to the contrary, reasoning that unfair prejudice and confusing evidence will not have the same negative impact on the judge as it would have on the jury. See, e.g., *Schultz v. Butcher,* 24 F.3d 626 (4th Cir. 1994) (trial court erred in excluding evidence in a bench trial on the ground of its prejudicial effect); *Gulf States Utils. v. Ecodyne Corp.,* 635 F.2d 517 (5th Cir. 1981) (the portion of Rule 403 referring to prejudicial effect "has no logical application in bench trials").

The Rule could be brought into line with the case law by the following change:

The court may exclude relevant evidence if its probative value is substantially outweighed by danger of one or more of the following: ~~unfair prejudice, confusing the issues,~~ misleading, confusing, or unfairly prejudicing the jury against the opponent, undue delay, wasting time, or needlessly presenting cumulative evidence."

Rules 413-415

The major ambiguity in these Rules is whether evidence of a defendant's prior acts of sexual misconduct are subject to exclusion under Rule 403. Every case construing these Rules has held that Rule 403 is applicable, so arguably there is no need to amend the Rule in light of this judicial unanimity. On the other hand, at least with Rules 413-414 the Rule 403 balancing has been construed into the Rules as a savings clause–the courts reasoning that if Rule 403 were unavailable, the Rules would violate the right of the accused to due process. See *Federal Rules of Evidence Manual,* §413.02 ("Some courts have held that Rules 413 and 414 might be unconstitutional if the trial court had no power to exclude evidence of an accused's prior sexual misconduct. Thus, these Courts read Rule 403 into the Rules as a kind of saving clause."). See also *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998) (recognizing that "Rule 413 raises a serious constitutional due process issue" because it creates a danger that the defendant will be convicted because he is a bad person, not because he committed the crime charged: "without the safeguards embodied in Rule 403, we would hold [Rule 413] to be unconstitutional.").

If the Committee wishes to specify that Rule 403 still applies to a defendant's prior sexual misconduct, it might add the following to Rules 413-415 (using Rule 413 as an example):

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. Subject to Rule 403, ~~T~~the evidence may be considered on any matter to which it is relevant.

* * *

Rule 607

Rule 607 states categorically that a party can impeach any witness it calls. On its face, the Rule permits a party to call a witness solely for the purpose of "impeaching" them with evidence that would not otherwise be admissible, such as hearsay. Yet despite the affirmative and permissive language of the Rule, the courts have held that a party cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. *See, e.g., United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985) ("The prosecution, however, may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule. The danger in this procedure is obvious."); *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975) (conviction reversed on the ground that the government should not have been permitted to call a witness for no other purpose than to impeach him). *See generally* Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence,* 68 Tex. L. Rev. 745 (1990) (noting this and other situations where courts have felt compelled to diverge from the text of an Evidence Rule in order to reach a just result).

If the Committee wishes to codify an exception to Rule 607 that the courts have developed to prevent abuse, it might look something like this:

Rule 607. Who May Impeach

Any party, including the party that called the witness, may attack the witness's credibility. But a party may not call a witness for the sole purpose of impeaching that witness with evidence that is otherwise inadmissible.

Rule 613(b)

The Rule provides that it is not necessary to give a witness an opportunity to examine a prior inconsistent statement before that statement is admissible to impeach the witness. All that is necessary is that the witness be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule from Queen Caroline's case, under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Note, however, some courts have reverted to the common-law rule. See, e.g., *United States v. Sutton,* 41 F.3d 1257 (8th Cir. 1994) (trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while cross-examined by defense counsel); *United States v. Marks,* 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite the language of Rule 613(b) "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and juries").

Some courts have returned to the common-law rule on the ground that it is more efficient. Allowing the adversary to admit extrinsic evidence without confronting the witness leads to a waste of time in cases where the witness would have admitted that he made the statement. The Rule also burdens witnesses who wish to minimize the time they must take from work or other activities. Under the Federal Rule a witness who apparently has nothing more to add must remain available for recall until the other party's case-in-chief or case-in-rebuttal has concluded.

The change from the common-law rule was deemed necessary for a number of reasons. First, the common-law rule was sometimes a trap for the unwary; statements were sometimes excluded due to an inadvertent failure to lay a foundation. Second, problems were presented when inconsistent statements were discovered after the witness testified. Third and most importantly, there was the danger under the common-law rule of prematurely alerting collusive witnesses to the evidence available for impeachment.

Those who argue against the current Rule maintain that a reversion to the common-law rule could be coupled with language granting discretion to the trial judge to dispense with the traditional foundation requirement where the interests of justice require. Judge Selya, concurring in *United States v. Hudson*, 970 F.2d 948, 959 (1st Cir. 1992), has expressed this view:

> [The common law rule] works to avoid unfair surprise, gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency, facilitates judges' efforts to conduct trials in an orderly manner, and conserves scarce judicial resources. At the same time, insistence upon a prior foundational requirement, subject, of course, to relaxation in the presider's discretion if the interests of justice otherwise require, does not impose an undue burden on the proponent of the evidence.

If the Committee were to propose a return to the common-law foundation requirement, while providing judicial discretion to dispense with such a requirement in the interests of justice, the amendment might look like this:

> **(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is not admissible ~~only if~~ before the witness is given an opportunity to explain or deny the statement ~~and an adverse party is given an opportunity to examine the witness about it, or if~~ unless the interests of justice otherwise require. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Rule 704(b)

Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." But some courts have held (and others have implied) that the rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from such witnesses as law enforcement experts testifying about the narcotics trade. *See, e.g., United States v. Gastiaburo,* 16 F.3d 582 (4th Cir. 1994) (stating that Rule 704(b) does not apply to the testimony of an expert law enforcement agent); *United States v. Lipscomb,* 14 F.3d 1236 (7th Cir. 1994) (expressing sympathy with such a position, but finding it unnecessary to decide the matter). Other courts, while technically applying the Rule 704(b) limitation to all expert witnesses, have applied it in such a way as to nullify its impact — permitting, for example, an expert to opine on the mental state of a hypothetical person whose fact situation mirrors the fact situation in issue. See, e.g., *United States v. Williams,* 980 F.2d 1463 (D.C.Cir. 1992) (permitting a law enforcement agent to testify that a hypothetical person carrying ziplock bags each containing small amounts of drugs was intending to distribute them; the hypothetical matched the facts of the case).

The Committee might consider whether the Rule should be amended to restore its original focus, which was to limit the conclusory testimony of psychological experts in criminal cases. If such an amendment were considered, it might look like this:

Rule 704. Opinion on Ultimate Issue

* * *

(b) In a criminal case, a mental health expert ~~witness~~ must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Alternatively, the Committee could consider the possibility of deleting Rule 704(b) entirely. If the Rule is designed to exclude expert testimony that is conclusory and unhelpful, then it is superfluous. Rule 702 already excludes expert testimony that is not helpful. Indeed, if Rule 704(b) is to be used at all independently of Rule 702, it is by definition being used to exclude *helpful* evidence about the defendant's mental state. It makes little sense to continue with a Rule that is either superfluous or else designed to exclude evidence that would assist the jury.

Rule 706

Judge Gettleman has proposed an amendment to the appointment clause of Rule 706 that would read as follows:

Rule 706. Court Appointed Experts

(a) Appointment Process.— ~~On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.~~.

(1) The court may, on its own motion or the motion of any party, enter an order appointing an expert to act as the court's witness. Prior to any such appointment, the court must notify and allow the parties a reasonable time to:

(A) object to the appointment;

(B) submit nominations by each party or by all parties jointly; and

(C) address the qualifications of any such expert.

(2) The court may appoint expert witnesses of its own choosing or may appoint an expert nominated by any party.

Judge Gettleman explains the proposed change as follows:

> The proposal eliminates the "show cause" language that is rarely observed in practice. Especially where a court-appointed expert is suggested by a party, the notice of motion serves as a "show cause" order. Where the court suggests the appointment, subsection (a) requires adequate advance notice.

* * *

Various suggestions have been made in the literature for other possible amendments to Rule 706. These include:

1. Regulating ex parte communications between the court and the expert and between a party and the expert, for example by requiring that all such communications be recorded and made available to all parties.

2. Granting the trial court discretion to limit depositions or cross-examination of court-appointed experts where the circumstances warrant.

3. Regulating whether the jury should be told that the expert is court-appointed — either prohibiting such a practice or requiring cautionary instructions.

4. Clarifying that the Rule does not affect the court's inherent authority to appoint a technical adviser, when that appointee will not be a witness at trial.

Most of these issues are addressed in the ABA Civil Practice Standards, and these Standards might serve as a guideline to any amendment to the Rule.

The Advisory Committee previously considered whether an amendment to Rule 706 should be proposed to deal with some of the possible problems set forth above. The Committee decided to defer consideration of any amendment because the Civil Rules Committee was considering an amendment to Civil Rule 53, governing special masters. The Evidence Rules Committee recognized that there is an overlap between the roles of special master and court-appointed expert, and found it appropriate to wait until Civil Rules completed its project. Rule 53 has since been amended, and it makes no attempt to regulate the use of court-appointed experts. So if the Committee were to decide to proceed with an amendment to Rule 706, it would not conflict with anything in the Civil Rules.

Rule 801(c)/(a)

Rule 801(c) defines hearsay as an out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement." The Committee Note states that "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is excluded from the definition of hearsay "by the language of subdivision (c)". This would mean that a statement would be hearsay only if it were offered for the truth of the express assertion in the statement — offering it for any implied assertion would escape hearsay proscription. So for example, a statement "It is raining cats and dogs" would be admissible to prove it is raining — the statement would not be offered to prove the express assertion that cats and dogs were falling from the sky.

This highly constricted definition of hearsay has been rejected by most courts. The cases generally state that statements are hearsay if 1) they are offered for the truth of a matter *implied* in the statement and 2) the speaker *intended* to communicate that implication. *See, e.g., United States v. Reynolds,* 715 F.2d 99 (3rd Cir. 1983) (rejecting the government's suggestion that only a statement's express assertion should be considered in deciding whether it constitutes hearsay); *Lyle v. Koehler,* 720 F.2d 426, 433 (6th Cir. 1983) (concluding that letters were hearsay because "the inferences they necessarily invite form an integral part of the letters"; the reference to "matters asserted" in Rule 801(c) covers both express and implied assertions); *United States v. Jackson,* 88 F.3d 845, 848 (10th Cir. 1996) (stating that the important question under Rule 801(c) is whether the assertion, express or implied, "is intended"). *See also* Milich, *Re-examining Hearsay Under the Federal Rules: Some Method for the Madness,* 39 Kan. L.Rev. 893 (1991) (arguing for an intent-based test in determining whether implied assertions are hearsay). There are cases, however, that appear to hold that implied assertions can never be hearsay. *See e.g., United States v. Perez,* 658 F.2d 654, 659 (9th Cir. 1981) ("Perez' verbal conduct acknowledging that the caller was Ruvalcaba, whether express or implied, was an implied assertion and admissible as nonassertive conduct under Federal Rule of Evidence 801(a), (c).").

An intent-based test for implied assertions, in accordance with the case law, could be added to Rule 801(c) as follows:

(c) Hearsay.—''Hearsay'' means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter that the declarant intended to expressly or impliedly assert ~~asserted~~ in the statement.

Another way to implement the intent-based test for implied assertions is to clarify the definition of "statement" in Rule 801(a). As the Committee discovered during the restyling, Rule 801(a) is ambiguous on whether verbal and written statements must be intentional to be admissible. The restyled rule reads as follows:

> **(a) Statement.** "Statement means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

The placement of "if the person intended it" is vague because it could refer only to nonverbal conduct. That ambiguity is in the original rule and courts and commentators have struggled with the meaning of the rule. Most courts have read the "it" to refer to all assertions listed — that is, an oral or written assertion is not a statement (and so cannot be hearsay) unless it was intended as an assertion. *See, e.g., United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005) (central question for hearsay application is whether an assertion is intended). But that is not a universal holding; a few courts have held that an implied assertion cannot be hearsay even if the declarant intended to communicate what was implied in the statement. *See, e.g., United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990) ("Rule 801, through its definition of "statement" forecloses appellants' argument by removing implied assertions from the coverage of the hearsay rule.").

If the Committee wishes to implement an intent-based test for all implied assertions, the possible fix to Rule 801(a) could look something like this: (a) Statement. "Statement means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

> (a) Statement. "Statement means a person's intentional oral assertion, written assertion, or nonverbal conduct~~, if the person intended it as an assertion~~.

It would probably be a good idea, for clarity purposes, to make changes to both Rules 801(a) and (c).

Rule 803(3)

Rule 803(3) incorporates the famous *Hillmon* doctrine, providing that a statement reflecting the declarant's state of mind can be offered as probative of the declarant's subsequent conduct in accordance with that state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. When the victim says, "I am going to meet Frank tonight", is the statement admissible to prove that Frank and the victim actually met? Or is the statement admissible only to prove the future conduct of the declarant? The Advisory Committee Note refers to the Rule as allowing only "evidence of intention as tending to prove the act intended" — implying that the statement can be offered to prove how the declarant acted, but cannot be offered to prove the conduct of a third party. The legislative history is ambiguous. The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. See, e.g., *Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978); *United States v. Jenkins,* 579 F.2d 840 (4th Cir. 1978) (statements of intent can prove only the declarant's subsequent conduct). Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place. See, e.g., *United States v. Delvecchio,* 816 F.2d 59 (2nd Cir. 1987). See C. Mueller and L. Kirkpatrick, *Evidence* at 938 ("Some modern cases take the clearly correct position that the exception in its present form cannot justify use of statements of intent by themselves as proof of what others did. And yet a growing number of cases approve use of a statement to prove what the speaker and another did together if other evidence confirms what the statement suggests the other did."). See also McLain, *"I'm Going to Dinner With Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker — and the Role of the Due Process Clause,* 32 Cardozo L.Rev. 373 (2010) (reviewing the case law and raising the possibility that a corroboration requirement could be codified in Rule 803(3).

If the Committee decides that Rule 803(3) should not permit admissibility of state of mind statements when offered to prove the conduct of someone other than the declarant, then the Rule could be amended as follows (with the bracketed language to be added if the Committee agrees with the courts that hold such statements admissible if corroborating evidence is provided):

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will; or

(B) a statement offered to prove the conduct of someone other than the declarant [unless it is supported by corroborating evidence indicating that the statement is true].

Rule 803(5)

The Rule provides a hearsay exception for past recollection recorded. The text works well when the party who made the statements in the record offered for truth is also the party who prepared the record and who is testifying at trial. What happens, however, when a person makes a statement to another person, and that other person is the one who writes it down? The exception by its terms does not seem to permit a “two-party voucher” system of proving past recollection recorded, because it states that the record must be shown to have been “made or adopted by the witness.” Thus, the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under Rule 803(5). *See, e.g.*, *United States v. Williams,* 951 F.2d 853 (7th Cir. 1993).

If the Rule were amended to provide for two-party vouching, it might read as follows:

(5) **Recorded Recollection.** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness — or made to another who testifies that the witness’s statement was accurately recorded — when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Rule 803(6)

The Rule defines a business record as one "made at or near the time by — or from information transmitted by — someone with knowledge." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge," not that the person must be reporting within the business structure. Yet despite the text, the courts have held that all those who report information included in a business record must be under a business duty to do so — or else the hearsay problem created from the report by an outsider must be satisfied in some other way, under the strictures of Rule 805, the rule on multiple hearsay. See *United States v. Turner,* 189 F.3d 712, 719-20 (8th Cir. 1999) ("[W]hen the source of information and the recorder of that information are not the same person, the business record contains hearsay upon hearsay. If both the source and recorder of the information were acting in the regular course of the organization's business, however, the hearsay upon hearsay problem may be excused by the business records exception to the rule against hearsay."); *Bemis v. Edwards,* 45 F.3d 1369 (9th Cir. 1995) (911 call was not admissible as a business record because the caller was not under any business duty to report, and the report did not independently satisfy any hearsay exception); *Cameron v. Otto Bock Orthopedic Indus. Inc.,* 43 F.3d 14 (1st Cir. 1994) (product failure reports submitted to the manufacturer after the plaintiff's accident were inadmissible; the reports were submitted by parties who had no business duty to report accurately to the manufacturer).

If the Committee thinks it appropriate to codify the business duty requirement, the amendment might look like this:

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge <u>and a duty to record or transmit the information</u>;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

The above is the equivalent of the unrestyled Tennessee Rule of Evidence 803(6).

Another possibility is to add an exclusionary clause as a hanging paragraph, along the lines of Louisiana Rule 803(6):

> This exception is inapplicable unless the recorded information was furnished to the business by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule.

Reporter's Note: The Louisiana version is more comprehensive and descriptive. It properly notes that a statement from an outsider to the business can be admitted even if not made pursuant to a business duty, so long as it complies with some other hearsay exception (e.g., an admission or an excited utterance in a business record). But it creates the dreaded hanging paragraph. If the Committee decides to proceed with considering a possible amendment, Professor Kimble will probably be able to incorporate the above language in some way without using a hanging paragraph.

Rule 803(8)

Rule 803(8) contains two textual anomalies. It currently reads as follows:

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

The anomalies are as follows:

1. *Rule 803(8)(A)(ii) and exculpatory reports:* Subdivision (A)(ii) excludes from its coverage public reports setting forth a "matter observed by law-enforcement personnel" if such reports are offered "in a criminal case." Read literally, the Rule would not provide a hearsay exception for a forensic report prepared by the police that concluded that the defendant was innocent. Such a report would be offered by the defendant, but the exclusionary language covers *all* police reports offered in criminal cases. Yet some lower courts have refused to be bound by the plain meaning of the rule, reasoning that Congress intended to regulate only police reports that unfairly *inculpate* a criminal defendant, and that the exception should therefore apply to public reports offered by the accused. See, e.g., *United States v. Smith*, 521 F.2d 957 (D.C.Cir. 1975) (despite its exclusionary language, the subdivision should be read in light of Congress's intent to exclude police reports only when offered *against* a criminal defendant). Other courts have read the Rule literally. *United States v. Sharpe,* 193 F.3d 852, 868 (5th Cir. 1999) (the defendant's reliance on Rule 803(A)(ii) to admit an exculpatory police report was "misplaced" because the Rule does not grant admissibility for any such reports offered in criminal cases).

2. *Rule 803(8)(A)(ii) and (iii) and law enforcement reports:* These subdivisions both contain language appearing to exclude from the hearsay exception all records prepared by law enforcement personnel, when such records are offered against a criminal defendant. Read literally, these provisions would prevent the government from introducing simple tabulations of non-adversarial information. For example, these subdivisions appear not to grant a hearsay exception for a routine printout from the Customs Service recording license plates of cars that crossed the border on a certain day, when offered in a criminal case. Courts have refused to apply the plain exclusionary

language of these subdivisions literally, however. They reason that the language could not have been intended to cover reports that are ministerial in nature and prepared under non-adversarial circumstances; it is only adversarial, evaluative reports (such as crime scene reports) that carry the risk of fabrication that the exclusionary language was designed to regulate. See, e.g., *United States v. Orozco*, 590 F.2d 789 (9th Cir. 1979) (customs records of border crossings are admissible under Rule 803(8) because they are ministerial and not prepared under adversarial circumstances); *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976) (reports concerning firearms' serial numbers were admissible because they were records of routine factual matters prepared in non-adversarial circumstances).

If these two textual anomalies were addressed in an amendment to Rule 803(8), the amendment might look like this:

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including~~, in a criminal case,~~ a matter observed by law-enforcement personnel<u>, if the record or statement is made under adversarial circumstances and offered against a criminal defendant</u>; or

(iii) in a civil case <u>—</u> or against the government in a criminal case <u>if the record or statement is made under adversarial circumstances —</u> ~~;~~ factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

There is another drafting alternative that captures the case law and would make Rule (803)(8) less elaborate and substantially easier to apply:

(8) Public Records. A record or statement of a public office<u>,</u> ~~if:~~

~~(A) it sets out:~~

~~(i) the office's activities;~~

~~(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or~~

~~(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and~~

~~(B) neither~~ unless the opponent shows that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

This is the Nebraska version. It makes a good deal of sense, because all of the exclusionary language in the existing Rule is designed to exclude untrustworthy reports, such as police reports of a crime scene that might be written to frame the accused. It would seem that a simple inclusion of the trustworthiness clause would be sufficient to regulate untrustworthy public reports — and the change would bring the Rule in line with the case law in both civil and criminal cases. There is no reason to pigeonhole reports in various subdivisions as they are all designed to admit public reports unless they are shown to be untrustworthy.

Rule 804(b)(1)

The Rule provides a hearsay exception for prior testimony when offered against a party who either 1) had a similar motive and opportunity to develop the testimony at the time it was given, or 2) in civil cases, had a predecessor in interest with such a similar motive and opportunity at the time the testimony was given. Some courts have defined a "predecessor in interest" as *anyone* who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the instant trial; these courts do not require some legal relationship between the prior party and the party against whom the evidence is now offered. This construction collapses the term "predecessor in interest" with the term "similar motive." *See e.g., Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179 (3rd Cir. 1978) (prior testimony properly admitted against plaintiff, where prior party had a similar motive to develop the testimony as the plaintiff in the instant case would have were the declarant to testify at trial; Judge Stern, concurring, states that such an expansive definition of "predecessor in interest" effectively reads that term out of the Rule); *Horne v. Owens-Corning Fiberglass Corp.,* 4 F.3d 276 (4th Cir. 1993) (prior testimony from a different case properly admitted against the plaintiff, where the previous plaintiff, though not affiliated in any way with the plaintiff, had a similar motive to develop the testimony). Other courts have admitted such evidence not as prior testimony (for want of a predecessor in interest) but as residual hearsay. *See Dartez v. Fibreboard Corp.,* 765 F.2d 456 (5th Cir. 1985).

If the Committee were to decide to codify the cases that read the predecessor in interest requirement out of the Rule — and thus provide for uniform case law — the amendment might look like this:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, ~~whose predecessor in interest~~ another party who had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Rule 804(b)(6)

Professor Tom Lininger, in his article *The Sounds of Silence: Holding Batterers Accountable for Silencing Their Victims,* 87 Tex. L.Rev. 857 (2009), argues for an amendment to Rule 804(b)(6) that will make it easier for a court to find that a defendant charged with abusing a victim had forfeited his hearsay objection. Professor Lininger contends that the existing Rule 804(b)(6) makes if difficult to find that an abuser forfeited his hearsay objection if he does anything less than specifically threaten the victim with harm for testifying. His proposal for a new Rule 804(b)(6) provides as follows:

> (6) **Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that engaged in wrongdoing that foreseeably could cause, and did in fact proximately cause, ~~wrongfully caused - or acquiesced in wrongfully causing -~~ the declarant's unavailability as a witness~~, and did so intending that result~~. Proof of forfeiture may consist, in whole or part, of the same proof that the proponent offers to establish any element of a criminal offense or civil claim at issue in the trial. Except with evidence that is separately admissible, evidence offered to establish wrongdoing must be heard outside the presence of the jury. The court may consider all available evidence other than privileged information, and the court must employ the same standard of proof as set forth in Rule 104(a).

Reporter's Note: Professor Lininger of course recognizes that the Supreme Court, in *Giles v. California*, 554 U.S. 353 (2008), held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* But he argues, in a detailed reading of *Giles*, that his proposed amendment is consistent with the Court's language and holding. If the Committee wishes to proceed with considering an amendment like that above, the Reporter will provide a further analysis of whether the proposed amendment would be found consistent with *Giles.* For now it is enough to say that Professor Lininger's argument is at the very least colorable.

Rule 807

Rule 807 permits the admission of residual hearsay only if that hearsay is "not specifically covered" by another exception. This might seem to indicate that hearsay that "nearly misses" one of the established exceptions should not be admissible as residual hearsay — because it is specifically covered by, and yet not admissible under, another exception. In fact, however, most courts have construed the term "not specifically covered" by another hearsay exception to mean "not admissible under" another hearsay exception. *See, e.g., United States v. Fernandez,* 892 F.2d 976 (11th Cir. 1989) (grand jury statement is "not specifically covered" by another hearsay exception because it is not admissible under any such exception). *Compare United States v. Dent,* 984 F.2d 1453 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that grand jury testimony can never be admissible as residual hearsay, since such testimony is specifically covered by, though not admissible under, the hearsay exception for prior testimony).

The predominant construction of the term "not specifically covered" indicates a much more liberal use of the residual exception than was contemplated by Congress. It is fair to state that Congress intended the residual exception to be used in only exceptional circumstances. But the courts have used the residual exception more broadly than that. It is notable that the Uniform Rules Committee has added language to its version of Rule 807 to limit its scope to "exceptional circumstances".

Another possible problem with the residual exception involves the notice requirement. The Rule states that a statement "is admissible only if" the proponent gives notice before the trial or hearing, sufficiently in advance so that "the party has a fair opportunity to meet it." Most courts have read the notice requirement far more flexibly than its language would seem to indicate. For example, most courts have held that the notice requirement can be satisfied by providing notice at trial, so long as the adversary is given sufficient time to prepare. *See, e.g.*, *United States v. Baker,* 985 F.2d 1248 (4th Cir. 1993). Other courts have read a good cause exception into the notice requirement. *See, e.g., United States v. Lyon,* 567 F.2d 777 (8th Cir. 1977). *But see United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978) (rejecting a good cause exception as not permitted by the text of the Rule).

If the Committee wishes to retain the rigid notice requirement in Rule 807, there is not much it can do to amend the Rule that could make the courts comply. The Rule already says that a statement may not be admitted if the notice provision is not met. An amendment such as "and we really mean it" would not seem workable. On the other hand, the Committee might wish to amend the notice requirement to codify the predominant case law, which essentially reads a "good cause" requirement into the Rule.

Assuming that the Committee wishes to amend Rule 807 to limit its scope to its original intent, and also wishes to codify the case law on notice, the Rule might look like this:

Rule 807. Residual Exception

(a) In General. ~~Under the following~~ In exceptional circumstances, the court may admit a hearsay statement ~~is not excluded by the rule against hearsay even if the statement is~~ not specifically covered by a hearsay exception in Rule 803 or 804, if the court determines that:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it, unless the court for good cause excuses advance notice.

Tender Years Exception

The Uniform Rules contain a special hearsay exception for children who are victims of physical or sexual abuse. It is similar to exceptions that are found in most states. Under Federal Practice, such statements are usually offered under Rules 803(2), 803(4) or 807. An argument can be made that each of these exceptions is an inadequate tool for regulating and admitting child hearsay in abuse cases. If the Committee believes that a special exception should be added to the Federal Rules to cover child-victim hearsay in abuse cases, an exception like that in the Uniform Rules could be added as a new Rule 808. The Uniform Rules Tender Years exception provides as follows:

Statement of Child Victim

(a) Statement of child not excluded. – A statement made by a child under [seven] years of age describing an alleged act of neglect, physical or sexual abuse, or sexual contact performed against, with, or on the child by another individual is not excluded by the rule against hearsay if:

(1) subject to subdivision (b), the court conducts a hearing outside the presence of the jury and finds that the statement concerns an event within the child's personal knowledge and is inherently trustworthy; and

(2) the child testifies at the proceeding, or the child is unavailable to testify at the proceeding, as defined in Rule 804(a), and, in the latter case, there is evidence corroborative of the alleged act of neglect, physical or sexual abuse, or sexual contact.

(b) Determining trustworthiness. – In determining the trustworthiness of a child's statement, the court must consider the circumstances surrounding the making of the statement, including:

(1) the child's ability to observe, remember and relate the details of the event;

(2) the child's age and mental and physical maturity;

(3) whether the child used terminology not reasonably expected of a child of similar age, mental and physical maturity, and socioeconomic circumstances;

(4) the child's relationship to the alleged offender;

(5) the nature and duration of the alleged neglect, physical or sexual abuse, or sexual contact;

(6) whether any other descriptions of the event by the child have been consistent with the statement;

(7) whether the child had a motive to fabricate the statement;

(8) the identity, knowledge and experience of the person taking the statement;

(9) whether there is a video or audio recording of the statement and, if so, the circumstances surrounding the taking of the statement; and

(10) whether the child made the statement spontaneously or in response to suggestive or leading questions.

(c) Making a record. – The court must state on the record the circumstances that support its determination of the admissibility of the statement.

(d) Notice. – The statement is admissible only if the proponent gives to all adverse parties reasonable notice in advance of trial — or during trial if the court excuses pretrial notice for good cause — of the nature of any statement the proponent intends to introduce at trial.

Rule 901(b)

Judge Victor E. Bianchini & Harvey Bass, in *A Paradigm for the Authentication of Photographic Evidence in the Digital Age,* 20 T. Jefferson L. Rev. 303 (1998), argue that the traditional authentication methods under the Evidence Rules may be inadequate to deal with the special risks of alteration and forgery presented by digitally produced photographic evidence. The authors contend, with some justification, that the chances of detecting a digital manipulation of a photograph are substantially less than the chances of detecting manipulation of a traditional photo. The authors propose an amendment that would add a new subdivision to Rule 901(b), to create a special category for digitally created evidence. The amendment to Rule 901(b) would read as follows:

> (b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:
>
> * * *
>
> <u>(11) In the case of photographic evidence generated digitally from computer sources, the proponent of such evidence must make the original computer data files available for examination upon request. Computer generated negatives, prints or other images created by emulsion-based "film recorders" or other such devices capable of masking the digital nature of the source, shall not be admissible unless such prints are digitally imprinted with a "fingerprint" identifying such print as having been so generated.</u>

Reporter's Note: This proposal might have some merit, but it probably should not be placed in Rule 901(b). That Rule simply provides illustrations of ways to authenticate evidence. It does not impose limitations. Perhaps this proposal is better placed at the end of Rule 901(a), which sets forth the standard for authenticity, or as a separate rule at the end of Article IX.

Rule 1006

Rule 1006 allows admission of summaries in lieu of having the voluminous originals presented at trial. The use of summaries in this manner should be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted. *See, e.g., Air Disaster at Lockerbie Scot. on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994) (finding no error where experts gave their opinions on the adequacy of PanAm security measures, relying from time to time on trial transcripts displayed on a projection screen; Rule 1006 objection was misplaced because the trial transcripts were records of testimony at the trial itself). Some courts have considered the "admissibility" of charts and summaries of trial evidence under Rule 1006, but this is a mistake; the Rule is really not applicable because pedagogical summaries are not evidence. See, e.g., *United States v. Sawyer,* 85 F.3d 713 (1st Cir. 1996) (applying Rule 1006 to approve the use of summaries based on evidence that had already been admitted at trial); *United States v. Stephens,* 779 F.2d 232 (5th Cir. 1985) (same).

It might be possible to alleviate some confusion by clarifying that Rule 1006 does not regulate the presentation of summaries of trial evidence. An amendment might look like this:

Rule 1006. Summaries to Prove Content

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court. <u>This rule does not govern the use of summaries of evidence that has been admitted at trial.</u>

The Committee Note could instruct that the use of summaries of admitted evidence is to be treated under Rules 611 and 403. *See* Federal Rules of Evidence Manual, ¶ 1006.02 [5] ("Rule 1006 allows admission of summaries in lieu of having the voluminous originals presented at trial. This use of summaries must be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted. * * * Although some courts have considered charts and summaries of admitted evidence under Rule 1006, the Rule is really not applicable, because pedagogical summaries are not evidence. Rather, they are demonstrative aids governed by Rules 403 and 611.").

"Global" Amendment

There are a number of Evidence Rules that impose a notice requirement–Rules 404(b), 412, 413-415, 609(b), 807 and 902(11)and (12). The notice requirements are not consistently written. Some have imposed specific time limits (e.g., 15 days before trial for 413-415, 14 days for 412), some employ "reasonableness." Some allow good cause excuse, some do not. It is for the Committee to decide whether it would be useful to craft a standard notice provision that would be used for all of the Evidence Rules that require notice.