ADVISORY COMMITTEE
ON
EVIDENCE RULES

Alexandria, VA
April 29, 2016

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Alexandria, Virginia

April 29, 2016

I. Opening Business

Opening business includes:

! Approval of the minutes of the Fall, 2015 meeting.

! A report on the January, 2016 meeting of the Standing Committee.

● Tributes to two departing members: Brent Appel and Paul Shechtman.

II. Possible Amendment to Rule 803(16)

The Committee's proposal to abrogate Rule 803(16), the hearsay exception for ancient documents, was issued for public comment in August, 2015. At this meeting the Committee must consider whether to propose an amendment to Rule 803(16) for final approval by the Standing Committee. The agenda book contains the following behind Tab Two:

A. Reporter's Memorandum on Rule 803(16).

B. Summary of public comment on the proposal to eliminate Rule 803(16).

III. Possible Amendments to Rule 902 for Certifying Authenticity of Certain Electronic Evidence

The Committee's proposals to amend Rule 902 to provide for self-authentication of machine-generated evidence (Rule 902(13)) and for self-authentication of copies of electronic data (Rule 902(14)) were issued for public comment in August, 2015. At this meeting the committee must consider whether to propose these rules for final approval by the Standing Committee. The agenda book contains a Reporter's memorandum on the proposed rules in light of the public comment.

IV. Possible Amendments to Certain Notice Provisions of the Evidence Rules

The agenda book contains a memo that discusses possible changes to certain notice provisions in the Evidence Rules, which the Committee at the last meeting either agreed upon in principle or agreed to further consider. These changes include: 1) deleting the provision in Rule 404(b) that conditions notice on the defendant's request; and 2) adding a good cause exception to Rule 807. At this meeting the Committee will decide whether to recommend to the Standing Committee that these proposed changes should be issued for public comment. The memo also considers whether uniform notice provisions can be implemented for Rules 404(b), 609(b), 807 and 902(11).

V. Best Practices for Authenticating Certain Electronic Evidence

The Committee has been working on a project that would provide Abest practices@ for authenticating electronic evidence. The goal is to prepare a pamphlet to be published and distributed by the Federal Judicial Center. The agenda book contains a final draft, to be approved by the Committee for release to the FJC.

VI. Possible Changes to Hearsay Exceptions

The agenda book contains a number of memoranda and reports that are related to proposals and ideas discussed at the Symposium on Hearsay Reform.

A. A Reporter's memorandum --- with an attached report by Professor Broun --- on a proposal to amend Rule 801(d)(1)(A) to allow for greater substantive use of prior inconsistent statements.

B. A Reporter's memorandum on suggested limitations on Rule 803(2), the excited utterance exception to the hearsay rule --- with an attached report by Professor Liesa Richter on state hearsay exceptions that contain untrustworthiness clauses.

C. The Federal Judicial Center Review of Scientific Literature on the Reliability of Present Sense Impressions and Excited Utterances.

D. A Reporter's memorandum on possible expansion of Rule 807, the residual exception to the hearsay rule.

E. A Reporter's memorandum on changing the categorical hearsay exceptions to "guidelines" or "illustrations."

F. A Reporter's memorandum addressing a change suggested by Judge Graber to Rule 803(22), the hearsay exception for prior convictions.

VII. Hearsay Exception for Recent Perceptions

The Committee has decided to defer action on an amendment that would add a Arecent perceptions" exception to Rule 804(b)—an exception that would be designed primarily to provide broader admissibility for electronic communications such as texts and tweets. The Committee directed the Reporter to monitor developments in the case law on admissibility of social media communications. The agenda book contains the Reporter=s updated outline of recent federal case law on electronic communications and the hearsay rule.

VIII. *Crawford* Outline

The agenda book contains the Reporter=s updated outline on cases applying the Supreme Court=s Confrontation Clause jurisprudence.

IX. Suggestion for an Amendment to Limit the Possibility of Waiver of Fifth Amendment Rights on Cross-examination.

A member of the public has recommended an amendment to the Evidence Rules directed to the risk that a criminal defendant, by testifying, could be found to waive Fifth Amendment rights to be silent as to matters that are brought up on cross-examination --- even if those matters are beyond the scope of the direct examination. The agenda book contains the Reporter's memorandum evaluating the proposal.

X. Presentation by Jayme Herschkopf, Supreme Court Fellow, Federal Judicial Center

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ADVISORY COMMITTEE ON EVIDENCE RULES

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Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
William K. Sessions III			Member: 2011	----
Chair	D	Vermont	Chair: 2014	2017
Brent R. Appel	JUST	Iowa	2010	2016
Daniel P. Collins	ESQ	California	2014	2017
James C. Dever III*	D	North Carolina (Eastern)	2015	2017
Stuart M. Goldberg**	DOJ	Washington, DC	----	Open
A. J. Kramer	FPD	Washington, DC	2012	2018
Debra Ann Livingston	C	Second Circuit	2013	2016
John T. Marten	D	Kansas	2014	2017
Paul Schectman	ESQ	New York	2010	2016
John A. Woodcock, Jr.	D	Maine	2011	2017
Daniel J. Capra				
Reporter	ACAD	New York	1996	Open

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** Ex-officio

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Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Solomon Oliver, Jr.**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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TAB 1A

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 9, 2015

Chicago, Illinois

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 9, 2015 at John Marshall School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Milton I. Shadur, Former Chair of the Evidence Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Bridget Healy, Rules Committee Support Office
Shelley Duncan, Rules Committee Support Office
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice
Professor Liesa Richter, University of Oklahoma School of Law

I. Opening Business

Approval of Minutes

The minutes of the Spring, 2015 Committee meeting were approved.

June Meeting of the Standing Committee

Judge Sessions reported on the June meeting of the Standing Committee. The Evidence Rules Committee proposed two amendments to the Evidence Rules: abrogation of Rule 803(16), and new provisions in Rule 902 to ease the burden of authenticating electronic evidence. Judge Sessions stated that the Standing Committee unanimously approved the proposed amendments to be issued for public comment.

II. Symposium on Hearsay Reform

The morning of the meeting was devoted to a symposium on hearsay reform. The Committee determined that a symposium would be useful to help it to determine whether the hearsay rule and its exceptions should be subject to major reform. The calls for reconsideration of the hearsay rule and its exceptions have fallen into two categories: 1) replace the current system of categorical exceptions with a single rule allowing judges to admit hearsay subject to a balancing process of probative value and prejudicial effect (or alternatively, a broadening of the discretionary standards set forth in the residual exception, Rule 807 of the Evidence Rules); and 2) eliminate or alleviate the hearsay rule's coverage of prior statements of testifying witnesses, on the ground that the declarant who made the statement is at trial subject to cross-examination.

Panelists at the symposium included judges (Posner, Schiltz and St. Eve), professors, and outstanding practitioners from the Chicago area. The proceedings will be published in the Fordham Law Review, along with accompanying articles by many of the panelists.

The afternoon session of the Advisory Committee meeting was devoted mostly to discussion among Committee members about the many ideas and arguments raised at the Symposium. The Committee generally concluded that the Symposium was excellent; that it gave the Committee plenty to think about in determining whether amendments to the current system of hearsay regulation should be proposed; and that it set an agenda for the Committee for a number of years to come. Among the specific points raised by Committee members were the following:

● In reviewing the continued validity of any hearsay exception, it should not be evaluated solely by whether the statements admissible under the exception are reliable. Reliability is one basis for a hearsay exception, but it might also be validly supported by a finding that statements under the exception can be corroborated by other evidence, or by the fact that the type of hearsay admitted can be evaluated and properly weighed by jurors using their common sense. And some exceptions, such as those for party-opponent statements, require no reliability at all but rather are based on the adversary system.

● Any argument that a particular exception allows admission of unreliable statements should not necessarily give rise to more judicial discretion to admit hearsay. Rather the solution should be to tighten the exception by including trustworthiness requirements, or by allowing the opponent to convince the judge that the particular hearsay proffered is unreliable.

● Members were struck by the uniform position of practitioners--- that the current rule-based system of hearsay regulation was far preferable to a system based solely on judicial discretion. Allowing judicial discretion over hearsay would --- in the practitioners' view --- lead to unpredictable results and, consequently, more difficulty in settling the case, fewer cases disposed on summary judgment, and more costs of pretrial motion practice.

● A member found it interesting that there was disagreement among the panelists at the symposium as to whether expanding judicial discretion with regard to hearsay would result in more or fewer trials. One member of the Committee thought that a system of judicial discretion would not lead to more trials, but rather to more pretrial motion practice to seek advance rulings on evidentiary admissibility. But because those advance rulings are themselves discretionary with the trial judge, it would seem that more trials would end up occurring in a discretionary system --- because much more information is in play as being possibly admissible, and the trial judge might wait to decide admissibility until trial.

● One member noted that a discretionary system would be an especially ill fit for the coconspirator exception. That exception is not grounded in trustworthiness; it is simply based on the proponent establishing a ground for attribution. The exception is relatively easy to apply under current law. What factors would be relevant to determining admissibility under a discretionary system? And why would it be an advantage to discard the law on the subject that has been developed for over 40 years?

● One member stated that the best way to understand the hearsay rule is as a way to require the party to produce the best person to testify about a matter, in order to be fair to the adversary by allowing that adversary to test the witness who actually knows something about the event. It is difficult to see how a discretionary system of loose standards would lead to the judge choosing the best person to present the evidence.

● One member argued that the biggest problem with a discretionary system is that application of the hearsay rule would vary from judge to judge. For example, one judge may require empirical support for arguments about trustworthiness while other judges might not. The fact that some of the existing exceptions may not be empirically supported is a problem, but it is not apparent that the problem is solved if judges decide hearsay admissibility on whatever basis is personal to them.

● Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. This would allow some discretion but yet would be likely to provide some consistency from judge to judge. Another Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a).

● One member suggested that if the concern is that some of the hearsay exceptions do not in fact guarantee reliability, it would be useful to review whatever empirical evidence exists. The FJC representative agreed to undertake a review of published data pertinent to contemporaneous and excited statements --- i.e., the purported guarantees for the hearsay exceptions criticized as being without empirical support by Judge Posner.

● Committee members discussed a proposal made at the Symposium that would substitute Rule 403 balancing for a system of categorical exceptions. Presumably this would mean that in assessing "unfair prejudice" under Rule 403, the judge would take into account the possibility that (and the degree to which) the jury would be unable to discount or properly weigh the hearsay statement. Members suggested that it might be difficult to make such an assessment with any particular piece of hearsay, and it would be difficult for such an analysis to be consistently applied from judge to judge.

● Committee members agreed that it would be worthwhile to explore possible compromise alternatives for hearsay reform --- i.e., something not as radical as removing all the exceptions in favor of a Rule 403-type balancing, and yet something more than retaining the current system of categorical rules. One possibility is to expand the applicability of Rule 807, the residual exception. This might be accomplished by removing the "more probative" requirement of that rule, so that it could be invoked without the showing of necessity that is currently required. The trustworthiness requirement might also be changed from one requiring "equivalence" with the other exceptions to something more freestanding and discretionary.

● As to prior statements of testifying witnesses, the Committee learned in the Symposium that the current Rule 801(d)(1)(A) encourages the practice of bringing "wobbler" witnesses before the grand jury --- in that way, the statement they provide would be substantively admissible should they decide to change their story at trial. Committee members observed that as a policy matter, this appears to be a good practice, albeit not an evidence-related result. Another collateral consequence is that the existing rule expands discovery in criminal cases, because the government must disclose grand jury materials, but need give no advance notice of prior witness statements outside the grand jury.

● At the Symposium, a speaker noted that the premise of excusing prior witness statements from the hearsay rule --- that the witness is available for cross-examination --- does not apply if the witness denies making the statement. A Committee member observed that such a denial would be unlikely if the statement were recorded, but another member stated that even if recorded, the witness could say something like, "they put the statement before me and I just signed it." But another member responded that the increasing use of videorecording for statements would belie that argument, because the circumstances of the preparation and signing of the statement could not be disputed.

● At the Symposium, a speaker stated that one possible problem with broadening substantive admissibility of prior inconsistent statements could arise at the summary judgment stage. A party who could suffer summary judgment due to witness statements by the party or agents might simply make an inconsistent statement for purposes of summary judgment, thereby creating a triable issue of fact. Committee members asked the Reporter to consider this problem.

It might be that the impact of a change on summary judgment practice would warrant retaining the existing rule in civil cases, even if it were expanded in criminal cases. The Reporter and Professor Broun will conduct research into the practice in states with broader substantive admissibility of prior inconsistent statements to see if there has been an impact on summary judgment practice in those states.

● One member noted that even if the Committee makes no changes to the existing rules on hearsay, the Committee's review of the suggestions made at the Symposium would be a good thing because it would show the public that the Committee continues to monitor and review calls for change.

At the end of the discussion, the Committee asked the Reporter to prepare materials on the following topics:

1. Replacing the current rule-based system with a system of guided discretion, which would include a list of standards or illustrations taken from the existing exceptions.

2. Replacing the current system with Rule 403 balancing.

3. Retaining the current structure but expanding the residual exception to allow easier and more frequent use.

4. Broadening Rule 801(d)(1)(A) to allow substantive use of prior inconsistent statements if the statement has been recorded.

5. Considering whether the impact of an expanded Rule 801(d)(1)(A) would have a negative impact on summary judgment cases, and if so whether that would warrant having a different rule in civil and criminal cases.

III. Proposed Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Spring 2015 meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it --

- the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

The Committee's proposal to abrogate Rule 803(16) was approved by the Standing Committee for release for public comment. At the Fall meeting, the Reporter provided information on the public comment to date. He noted that there have been objections to the proposal by plaintiffs' lawyers in environmental, insurance and asbestos cases. However, most of the objections were about the difficulty of *authenticating* ancient documents --- and the Committee has not proposed any change to the existing authentication rules. Moreover, none of the objections address the possibility that ancient documents, if actually reliable, can still be admitted as business records or under the residual exception. The Reporter will provide a memo on other public comments as they are received, and all of the comments will be reviewed in detail at the next meeting.

IV. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its last meeting, the Committee approved changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person's testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee's proposal for an amendment adding new Rules 902(13) and (14) was unanimously approved at the June meeting of the Standing Committee, and the proposed amendment was issued for public comment. At the Fall meeting the Reporter notified the Committee that no meaningful comment on the proposal had yet been received. He did note, though, that some law professors had made inquiries to him about whether the proposal might raise an issue in criminal cases due to the Confrontation Clause. He reported to these professors

that the Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee was satisfied that there would be no constitutional issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not violate the right to confrontation --- those courts have relied on the Supreme Court's statement in *Melendez-Diaz*. The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)). Nonetheless the Reporter notified the Committee that it could expect that some public comment will raise the Confrontation issue. The Reporter will provide a memo on other public comments as they are received, and all of the comments will be reviewed in detail at the next meeting.

V. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

At the Spring 2015 meeting the Committee considered a memo prepared by the Reporter on the inconsistencies in the notice provisions of the Federal Rules of Evidence. The Reporter's memo indicated that some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. Moreover, the particulars of what must be provided in the notice vary from rule to rule; and the rules also differ as to whether written notice is required.

The Committee at the Spring meeting agreed upon the following points:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement

should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- was an unnecessary limitation that serves as a trap for the unwary. Most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to eliminate that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

At the Fall meeting, the Committee reviewed the Reporter's memorandum that focused on deleting the request requirement of Rule 404(b) and altering the notice requirement of Rule 807. The Reporter added an issue not raised in the previous meeting --- whether Rule 807 should be amended to require the proponent to give not just notice of intent to use the hearsay but more specifically notice of intent to use the evidence *as residual hearsay.* He noted that some courts have required this more specific notice while others had not. While no vote was taken on the specific proposal, some Committee members observed that the requirement of a more specific notice would probably provide little benefit, because it would essentially become boilerplate in every case --- the proponent would provide such notice in an excess of caution, even if it was unlikely to offer the evidence as residual hearsay. Another member noted that adding procedural requirements to Rule 807 would be inconsistent with any future attempt to make the exception broader and more easily-used, which is a subject on the Committee's agenda, as discussed above.

Before the meeting, Paul Shechtman had submitted an alternative proposal to provide for a uniform approach to the notice provisions in Rules 404(b), 609(b), 807, and 902(11) --- i.e., all the notice provisions except those found in Rules 412-415. Under Paul's proposal, each of the notice provisions would be structured to provide as follows:

The proponent must give an adverse party reasonable [written] notice of an intent to offer

evidence under this Rule -- and must make the substance of the evidence available to the

party -- so that the party has a fair opportunity to meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses lack of notice.[1]

Paul's proposal would make a number of substantive changes in addition to the two that have been preliminarily approved by the Committee (i.e., eliminating the request requirement of Rule 404(b) and adding a good cause exception to Rule 807). The additional substantive changes would be: 1) the Rule 404(b) notice requirement would extend to civil cases, and to the defendant in criminal cases; 2) the provisions on the "particulars" of notice in each provision would be eliminated, in place of the phrase "substance of the evidence"; and 3) each of the rules would require the notifier to identify the rule under which the evidence would be proffered --- effectively that is an extension of the Reporter's proposal to amend Rule 807 to require notice of intent to offer the evidence as residual hearsay.

In a preliminary discussion of Paul's uniformity proposal, the DOJ representative objected to extending the Rule 404(b) notice requirement to civil cases. She argued that this would be a major change, and questioned its necessity given the breadth of civil discovery. Other members noted that the proposal, currently in brackets, to require notice in writing was a good idea. That is the best way to know that notice has been provided --- eliminating the possibility of a dispute over whether notice was ever given.

One member noted that two of the notice provisions (404(b) and 609(b)) require notice to be provided "before trial" while the other two (807 and 902(11)) require notice to be provided "before the trial or hearing." The Reporter stated that he would look into whether there would be any substantive change if the reference to a "hearing" would be dropped from one set or added to the other set.

The Committee resolved to further consider the possible substantive changes to Rules 404(b) and 807, as well as Paul Shechtman's proposal for uniform notice provisions, at the next meeting.

VI. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it could provide significant assistance to courts and litigants, in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has been working on preparing such a manual with Greg Joseph and Judge Paul Grimm. The goal is to produce a pamphlet to be issued by the FJC. For the Fall meeting, the Reporter submitted drafts on best practices for authenticating email, texts, and social media postings. He informed the Committee that a draft had been

[1] Rule 902(11) would retain an existing provision requiring the proponent to make the record and certificate available for inspection.

recently prepared for authentication of YouTube and other videos. The next steps are: 1) preparing best practices for authenticating web pages, search engines, and chatroom conversations; 2) revising the draft on judicial notice; and 3) adding an introduction on the applicable standards of proof that Judge Grimm has already prepared. The Reporter estimated that the final product should be ready for approval no later than the Fall 2016 meeting.

VII. Recent Perceptions (eHearsay)

The Committee has decided not to proceed on a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Fall meeting, the Reporter submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

VIII. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are 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 Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court in the last term decided *Ohio v. Clark*, in which statements made by a child his teachers --- about a beating he received from the defendant --- were found not testimonial, even though the teacher was statutorily required to report such statements to law enforcement. The new decision in *Clark*, together with the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

IX. Next Meeting

The next meeting of the Committee is scheduled for Friday, April 29, 2016, in Washington, D.C.

Respectfully submitted,

Daniel J. Capra

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7, 2016 | Phoenix, AZ

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its spring meeting in Phoenix, Arizona on January 7, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Esq.
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter (by teleconference)
Professor Michelle M. Harner, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

Elizabeth J. Shapiro, Esq., Deputy Director for the Civil Division of the Justice Department, represented the Department of Justice on behalf of the Honorable Sally Quillian Yates, Deputy Attorney General.

Other meeting attendees included: Judge David G. Campbell; Judge Scott Matheson, Jr. (teleconference); Judge Robert M. Dow (teleconference); Judge Phillip R. Martinez and Sean Marlaire, representing the Court Administration and Case Management Committee ("CACM"); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; Professor Geoffrey C. Hazard, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf (by teleconference)	Secretary, Standing Committee
Julie Wilson (by teleconference)	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy (by teleconference)	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell (by teleconference)	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He introduced two new members of the Standing Committee, Daniel Girard and William Kelley, welcomed back Bryan Garner as a Style Consultant, welcomed Judge John Bates as the new chair of the Advisory Committee on Civil Rules and Judge Donald Molloy as the new chair of the Advisory Committee on Criminal Rules, and introduced Greg Maggs as the new reporter for the Advisory Committee on Appellate Rules and Michelle Harner as a new reporter for the Advisory Committee on Bankruptcy Rules. He thanked Judge Phillip Martinez and Sean Marlaire for representing CACM. And he reminded the attendees that Justice O'Connor would attend the dinner meeting.

Judge Sutton reported that the civil rules package, which included revisions of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84, and Bankruptcy Rule 1007, went into effect on December 1, 2015. He observed that Chief Justice Roberts devoted his year-end report to that package.

Judge Sutton also reported that the Judicial Conference submitted various rule proposals to the Supreme Court on October 9, 2015 (Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45) and again on October 29, 2015 (Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033, known as the "*Stern* Amendments").

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the May 28, 2015 meeting.**

INTER-COMMITTEE WORK

Judge Sutton reserved discussion of electronic filing, service, and notice requirements for the Advisory Committee on Criminal Rules' report on Criminal Rule 49.

Professor Capra discussed the 2015 study conducted by Joe S. Cecil of the Federal Judicial Center entitled *Unredacted Social Security Numbers in Federal Court PACER Documents*, which discussed unredacted social security numbers in documents filed in federal courts and thus available in PACER, notwithstanding the "privacy rules" adopted in 2007 that require redaction of such information. The Standing Committee concluded that this problem could not be resolved by another rule amendment, and offered to support those in CACM who would address implementation of the existing rule at their summer 2016 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy reported that the Advisory Committee on Criminal Rules had no action items and six information items.

Information Items

Rule 49 – Rule 49 provides that service and filing must be made "in the manner provided for a civil action." The Advisory Committee is considering ways to amend this rule in anticipation of a likely change in the civil rules that will require all parties to file and serve electronically. After study by the Rule 49 Subcommittee chaired by Judge David Lawson, the Advisory Committee concluded that such an electronic default rule could be problematic in the criminal context for two reasons. First, pro se defendants and pro se prisoners filing actions under § 2254 and § 2255 rarely have unfettered access to the CM/ECF system. Second, the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the Advisory Committee favors severing the link to the civil rules governing service and filing and is drafting a stand-alone Rule 49 that does not incorporate Civil Rule 5. They plan to submit a final draft rule to the Standing Committee in June 2016.

The Standing Committee then discussed the general topic of incorporation by reference across the various sets of rules. Consensus formed around the idea that whenever an advisory committee is considering changing a rule that is incorporated by reference, or is parallel with language in another set of rules, it should always first coordinate with the committee responsible for those other rules before sending proposed changes out for notice and comment.

Members also agreed that the presumption in favor of parallel language across the rules suggested that changes to Rule 49 should depart as little as possible from the language of Civil Rule 5.

Rule 12.4(a)(2) – After an amendment in 2009, the Code of Judicial Conduct no longer treats as "parties" all victims entitled to restitution. The Department of Justice consequently recommended a corresponding amendment to Rule 12.4(a)(2), which assists judges in

determining whether to recuse themselves based on the identity of any organizational or corporate victims. The Advisory Committee agreed with this recommendation and created a subcommittee to draft a proposed amendment. Because a parallel provision exists in the Appellate Rules, the Advisory Committee on Criminal Rules is working with the Advisory Committee on Appellate Rules to draft the amendment.

Rule 15(d) – The Advisory Committee appointed a subcommittee to study whether to amend this rule and its accompanying note, which governs payment of deposition expenses, in light of an inconsistency between the text of the rule and the committee note. Judge Molloy said the text of the rule accurately identifies who bears the costs, but the note slightly mischaracterizes the rule by suggesting that the Department of Justice would have to pay for certain depositions overseas even if it did not request them. The Advisory Committee is struggling with how to fix this problem given the presumption that it cannot amend a note absent a rule revision. The Subcommittee will make its recommendations about how to fix this potential problem at the April 2016 meeting of the Advisory Committee.

Rule 32.1 – At the suggestion of Judge Graber, the Advisory Committee has examined whether Rule 32.1 should track the language of Rule 32 and require the court to give the government an opportunity to allocute at a hearing for revocation or modification of probation or supervised release. In a couple of cases, the United States Court of Appeals for the Ninth Circuit has held that the court must grant the government this opportunity and imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. After discussing the matter at its September 2015 meeting, the Advisory Committee decided to let this issue percolate and watch for developments in other circuits before considering any rule amendments.

Rule 23 – The Advisory Committee considered a suggestion to revise Rule 23 to allow oral waivers of trial by jury. The current rule requires a written stipulation from the defendant if they want to waive a jury trial and from the parties if they want to have a jury composed of fewer than twelve persons. Several cases have held that an oral waiver is sufficient if it is made knowingly and intelligently and have held that the failure to make the waiver in writing was harmless error. After study, the Advisory Committee decided against pursuing an amendment to Rule 23 because so many other criminal rules require written waivers and because the doctrine of harmless error covers this issue.

Rule 6 – In response to a suggestion to consider several amendments to Rule 6, which governs grand jury procedures, after a thorough discussion, the Advisory Committee decided to retain the current rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported that the Advisory Committee on Appellate Rules had three action items in the form of three sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

STAYS OF THE ISSUANCE OF THE MANDATE: RULE 41 – The Advisory Committee sought approval of several amendments to Rule 41 designed to respond to two Supreme Court cases that highlighted some ambiguity within the Rule and to remove some redundancy from the Rule.

The proposed amendment to Rule 41(b) clarifies that a circuit court can extend the time of a stay of its mandate "by order" and not simply by inaction. In response to a question from a member, the Standing Committee discussed the pros and cons of inserting "only" in front of "by order" but decided to leave the language as is, with the potential to revisit at the June 2016 Standing Committee meeting. The proposed amendment to Rule 41(d)(4) next clarifies that a circuit court can "in extraordinary circumstances" stay a mandate even after it receives a copy of a Supreme Court order denying certiorari, thereby adopting the same extraordinary circumstances standard that the Supreme Court has found is required to recall a mandate. Finally, the Advisory Committee proposed deleting Rule 41(d)(1), which replicates Rule 41(b) regarding the effect of a petition for rehearing on the mandate, and is therefore redundant.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 41 and their accompanying Committee Notes.**

AUTHORIZING LOCAL RULES ON THE FILING OF AMICUS BRIEFS: RULE 29(A) – The Advisory Committee sought approval of an amendment to Rule 29(a) that would authorize local rules that prohibit the filing of amicus briefs, even if the parties have consented to their filing, in situations where they would disqualify a judge. As it stands, Rule 29(a) appears to be inconsistent with such local rules because it implies that there is an absolute right to file an amicus brief if the parties consent: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." The proposed amendment adds to that sentence "except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge."

The Standing Committee members raised and discussed several potential stylistic issues with the proposed amendment. Judge Colloton noted in advance that he plans to shorten "the disqualification of a judge" to "a judge's disqualification." Judge Sutton recommended omitting the phrase "by local rule," which received support from the members. Others raised stylistic concerns with the "except that" phrase as a whole, preferring to start a new sentence beginning with "But" or "A court of appeals may," or breaking up the sentence with a semicolon and beginning the second clause with "provided however that." Others pointed out that a third sentence might suggest that the exception would also apply to the first sentence of Rule 29(a), which governs amicus briefs submitted by the government. Finally, some members raised a concern with the meaning of the phrase "prohibit the filing," asking whether it referred to prohibiting the actual submission of the document, its delivery to the panel, or its continued appearance in the record.

Judge Colloton decided to "remand" the proposal back to the Advisory Committee for further consideration of these largely stylistic revisions before re-submission to the Standing Committee.

EXTENSION OF TIME FOR FILING REPLY BRIEFS: RULES 31(A)(1) AND 28.1(F)(4) – The Advisory Committee sought approval of an amendment to Rules 31(a)(1) and Rule 28.1(f)(4), which would lengthen the time to serve and file a reply brief from 14 days to 21 days after the service of the appellee's brief. This amendment comes in anticipation of the elimination of the "three day rule," which would effectively reduce the time to file a reply brief from 17 to 14 days. After appellate lawyers on the Advisory Committee expressed the concern that this reduced window of time would adversely effect the quality of reply briefs, and in the hope that the extra time might lead to shorter reply briefs, the Advisory Committee decided to increase the time allowed. The Advisory Committee elected to shift from 14 days to 21 days in keeping with the established convention to measure time periods in 7-day increments where feasible. Judge Colloton noted that the phrase "the committee concluded that" will be deleted from the draft Committee Notes for both amended rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) and their accompanying Committee Notes.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions reported that the Advisory Committee on Evidence Rules had no action items and four information items.

Information Items

SYMPOSIUM ON HEARSAY REFORM – Judge Sessions reported on the Symposium on Hearsay Reform in Chicago on October 9, 2015. Inspired by a recent decision by Judge Posner in which he had suggested the removal of all the specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to re-examine the continuing vitality of the hearsay rule and its exceptions. Participants considered reform of the hearsay rule in the context of the electronic information era and discussed the pros and cons of various potential amendments to the hearsay rule. Participants entertained a proposal to replace the rule-based system with a guidelines system akin to the Sentencing Guidelines. Another proposal favored replacing the system of exceptions with a Rule 403 balancing analysis. And yet another was to retain the current system while expanding use of the residual exception in Rule 807. Judge Sessions added that none of these changes was likely to happen soon, particularly in view of the nearly uniform position of the practicing attorneys that the specificity of the current rules works well. He and several members remarked upon how successful the symposium had been and thanked Judge St. Eve, Judge Schiltz and Professor Capra for their help with the event.

PROPOSED AMENDMENTS TO RULES 803(16) AND RULE 902 ISSUED FOR PUBLIC COMMENT – The Advisory Committee has two proposed amendments out for public comment. The first, Rule 803(16), eliminates the hearsay exception for ancient documents. The second, Rule 902, would ease the burden of authenticating certain electronic evidence. Judge Sessions reported that since November 2015 the Advisory Committee has received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and

environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old, a concern Judge Sessions believed misplaced because the proposed rule does not alter the rules for authenticity, but rather reliability. Judge Sutton asked whether a Committee Note might help clarify this issue, and Professor Capra concurred. With respect to Rule 902, the proposal elicited little public comment and seems to have been universally accepted. Professor Capra added that the magistrate judges support both proposed amendments.

PROPOSED AMENDMENTS TO THE NOTICE PROVISIONS IN THE FEDERAL RULES OF EVIDENCE – The Advisory Committee continues to consider ways to increase uniformity among the various notice provisions throughout the Federal Rules of Evidence. Uniformity cannot be achieved for all provisions. For example, the notice provisions of Rules 412–415 dealing with sex abuse offenses, are congressionally mandated and cannot therefore be amended through the rules process. The Advisory Committee continues to consider uniform language that would work for other notice provisions.

Turning to specific notice provisions, the Advisory Committee is considering removing the requirement in Rule 404(b) that a criminal defendant must request notice of the general nature of any evidence that the prosecutor intends to offer at trial. Judge Sessions added that the Advisory Committee believed the existing rule was a "trap for an incompetent lawyer" and unfair because it punishes defendants whose lawyers fail to request notice. The Advisory Committee is also considering inclusion of a good faith exception to the pretrial notice provision in Rule 807.

BEST PRACTICES MANUAL ON AUTHENTICATION OF ELECTRONIC EVIDENCE – In an effort to assist courts and litigants in authenticating electronic evidence such as e-mail, Facebook posts, tweets, YouTube videos, etc., and following a suggestion from Judge Sutton, the Advisory Committee is creating a best practices manual on the subject. Judge Sessions reported that Professor Capra has worked on this manual along with Greg Joseph and Judge Paul Grimm, and the final product should be completed for presentation to the Standing Committee by its June meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta reported that the Advisory Committee had five action items and four information items to present to the Standing Committee. She also announced that the modernized bankruptcy forms became effective on December 1, 2015. She added that they have been well received and that the only "criticism" made against them is that they are so clear and easy to use that they might encourage more pro se filings.

Action Items

Judge Ikuta explained that because the first three action items (a proposed change to Rule 1015(b), proposed changes to Official Forms 20A and 20B, and a proposed change to Official Form 410S2) involved just minor or conforming changes, the Advisory Committee recommended to the Standing Committee that they go through the regular approval process but without notice and public comment. She added that this would result in a December 1, 2017

effective date for the rule rather than the December 1, 2016 effective date stated in the agenda book. The forms, she said, would remain on track to go into effect on December 1, 2016.

RULE 1015(B) (CASES INVOLVING TWO OR MORE RELATED DEBTORS) – In light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Advisory Committee proposed that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 1015(b).**

OFFICIAL FORMS 20A (NOTICE OF MOTION OR OBJECTION) AND 20B (NOTICE OF OBJECTION TO CLAIM) – The Advisory Committee proposed that Official Forms 20A and 20B be renumbered to 420A and 420B, to conform with the new numbering convention of the Forms Modernization Project. It also proposed substituting the word "send" for "mail" in this rule to encompass other permissible methods of service and to maintain consistency with other new forms.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Forms 20A and 20B.**

OFFICIAL FORM 410S2 (NOTICE OF POSTPETITION FEES, EXPENSES, AND CHARGES) – The Advisory Committee proposed resolving an inconsistency between Rule 3002.1(c) and Official Form 410S2. The rule requires a home mortgage creditor to give notice to the debtor of all fees without excluding ones already ruled on by the bankruptcy court. The form that implements the rule, however, says that the creditor should not "include…any amounts previously…ruled on by the bankruptcy court." The Advisory Committee proposed deleting the form's inconsistent instruction and adding an instruction that tells the lender to flag the fees that have already been approved by the bankruptcy court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Form 410S2.**

RULE 3002.1(B) (NOTICE OF PAYMENT CHANGES) AND (E) (DETERMINATION OF FEES, EXPENSES, OR CHARGES) – The Advisory Committee sought approval from the Standing Committee of three proposed amendments to Rule 3002.1(b) for publication for public comment in August 2016. First, the Advisory Committee recommends creating a national procedure by which any party in interest can file a motion to determine whether a change in the mortgage payment made by the creditor is valid. Second, the Advisory Committee recommends giving the court the discretion to modify the 21-day notice requirement in the case of home equity lines of credit because the balance of such loans is constantly changing. And third, the Advisory Committee recommends amending Rule 3002.1(e) by allowing any party in interest, and not just a debtor or trustee as currently allowed under the rule, to object to the assessment of a fee, expense, or charge.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 3002.1(b) and 3002.1(e) for publication for public comment.**

REQUEST FOR A LIMITED DELEGATION OF AUTHORITY – The Advisory Committee requested a limited delegation of authority to allow it to make necessary non-substantive, technical, and conforming changes to the official bankruptcy forms that would be effective immediately but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. Judge Ikuta explained that there were three categories of such changes that would benefit from this procedure: 1) typos; 2) changes to the layout or wording of a form to ensure that CM/ECF can capture the data; and 3) conforming changes when statutes, rules, or Judicial Conference policies change in non-substantive ways. Discussion led to consensus around the idea that after the Advisory Committee identified the need for a minor change in a form, it would vote on the proposed change, and notify the chair of the Standing Committee during that approval process. Some members observed that because the process to amend forms concludes with approval by the Judicial Conference, and does not require the full Rules Enabling Act process, the delegation of authority to the Advisory Committee to make minor changes effective immediately, but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, posed no procedural problems.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously agreed to seek Judicial Conference delegation of authority to the Advisory Committee on Bankruptcy Rules to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.**

Information Items

STERN AMENDMENTS RESUBMITTED TO THE SUPREME COURT – Professor Gibson gave a brief update on the *Stern* Amendments. After the Supreme Court's decision in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which upheld the validity of party consent to bankruptcy courts entering final judgment on *Stern* claims, the Advisory Committee resubmitted to the Standing Committee its *Stern* Amendments. It had originally submitted these amendments in 2013, and secured the approval of the Standing Committee and the Judicial Conference, but the Judicial Conference withdrew them given the Supreme Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). The Standing Committee reapproved the amendments by e-mail vote in October 2015 and the Judicial Conference approved them shortly thereafter. The Judicial Conference submitted them to the Supreme Court as a supplemental transmittal on October 29, 2015. If approved by the Supreme Court in the spring of 2016, they will go into effect on December 1, 2016. Professor Gibson and Judge Ikuta expressed the Advisory Committee's appreciation of the Standing Committee's quick action on the *Stern* Amendments.

CHAPTER 13 PLAN FORM AND OPT-OUT PROPOSAL – Judge Ikuta gave a report on the history and current status of the Advisory Committee's plan to create a national Chapter 13 plan official form. The Advisory Committee commenced work on this at its spring 2011 meeting. It published its proposed plan form and related rules in August 2013. In response to comments received, the package was revised and republished in August 2014. The second publication prompted additional comments, most notably from numerous bankruptcy judges expressing their

preference to retain their local forms. In response, the Advisory Committee voted unanimously to consider a proposal to approve the plan form and most of the related rules with minor amendments, but to consider further rule revisions that would allow a district to use a single district-wide local plan form so long as it met certain criteria. At its April 2016 meeting, the Advisory Committee will decide whether to recommend that this "opt-out" proposal go forward without further notice and public comment. Judge Sutton and Professor Coquillette suggested that while republication might not be required because the Chapter 13 package has been published twice before, prudence might favor republication given the demonstrated public interest over the past two publication periods and the somewhat new concept of the opt-out proposal. Members generally supported the idea of further publication, but only to the rule changes needed to implement the proposed opt-out procedure, and, if acceptable to the Judicial Conference and the Supreme Court, on an accelerated basis that would allow for an effective date of December 2017, rather than December 2018. To accomplish this, the rule changes could be published for three months (August–November, 2016) and the entire Chapter 13 package could be considered by the Standing Committee in January 2017, the Judicial Conference in March 2017, and the Supreme Court by May 2017, with a target December 1, 2017 effective date assuming no contrary congressional action.

RULE 4003(C) (EXEMPTIONS – BURDEN OF PROOF) – Professor Harner reported the Advisory Committee's ongoing study regarding whether Rule 4003(c), which places the burden of proof in any litigation concerning a debtor's claimed exemptions on the objecting party, violates the Rules Enabling Act. In light of the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), which held that the burden of proof is a substantive component of a claim, Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, suggested to the Advisory Committee that by placing the burden of proof on the objector, as opposed to the debtor which many states do, Rule 4003(c) alters a substantive right and thereby violates the Rules Enabling Act. Professor Harner explained that the Advisory Committee is studying whether, à la *Hanna v. Plumer*, the rule announced in *Raleigh* is substantive or procedural.

RULE 9037 (PRIVACY PROTECTION FOR FILINGS WITH THE COURT) – REDACTION OF PREVIOUSLY FILED DOCUMENTS – Judge Ikuta reported that the Advisory Committee is studying CACM's recent suggestion that it amend Rule 9037. CACM suggested that the rule require notice be given to affected individuals when a request is made to redact a previously filed document that mistakenly included unredacted information. Because a redaction request may flag the existence of unredacted information, consideration is being given to procedures to prevent the public from accessing the unredacted information before the court can resolve the redaction request. Further consideration at the Advisory Committee's spring 2016 meeting may result in a proposal.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates reported that the Advisory Committee on Civil Rules had no action items but four information items to put before the Standing Committee.

Information Items

RULE 23 SUBCOMMITTEE – Judge Bates reported on the work of the Rule 23 Subcommittee, chaired by Judge Robert Dow, which has been in existence since 2011. After various conferences and multiple submissions, the Subcommittee has identified six topics for possible rule amendments:

1. "Frontloading" in Rule 23(e)(1), requiring upfront information relating to the decision whether to send notice to the class of a proposed settlement.
2. Amendment to Rule 23(f) to clarify that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f).
3. Amendment to Rule 23(c)(2)(B) to clarify that the Rule 23(e)(1) notice triggers the opt-out period under a Rule 23(b)(3) class action.
4. Another amendment to Rule 23(c)(2)(B) to clarify that the means by which the court gives notice may be "by United States mail, electronic means or other appropriate means."
5. Addressing issues raised by "bad faith" class action objectors. Finding a way to deter objectors from holding settlements "hostage" while pursuing an appeal until they receive a payoff and withdraw their appeal has received considerable attention. Members of the Subcommittee seem inclined to recommend a simple solution which would require district court approval of any payment in exchange for withdrawing an appeal. One potential issue with this solution is jurisdictional: Once the notice of appeal is filed, jurisdiction over a case typically transfers from the district court to the court of appeals. The Subcommittee is currently studying this issue. The Subcommittee is also considering a more complicated solution whereby it would amend both Rule 23 and Appellate Rule 42(c), on the model of an indicative ruling.
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2). The proposed amendment focuses and expands upon the "fair, reasonable, and adequate" standard incorporated into the rule in 2003 by offering a short list of core considerations in the settlement-approval setting.

The Standing Committee principally discussed the "bad faith" objector issue. Some members raised the question of whether sanctioning lawyers might help address the problem. Others asked whether securing district court approval for a payoff might actually worsen the problem by incentivizing bad faith objectors to do more work and run up a bill that they can justify to a court.

Judge Bates next reported on those issues that the Rule 23 Subcommittee has decided to place on hold.

1. Ascertainability. Because this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court, the Subcommittee has decided not to propose a rule amendment at this time.
2. "Pick-off" offers of judgment. This issue has also recently been litigated in the circuit courts and, as of the time of the meeting, was pending before the Supreme Court in *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016).

3. Settlement class certification standards. Given the feeling of many in the bar that they and the courts can handle settlement class certification without the need for a rule amendment, the Subcommittee has decided to place this issue on hold.
4. Cy Pres. Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place this issue on hold.
5. Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.

RULE 62: STAYS OF EXECUTION – Judge Bates reported on the work of the joint Subcommittee of the Appellate and Civil Rules Advisory Committees chaired by Judge Scott Matheson. The Subcommittee has developed a draft amendment for Rule 62 that straightforwardly responds to three concerns raised by a district court judge and other members of the Appellate Rules Advisory Committee. First, the draft extends the automatic stay from 14 days to 30 days to eliminate a gap between the current 14-day expiration of the automatic stay and the 28-day time set for post-trial motions and the 30-day time allowed for appeals. Second, it allows security for a stay either by bond or some other security provided at any time after judgment is entered. And third, it allows security by a single act that will extend through the entirety of the post-judgment proceedings in the district court and through the completion of the appeal. Judge Bates concluded by noting that the Subcommittee had considered but withdrawn a proposal that spelled out several details of a court's inherent power to regulate several aspects of a stay. The Subcommittee withdrew it after discussion at the Advisory Committee meetings because a stay is a matter of right upon posting of a bond and because they concluded that such an amendment was not necessary to solve any problems. This preliminary draft has yet to be approved by either Advisory Committee. Judge Bates said that he planned to submit this to the Standing Committee in June 2016 for publication.

EDUCATIONAL PROGRAMS REGARDING THE CIVIL RULES PACKAGE – Judge Bates reported that the Advisory Committee has been collaborating with the Federal Judicial Center to create educational programs for judges and lawyers to help spread the word about the new discovery amendments that went into effect on December 1, 2015. Judge Campbell and others have starred in various educational videos highlighting the new rules. Judge Sutton and Judge Bates sent out letters to all chief judges of the circuit, district, and bankruptcy courts on December 1, 2015, explaining the changes. Various circuit courts are creating educational programs of their own for circuit conferences and other court gatherings. The American Bar Association and other bar groups have started to create programs as well. The Education Subcommittee, chaired by Judge Paul Grimm, is now working on additional steps in collaboration with the Federal Judicial Center. Judge Sutton underlined the ongoing responsibility of Standing Committee members to help support these local and national educational efforts.

PILOT PROJECTS – Judge Campbell reported on the ongoing work of the Pilot Project Subcommittee. The Subcommittee investigates ways to make civil litigation more efficient and collects empirical data on best practices to help inform rule making. The Subcommittee consists of members of the Advisory Committee on Civil Rules along with Judges Sutton, Gorsuch and St. Eve from the Standing Committee, Jeremy Fogel and others from the Federal Judicial Center, and in the near future one or more members of CACM. Over the past several months, members

of the Subcommittee have been researching pilot projects and various studies that have already been conducted, including 11 projects in 11 different states, efforts in 2 federal courts particularly noted for their efficiency, a pilot project conducted during the 1990s at the direction of Congress, the work of the Conference of State Court Chief Justices, and a multi-year FJC study conducted at CACM's request that examined the root causes of court congestion.

The Subcommittee has decided to focus on two possible pilot projects. First, it is looking into enhanced initial disclosures in civil litigation. Some research indicates that initial disclosure of helpful and hurtful information known by each party can improve the efficiency of litigation. But the experience with a mandatory disclosure regime in the 1990s under then Rule 26(a), which involved fierce opposition, a dissent by three Supreme Court Justices, multiple district court opt-outs, and eventual abandonment of the rule, provides something of a cautionary tale. The Subcommittee is exploring and conducting empirical and historical research on this topic at both the federal and state level. They have concluded that conducting pilot projects that test the benefits of more robust initial disclosures would be a sensible next step before proceeding to the drafting and publishing of any new possible rule amendments. Judge Campbell sought the perspective of members on several tough questions, including what the scope of the discovery requirement should be, how to handle objections to discovery obligations, how to handle electronically stored information, how to get around a categories-of-documents-based approach to discovery obligations, and how to measure the success of any pilot projects in this area (cost of litigation, time to disposition, number of discovery disputes, etc.).

The second category of possible pilot projects would focus upon expedited litigation. The Federal Judicial Center has shown that there exists a linear relationship between the length of a lawsuit and its cost. There are already a number of federal and state courts that have expedited schedules, including the Eastern District of Virginia, Southern District of Florida, Western District of Wisconsin, and the state courts of Utah and Colorado. Under the CJRA, researchers found in the 1990s that early judge intervention, efficient and firm discovery schedules, and firm trial dates are among the factors most helpful in moving cases along. Because Rule 16, in existence in its current form since 1983, already permits judges to do all of this, a change in a federal rule of procedure is less necessary than a change in local legal culture to help speed up case disposition times. The Subcommittee is considering running a pilot project that could address a court's legal culture by setting certain benchmarks for it, including requiring case management conferences within 60 days, setting firm discovery schedules and trial dates, and measuring how well the local court is meeting those benchmarks over a three-year period. At the same time, the Federal Judicial Center would provide training for the pilot judges in that court in accelerated case management.

Judge Campbell discussed another possible pilot project of having the Federal Judicial Center regularly publish a chart showing the average disposition time by a district court of different kinds of suits compared to the national average.

And finally, speaking on his own and not on behalf of the Pilot Project Subcommittee, Judge Campbell discussed with members the pros and cons of possibly shortening the time before cases and motions were placed on the CJRA list from 3 years to 2 years, and from 6 months to 3 months.

REPORT OF THE ADMINISTRATIVE OFFICE

REPORT ON THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT'S CONSIDERATION OF PROTECTION OF COOPERATOR INFORMATION – Judge Martinez, assisted by Sean Marlaire, reported on CACM's work on the issue of harm or threat of harm to government cooperators and their families in criminal cases. This problem, which goes back at least a decade, has proven a tricky one, and seems to pit the interest in protecting cooperators from retaliation against the interest of access to court records and proceedings. CACM met in early December in Washington, D.C., where it discussed the issue. Judge Martinez reported that Judge William Terrell Hodges, the chair of CACM, recommends that the Standing Committee refer this issue to the Advisory Committee on Criminal Rules. CACM has concluded that a national approach, whether in the form of rule change or suggested best practices, would be preferable to one based on diverse local rules. Members of the Standing Committee generally agreed that the problem was a serious one that required collaboration across multiple committees and consultation with the Department of Justice and the Bureau of Prisons. Judge Molloy, on behalf of the Advisory Committee on Criminal Rules, and in consultation with his Reporters, welcomed the reference of the issue to his Committee. He added that he looked forward to inviting interested parties to the discussion, and pledged to keep the Advisory Committee on Appellate Rules informed of the Committee's work.

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Judge Sutton observed that the Standing Committee had various ongoing initiatives that support the strategies and goals of the current *Strategic Plan for the Federal Judiciary*, which the Judicial Conference approved on September 17, 2015.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all of the impressive work they had done on their memoranda for the meeting and the members of the Rules Committee Support Office for helping to coordinate the meeting. He then concluded the meeting. The Standing Committee will next meet in Washington, D.C., on June 6–7, 2016.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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FORDHAM

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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposal to eliminate the ancient documents exception to the hearsay rule.
Date: April 1, 2016

Introduction

At its Spring 2015 meeting, the Evidence Rules Committee unanimously agreed to propose an amendment that would eliminate Rule 803(16), the ancient documents exception to the hearsay rule. Rule 803(16) currently provides a hearsay exception for a statement in any document that can be shown to be authentic and over 20 years old. The predominant reason for proposing elimination of the rule was a concern large amounts of electronically stored information (ESI), nearing the 20-year mark. The potential problem, as applied to ESI, is that ESI might be stored without much trouble for 20 years, and the sheer volume of it could end up creating an exception to the hearsay rule that would be much broader probably was intended — in fact broad enough to swallow up all the other exceptions for ESI more than 20 years old. But beyond the ESI problem, the fundamental flaw in the ancient documents exception, as found by the Committee, is that it confuses authenticity of a document with reliability of the contents of that document.

The Committee's proposal to eliminate the ancient documents exception was approved unanimously by the Standing Committee, and it was released for a period of public comment. The Committee received more than 200 comments, and also heard 10 witnesses at a public hearing held in February 2016.

That public comment was almost universally opposed to eliminating the ancient documents exception to the hearsay rule.[1] Some of the comments were duplicative, and some mistaken about the consequences of the change proposed. But on the whole, the public comment establishes that the proposed amendment raises substantial concerns about the elimination of the ancient documents exception in certain important types of cases. Some of the public comment was especially emotional, accusing the Committee of such things as stacking the decks against plaintiffs, serving corporate interests, bankrupting churches, and denying the will of Congress.

The question for the Committee is how to address and adjust to this public comment going forward. One option that does not seem viable is to simply stand pat, i.e., propose the elimination of Rule 803(16), with no change to the Committee Note. Given the number and critical mass of the negative comment, something must be changed as a way to recognize that the concerns have been heard.

It seems, then, that there are three possibilities for the Committee: 1) continue to propose elimination of the exception but adapt the Committee Note to address some of the common concerns addressed in the public comment (for example, the concern about the availability of the residual exception); 2) amend the proposal in a way that would limit rather than eliminate the ancient documents exception; or 3) abandon any proposal to amend Rule 803(16), with the possibility that it will be taken up again when parties begin to offer ESI under the ancient documents exception.

This memo is divided into five parts. Part One will provide background on the problems posed by the ancient documents exception, and the Committee's response. Part Two will discuss the public comment. Part Three will discuss the options for changing the Committee Note to address the public comment. Part Four will discuss the viable alternatives for amending, rather than eliminating, Rule 803(16). Part Five will discuss the "wait-and-see" approach.

[1] A summary of the comments is found in a separate memorandum, appearing behind this memorandum in the agenda book.

I. Background to the Proposed Elimination of the Ancient Documents Rule

A. The Ancient Documents Rule

Rule 803(16) provides as follows:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> * * *
>
> **(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.

The ancient documents "rule" is actually comprised of two separate types of rules. One type is the rules on authenticity, which provide standards for qualifying an old document as genuine. The other is a hearsay exception for statements contained in an authentic ancient document. These rules are derived from the common law, though one difference from the common law is that the relevant time period for being "ancient" has been reduced from 30 years to 20 years.[2]

As to authenticity: Rule 901(b)(8) provides as an example of evidence satisfying the standards of authenticity a document or "data compilation" that:

> "(A) is in a condition that creates no suspicion about its authenticity;
> (B) was in a place where, if authentic, it would likely be; and
> (C) is at least 20 years old when offered."

As the Advisory Committee puts it, the rationale for Rule 901(b)(8) is "the unlikeliness of a still viable fraud after the lapse of time." The standard for establishing authenticity to the court, under Rule 901(a), is low --- enough for a reasonable person to believe that the document is what the proponent says it is. Under that low standard, if a document looks old and not suspicious and is found where it ought to be, it makes sense to leave the question of authenticity to the jury.

[2] See Advisory Committee Note to Rule 803(16) (citing common law basis for the hearsay exception that stems from the rule on authenticity); Advisory Committee Note to Rule 901(b)(8) (adopting the "familiar ancient document rule of the common law"). The Committee Note to Rule 901(b)(8) attempts to explain the shortening of the time period from 30 to 20 years as a "shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time" and concedes that any time period "is bound to be arbitrary."

Rule 901(b)(8) is not, however, the only avenue for authenticating an ancient document and thus triggering the ancient documents exception to the hearsay rule. Rule 803(16) says that the statements in a document that is at least 20 years old and whose "authenticity is established" are admissible for their truth. "Authenticity is established" means established in any way. Thus, the tried and true methods for authenticating ESI in general --- such as "distinctive characteristics" and circumstantial evidence, see Rule 901(b)(4) --- are fully applicable to authenticating 20 year-old ESI.

As to hearsay: If a document satisfies the authenticity requirements of Rule 901(b)(8) --- or any other ground of authentication provided in Rules 901 or 902 and is over 20 years old --- then *every statement in that document can be admitted for its truth.* (The only exception would be if there is double hearsay in the document --- most, though not all, courts find that double hearsay is as inadmissible in an ancient document as it is in any other hearsay statement).[3]

Rule 803(16) simply equates authenticity of the document with admissibility of the hearsay statements in that document. While the Advisory Committee Note states that "age affords assurance that the writing antedates the present controversy" there is no requirement in the rule that in fact the statements must predate the controversy. As the court put it in *Threadgill v. Armstrong World Industries, Inc* 928 F.2d 1366, 1375 (3rd Cir. 1991) :"Once a document qualifies as an ancient document, it is automatically excepted from the hearsay rule under Fed.R.Evid. 803(16)" --- consequently the *Threadgill* court reversed a trial court's quite sensible ruling that excluded an ancient document because the content was untrustworthy.

Rule 803(16) is the only rule of evidence that equates authenticity with admissibility of hearsay. [4] It is a fallacy to assume that just because an old document is authentic, the statements in it are automatically reliable enough to escape the rule excluding hearsay. Despite the Advisory Committee Note's assertion that "danger of mistake is minimized by authentication requirements," the fact is that none of the guarantees for authenticity set forth in Rule 901(b)(8) or any other authenticity rule do anything to assure that the *statements* in the authentic document are reliable. As the Seventh Circuit aptly put it in *United States v. Kairys,* 782 F.2d 1374, 1379

[3] Take as an example an old diary entry stating that "The defendant just sent me a letter in which he confessed to robbing my store." The hearsay exception would cover the fact that the diarist received a letter. But whether the defendant actually confessed to the robbery would have to be handled by another exception — in this case that would be a party-opponent statement, Fed. R. Evid. 801(d)(2). In other words, the ancient documents exception does not abrogate the rule on multiple hearsay imposed by Rule 805—at least in the view of right-thinking courts. *See, e.g.*, United States v. Hajda, 135 F.3d 439, 443 (7th Cir. 1998) (noting that the ancient documents exception "applies only to the document itself. If the document contains more than one level of hearsay, an appropriate exception must be found for each level. Fed. R. Evid. 805.").

Notably, though, some examples provided in the public comment indicate that some courts are admitting multiple hearsay simply because it is found in an ancient document.

[4] *See* Fagiola v. National Gypsum Co. AC & S., Inc., 906 F.2d 53, 58 (2nd Cir. 1990) ("Because of the hearsay rule, authentication as a genuine ERCO document would not generally suffice to admit the contents of that document for its truth. An exception is when documents are authenticated as ancient documents under Rule 901(b)(8), in which case they automatically fall within the ancient document exception to the hearsay rule, Rule 803(16).").

(7th Cir. 1986), the authentication rule's requirement that a proffered document be genuine "goes not to the content of the document, but rather to whether the document is what it purports to be."

Equating authenticity requirements and hearsay requirements is obviously misguided. The policy of the hearsay rule is to exclude unreliable out-of-court assertions, and that policy is not sufficiently furthered --- indeed it is ignored --- if the only standard for admissibility is that the document itself is genuine.

A further anomaly with the ancient documents hearsay exception is inherent in its bright-line nature. As one (favorable) public commenter put it, an unreliable document does not become reliable just because it turned 20.

In the end, Rule 803(16) is, as the Committee has recognized, a problematic hearsay exception --- an error of the common law that was adopted, and exacerbated, by the original Advisory Committee's reduction of the time period necessary to trigger it. And as previous memos have indicated, the explosion of ESI does in fact raise the specter that the ancient documents exception to the hearsay rule will be used as a means of admitting large amounts of unreliable old ESI. As stated above, the primary justification for the ancient documents exception is necessity, which comes down to the premise that, given the 20-year time period, it is likely that all the reliable evidence (such as business records) has been destroyed so we have to make do with more dubious evidence. This necessity assumption appears to have been substantially undermined by the development of ESI going forward. Because ESI is prevalent and is easily preservable, whatever reliable evidence existed at the time of a 20 year-old event during the era of ESI probably *still exists* — because it is likely to be ESI. Business records from the time, emails from the time, texts, chats — the chances of most or all of that being preserved are certainly higher than the chances of hardcopy and eyewitnesses still being around. There is no reason to admit *unreliable* ESI on necessity grounds if it is quite likely that there will be *reliable* ESI that is admissible under other hearsay exceptions.[5] Thus in the era of ESI, the "necessity" of proving claims based on older information of whatever provenance can be answered by the existence of bytes upon bytes of *reliable* electronic information — information that was not or could not have been preserved back in the pre-ESI days.

If the ancient documents exception remains as is, it is likely that parties will be able to freely admit unreliable ESI, just because it is old, and all this will be done in the face of prevalent, reliable alternative evidence.

[5] *See, e.g.*, Paramount Pictures Corp. v. International Media Films Inc., 2013 WL 3215189 (C.D. Cal.) (records regarding a film, more than 20 years old, were admissible as business records).

B. Committee Action

In several meetings, the Committee considered the above arguments about Rule 803(16), and came to the following conclusions: 1) the premise of Rule 803(16) is flawed, because it confuses authenticity with reliability; and 2) the risk of old and unreliable ESI coming in through Rule 803(16) was real, and the Committee should be proactive about managing that risk.

The Committee considered several alternatives short of eliminating the exception. The alternatives were:

1) *Limiting the exception to hardcopy*. That proposal was rejected because the line between hardcopy and paper would be difficult to draw. For example, a printout of a 20-year-old webpage is a product of ESI but it is in paper form. Indeed most ESI can be reduced to paper form, and so this drafting model would probably do little to limit the risk of overuse of the ancient documents hearsay exception. It might be argued that the way to limit the exception would be to exclude hardcopy that is *derived from* ESI, but that limitation would be hard to draft precisely and risks being overrun by technological advances. Moreover, old hard copies are being digitized by various companies and institutions, and where that is so it would make little sense to admit only the hardcopy but not the digital form of the same exact document.

2) *Requiring a showing of necessity*. This option would borrow language from the residual exception, which would require the proponent to show that the ancient document was more probative to prove the point for which it is offered than any other reasonably available evidence. The thinking behind this option is that it would not alter the admissibility of any of the hardcopy evidence that is currently being admitted under the ancient documents exception --- those hardcopies by definition are pretty much the only available proof of the contested fact (e.g., papers found in a warehouse that establish that a defunct business used asbestos). The Committee did not reject this option on the merits. Rather, it decided that the best result would be to do away with the ancient documents exception entirely.

3) *Adding a Trustworthiness Burden-Shifting Provision.* This proposal was borrowed from the 2014 amendment to Rule 803(6) that specifically imposes the burden on the opponent to show untrustworthiness. The Committee did not reject this proposal on the merits. But in a brief discussion, there was concern that a trustworthiness burden-shifting provision would not work in Rule 803(16), because the analogy to business records is not apt. The foundation requirements of the business records exception establish a fair presumption that the record is trustworthy, so it is fair to shift the burden to the opponent to show untrustworthiness. The same presumption does not apply to ancient documents --- they are just admitted because they are old, not because they are reliable. Thus the presumption of trustworthiness seems unwarranted and so shifting the burden to the opponent seems not justified. Moreover, Committee members determined

that the age of the document will often make it difficult if not impossible to establish untrustworthiness.

In the end, the Committee determined unanimously that it would propose elimination of the ancient documents exception to the hearsay rule --- though it is important to remember that the ancient document basis of *authentication* remains unchanged.

The minutes of the Spring 2015 meeting describe the Committee's determination:

At the Committee's direction, the Reporter prepared a memorandum for the Spring meeting that provided four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances.

Committee discussion indicated that some members who had thought it unnecessary to amend Rule 803(16) at this time had changed their mind. Committee members raised the following arguments against retaining the current Rule 803(16):

- The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable, not just old --- an analysis that today would have rendered it admissible as residual hearsay. So the only real "use" for the exception is to admit unreliable hearsay --- as has happened in several reported cases.

- The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.

- Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.

- The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for *authenticity* of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof

of title. It was subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

- The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception --- i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay --- and if it is unreliable it should be excluded no matter how "necessary" it is.

The discussion indicated general agreement that the Committee should act now to propose a change to Rule 803(16). The question then turned to which of the four proposals to adopt. There was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it --- the appropriate remedy would be to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

A motion was made and seconded to recommend to the Standing Committee that a proposal to abrogate Rule 803(16) be issued for public comment. That motion was approved unanimously.

The Committee Note to the proposed amendment, as released for public comment, provides as follows:

Committee Note

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

II. The Public Comment

The public comment was the most one-sided negative set of comments that the Evidence Rules Committee has yet received. The basic points made were:

- The ancient documents exception retains its vitality and necessity in a number of types of litigation, most importantly: 1) cases involving latent injuries such as toxic torts, especially asbestos; 2) environmental harms and cleanup cases; 3) claims by

survivors of child sexual abuse against institutions that failed to prevent or ratified the abuse; 4) cases involving insurance coverage, in which ancient documents are offered to prove up the policy; and 5) land title disputes. In these cases, elimination of the exception would mean that plaintiffs --- who already have many difficulties in their path --- would not be able to prove their causes of actions. (And there are some comments that mention similar difficulties that would be suffered by defendants in these same kinds of cases).

● In asbestos litigation, there is already a cache of ancient documents that have been qualified as admissible, and is currently being used in litigation throughout the country. Eliminating the exception throws these documents into doubt and will require the plaintiffs to start anew to try to qualify them, possibly unsuccessfully.

● The business records exception is not a viable alternative for many of the ancient documents because it is difficult if not impossible to find a custodian to qualify these kinds of records.

● The residual exception is not a viable alternative because courts have held that it is to be used only sparingly. Moreover, if it is used, it is so discretionary that there will be inconsistent determinations throughout the country. Finally, using the residual exception for ancient documents will be especially challenging because the elimination of Rule 803(16) may serve like a Scarlet Letter of unreliability for ancient documents.

● Even if an alternative exception is available, the elimination of the ancient documents exception will mean that plaintiffs will incur new costs of qualifying the documents that they did not previously have to qualify. The fight over admissibility will be statement-by-statement, as opposed to wholesale admissibility of an ancient document. That will add further costs. It will also mean that there will be more motion practice and court time needed for qualifying the records. Indeed many comments can be interpreted as mostly about cost as opposed to inability to admit the ancient documents.

● Eight United States Senators complained that by imposing heavy burdens on plaintiffs in certain federal litigation (e.g., CERCLA), the rules committee was undermining the will of Congress, which created these causes of action.

● No cases indicate that ESI is currently being offered under the ancient document exception. So it is not a problem right now and the Committee should cross that bridge when it comes to it. A potential risk should not result in an amendment that imposes real hardships on plaintiffs in certain types of litigation.

While the comments make some valid points, and many are moving, it should be noted that there are some misconceptions in many of the comments. For example:

● Many of the commenters bemoan the fact that the Committee's proposal will make it difficult or impossible to *authenticate* ancient documents. This is a misconception. The proposal does not affect any means of authenticating ancient documents.[6]

● In asbestos litigation particularly, much is made of the proposal's preclusion of documents offered to show that companies knew that asbestos was dangerous. But if the document is offered to prove awareness, you don't need the ancient documents exception for the document to be admissible. For example, a report in the file directed to the CEO of the company about the dangerousness of asbestos is not hearsay because it is offered for notice. And even a document *from* the CEO that he is aware of the dangerousness of asbestos is admissible without resort to the ancient documents exception --- because it is a statement of a state of mind. Other documents that are cited in the comment might be admissible as party-opponent statements, or might be qualified as business records because Rule 803(6) is pretty flexible as to who can qualify records. In land title litigation, at least some of the documents currently offered under Rule 803(16) are admissible under other exceptions such as Rules 803(13)-(15).

All that said though, it is pretty clear that if Rule 803(16) is eliminated, some of the documents cited in the comments will have to be admitted under the residual exception or not at all --- examples include shipping documents from one defunct business to another, indicating that asbestos was used at a certain plant in which the plaintiff worked; or accusations about sexual abuse by a priest, offered not to show awareness but that the abuse occurred; or a letter about use of a property, offered in a land-title dispute, that is not recorded in a public office, not about family history, and does not purport to affect an interest in property. Still, the body of evidence that is admissible under the ancient documents exception and nowhere else (except maybe the residual exception) is somewhat smaller than the commentators assert.

[6] It should be mentioned that some commentators seem to be using the term "authenticate" to refer to both authenticity and establishing a hearsay exception --- an understandable outcome given the Rules' conflation of authenticity and reliability.

● Some of the material currently admitted under the ancient documents exception seems to prove the Committee's point that it admits questionable evidence. To take one example from the public commentary: a lawyer representing an adult survivor of sexual abuse attached an exhibit that was admitted under the ancient documents exception, in a case he brought against the church. It was a typed letter from the parent of a child, complaining that a particular priest had molested the child; it was offered not to prove notice but the fact of abuse. With all due respect to the rights of the plaintiff, this letter should not be admitted --- at least on its own --- in a court with a functioning hearsay rule. It is an undetailed accusation that is based solely on the report of the child to the parent. Thus it is, to start with, double hearsay. It was not a report made contemporaneously with the crime; it is conclusory; and there is no indication of the circumstances under which the child made the report. Nor is there an indication of the circumstances under which the typed letter was prepared. Perhaps many letters from different claimants could cross-corroborate each other so that the whole would be reliable; but there was no requirement that the court make such an analysis --- it was just dumped into court under the ancient documents exception and that was that. So claims that ancient documents are absolutely critical to the case have to be tempered by the fact that at least some of those documents do not fit standard notions of what is reliable enough to escape the hearsay rule. If that letter was less than 20 years old it would be excluded even if it was absolutely critical to the plaintiff's case. Why should it make any difference that it was more than 20 years old?

● Some commentators say that the unreliability problem with ancient documents can be handled in another way short of elimination of the exception --- specifically if the judge finds an ancient document to be unreliable, she can just exclude under Rule 403. But Rule 403 is not a means of excluding, on grounds of unreliability, a statement that fits a hearsay exception. If that were true, you wouldn't need a hearsay rule (or exception) at all ---you could just leave the whole matter of hearsay up to Rule 403. If Rule 403 could be used to exclude unreliable hearsay, you wouldn't need language in Rules such as Rule 803(6), which allow a court to exclude a business record if unreliable under the circumstances. That would be superfluous, as Rule 403 could do the job. As the Hearsay Symposium definitely showed, we do not have a system allowing the trial court to exclude hearsay under Rule 403 because it is unreliable --- that may be a pipe dream for Judge Posner, but it does not exist today. There are many cases holding that if a statement fits a hearsay exception, it is admissible for its truth even if it is unreliable

under the circumstances --- that is the consequence of the categorical approach taken by the Federal Rules.[7]

III. Responding to the Public Comment by Changes to the Committee Note

Assuming the Committee decides to continue with the proposal to eliminate Rule 803(16), the Committee Note should surely be expanded to address some of the concerns expressed in the public comment. The question is whether a beefed-up Committee Note will be enough to be considered a serious response to the public comment. That comment is so fierce, and comes from so many sources, that it may well be that nothing that could be said in a Committee Note will be sufficient because, after all, the end result is what everyone hated --- the elimination of the ancient documents exception.

With that proviso, what follows is an attempt to adapt the Committee Note to some of the concerns expressed in the public comment.

[7] See, e.g., United States v. United States v. DiMaria, 727 F.2d 265, 271 (2nd Cir. 1984) (Friendly, J.) (exculpatory statement of state of mind made under untrustworthy circumstances is admissible under Rule 803(3): "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that rule mean what they say, its truth or falsity is for the jury to determine."). See also Threadgill v. Armstrong World Industries, Inc 928 F.2d 1366, 1375 (3rd Cir. 1991) ("Once a document qualifies as an ancient document, it is automatically excepted from the hearsay rule under Fed.R.Evid. 803(16)" ; reversing a ruling that excluded an ancient document because the content was untrustworthy).

One commenter, Jeffrey Stempel, makes a lengthy and labored attempt to argue that courts can use Rule 403 to exclude hearsay that is admitted under Rule 803(16), if the court finds it to be unreliable. He relies on an implication from a case in which the court specifically found that Rule 403 was *not* applicable; he has no answer to the significant case law that *prohibits* courts from looking at reliability once the ancient document is qualified as reliable, such as *Threadgill, supra;* and he does not even address the broader structural aspects of the categorical exceptions which prohibit judicial discretion, as discussed at the Hearsay Symposium. So the analysis comes to nothing.

Draft Committee Note in Response to Public Comment

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The elimination of the ancient documents hearsay exception is intended to have no effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8) --- or under any ground available for any other document (e.g., Rule 901(b)(4)) --- remains unchanged.

The Committee has determined that the ancient documents exception should be abrogated not only because of its flawed premise, but also due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the development and growth of electronically stored information, the ancient documents exception has become especially subject to abuse, as no showing of reliability needs to be made to qualify under the exception. Moreover, going forward in an age of ESI, the need to offer an ancient document that is not admissible under any other hearsay exception has been and will be diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6).

The Committee is of course aware that in certain cases, parties will have no alternative but to offer hardcopy documents from the past. But it does not follow that the ancient documents exception is a necessary or appropriate exception to qualify these documents. Experience in such cases indicates that many documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements. Rule 803(6) may be used for many of these documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. Finally, Rule 807 should be used to admit ancient documents upon a showing of reliability --- which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. Rule 807 also requires a showing of necessity, but that requirement should be easy to satisfy when the proponent offers the kinds of hardcopy documents currently admitted as ancient documents.

The abrogation of the ancient documents exception is not intended to raise an inference that ancient documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Rather, the judgment is made that such documents should qualify for admissibility like any other document --- because they are reliable, not simply because they are old. The Committee anticipates that courts will apply Rule 807 to admit any ancient document that is reliable under the circumstances.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that qualifying an ancient document under another hearsay exception will be more costly than it would be under Rule 803(16). But the costs are justified to avoid wholesale admission of unreliable hearsay, simply because it has turned 20.

Reporter's comment on additions made to the Note:

The note is more clear on what problem is being addressed --- i.e., ESI. Also it seeks to show that the ancient documents exception is not necessary for many of the statements currently admitted under the exception. Further, the note tries to make the case for admissibility of reliable old statements under the residual exception and the business records exception. It specifically addresses the concern that abrogation of the exception puts a Scarlet Letter of unreliability on all ancient documents. Finally, the note recognizes that the change will impose costs but tries to make the case that there is a good reason for that extra cost.

Whether there is enough by way of disclaimer here is of course a question for the Committee--- as is the broader question of whether any Committee Note will be a sufficient response to the public comment received on the proposal to eliminate Rule 803(16).

IV. Alternatives Short of Elimination

Based on previous discussions, and proposals in the public comment, there appear to be six colorable alternatives for amending Rule 803(16) rather than eliminating it. The decision to adopt one of the alternatives below is bound up with whether any of the alternatives would require a new round of public comment --- delaying implementation by a year, and subjecting the Committee (and the Reporter) to 200 or more negative comments, because one thing many commenters made clear is that they would not be happy with *any* change to the Rule. Any change means more money needs to be spent to qualify ancient documents.

A. Grandfathering

Probably the least costly alternative (meaning least costs to the interests of the public commenters) would be grandfathering --- retaining the ancient documents exception for documents prepared before a certain date. The FJC representative suggested dates of 1995 and 2000, as possible watershed dates for ESI. Both sound reasonable, recognizing that there is some arbitrariness involved in setting any date. Of course, the consequence of setting a date is that there is a complete difference in an admissibility result depending on whether the document was prepared one day before or one day after that date. But that is true with the exception itself.

Another issue to consider is that the date has to be set so that the cases that are now being brought with ancient documents will actually retain the benefit of the rule. Based on the public comment, 1995 appears to be relatively uncontroversial, as reference is constantly being made to evidence from the 60's, 70's, and 80's. But perhaps, just to be safe, the date should be moved up to 2000 to avoid any effect on the current use of the exception, and basically to soften the blow generally.

A grandfathering amendment:

> **(16)** ***Statements in Ancient Documents***. A statement in a document ~~that is at least 20 years old~~ prepared before the year 1995 [2000] and whose authenticity has been established.

Committee Note for a Grandfathering Amendment

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before the year 1995 [2000]. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronically stored information around the year 1995 [2000], the hearsay exception for ancient documents has now become a possible open door to large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception. Moreover, going forward in an age of ESI, the need to offer an ancient document that is not admissible under any other hearsay exception has been and will be diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6).

The Committee is of course aware that in certain cases --- such as cases involving latent diseases --- parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1995 [2000]. Going forward, it is anticipated that any need to admit old hardcopy documents will decrease. Moreover, experience in such cases indicates that many such documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements. Rule 803(6) may be used for many of these documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. Finally, Rule 807 should be used to admit documents upon a showing of reliability --- which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that ancient documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807.

The limitation of the ancient documents hearsay exception is intended to have no effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8) --- or under any ground available for any other document --- remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party

will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But 1995 [2000] is a rational date for raising concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the information is recorded. Thus, if a hardcopy document is 30 years old, and a party seeks to admit a scanned copy of that document, Rule 803(16) will apply to the document, because it was prepared 30 years ago. The relevant point is when the information is recorded, not when the information is prepared for trial.

Reporter's Comment:

One should pause to consider the fact that there is no other rule of evidence in which applicability is tied to a specific date. That is an odd concept in the Federal Rules of Evidence. But the counter-argument is that Rule 803(16) *itself* is tied to a date, albeit one that is dynamic rather than static.

New Round of Public Comment?

Since the ancient documents exception is essentially being retained, unchanged, in all the current cases in which it is being used, it can certainly be argued that the grandfathering option would not require a new round of public comment. Though it could be argued to the contrary that the impact of the change is unknown with respect to cases depending on hardcopy documents prepared after the cutoff date. Will there be any such cases? What will they look like? Why would they involve hardcopy documents only? Perhaps public comment would provide information on such unknowns. Perhaps not.

B. Add a Necessity Requirement

A second option is to apply the ancient documents exception to both ESI and hardcopy equally, but to limit the exception to situations in which the initial justification still obtains — i.e., where it is necessary to introduce the old evidence because there are no reasonably available alternatives.

An amendment adding a necessity requirement:

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old if:

(A) ~~and whose~~ the document's authenticity is established; and

(B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Committee Note for Amendment to Add a Necessity Requirement

Rule 803(16) has been amended to require a specific showing of necessity before hearsay may be admitted under the ancient document exception. See Rule 807 (imposing an identical necessity requirement). Unlike other hearsay exceptions, Rule 803(16) imposes no requirement that the hearsay in a document must be reliable. The basic justification for the exception is necessity, but the text of the existing Rule does not in fact require the proponent to show that there is no other way to prove the point for which the hearsay is offered.

The absence of a necessity requirement is particularly troubling given the development and widespread use of electronically stored information (ESI). Without a

necessity requirement, a proponent might use the ancient documents exception to admit unreliable ESI or hardcopy, even though reliable ESI is readily available.

The language added to the Rule is intentionally chosen, so that guidance from case law under Rule 807 can be used to interpret the identical language in Rule 803(16). It is anticipated that the hardcopy documents traditionally admitted under Rule 803(16) will easily meet the necessity requirement. Examples include documents to prove liability in cases involving latent injuries from years earlier, when those with personal knowledge of the documents are no longer available. On the other hand, ESI is unlikely to qualify under Rule 803(16), because the proponent will have to show the absence of other retrievable ESI that could be admissible under other exceptions.

Reporter's Comment on Necessity Alternative:

The language in new subdivision (B) is taken directly from the residual exception to the hearsay rule, Rule 807. That language was intended to limit the use of the residual hearsay exception to cases where it was truly necessary. It can be argued that the same reasoning should apply to the ancient documents exception: if other evidence admissible under other reliability-based exceptions could be obtained through reasonable efforts, then the ancient documents exception should not be used either for hardcopy or ESI. Essentially the proposal ties the exception to its only real (albeit weak) reason for being.

Adding the "more probative" requirement to Rule 803(16) could have an ameliorative effect on the potential abuses raised by ESI. As discussed above, in any case in which there is old ESI available, there is likely to be reliable ESI that could be admitted to prove a point, and it is simply bad practice to allow a proponent to admit unreliable ESI just because it is old. The draft Committee Note makes this point.

The added advantage of tracking the "more probative" language from the residual exception is that there is case law that can be borrowed from Rule 807 on what constitutes "reasonable efforts" to obtain information admissible under other exceptions. The case law under Rule 807 indicates that a proponent must try to find alternative evidence, but need not undertake Herculean efforts to do so. Limitations upon the financial resources available to the parties and the court are rightfully considered.[8] As one court put it, whether equally probative evidence is

[8] See the cases cited in Saltzburg, Martin and Capra, Federal Rules of Evidence Manual, at pages 807-17 through 807-21.

reasonably available depends upon "the importance of the evidence, the means at the command of the proponent, and the amount in controversy."[9] Thus, as applied to ESI and the ancient documents exception, old ESI might be admissible if alternative ESI can only be found by expensive forensic efforts, or could be read only by obtaining software that is not easily available or copyright-protected. On the other hand, with regard to the old hardcopy that the public commenters raised, there should by definition be little problem in establishing that it is more probative than any other evidence reasonably available.

What the additional necessity-based language would do is limit the exception to its original rationale and it would probably make it much less likely that the exception would become a broad avenue of admissibility for questionably reliable ESI — because in most cases there is likely to be reliable ESI that can be admitted under other exceptions.

Of course, the necessity-based solution suffers from the fundamental flaw from which the ancient documents exception has always suffered: the unsupportable equation of authenticity and reliability. Essentially the exception, as amended by the necessity language, would say that unreliable hearsay can be admitted when it is necessary to prove a point. That is logically problematic, but in light of the public comment, the Committee might conclude that some concession in logic needs to be made.

Another issue to consider is that borrowing the necessity language from Rule 807 needs to be considered together with the possibility of amending Rule 807 itself. Another memo in this agenda book raises the possibility that the residual exception should be made easier to use --- and one of the possibilities discussed is the elimination of the necessity language from the Rule. If that proposal goes forward, it would undermine any attempt to add the same language to Rule 803(16). Certainly any argument that the case law from Rule 807 can be used to interpret the new language in Rule 803(16) is undermined when the language is being eliminated from Rule 807. So if the Committee is interested in adding the necessity language to Rule 803(16), it will probably need to decide that it should be retained in Rule 807.

The public comment was mostly about the *cost* of admitting old evidence other than under the ancient documents exception. It would seem that the necessity-based exception would have a relatively low-cost impact on the kind of evidence that the public commenters are worried about. The whole point of the public commenters was to emphasize that without the ancient documents exception, evidence would be excluded that would be crucial to a case and the point could not be proven any other way. Proving up necessity should be considerably easier (and less contested) than proving up reliability. And the rulings could be made on a document-by-document, rather than statement by statement, basis.

[9] Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1552 (9th Cir. 1990).

New Round of Public Comment?

The question remains whether, if the Committee were to support a necessity-based amendment to Rule 803(16), a new round of comment would be required. This is a difficult judgment call. On the one hand, the amendment adds an admissibility requirement that has not been the subject of any public comment. On the other hand, the change is one that should serve to answer the basic concern in the public comment --- that essential ancient documents will not conveniently be admitted under other hearsay exceptions, and that there are no evidentiary substitutes for these documents. Put another way, the exception will remain open, and reasonably accessible, for the kind of documents that it currently covers.

Precedent would seem to allow this kind of amendment to be adopted without a new round of public comment. That precedent includes: 1) the recent discovery amendments to the Civil Rules, which included a number of substantive changes added after public comment, in an attempt to answer concerns about the proposals released to the public; and 2) the 2006 amendment to Evidence Rule 408 --- where the proposal released for public comment provided that compromise evidence was admissible in criminal cases, while the amendment eventually adopted (in response to negative public comment) provided just the opposite.

C. Limiting the Exception to Hardcopy

Some public commenters stated that if the concern about the ancient documents exception was about it being overrun by old unreliable ESI, then the exception could be amended to preclude ESI. A "hardcopy" limitation to ESI would accommodate the concerns of most of the commenters. As discussed below, the Committee has previously rejected this hardcopy alternative, but in light of the tsunami of public comment, it probably can't hurt to look at this option another time.

An amendment preserving the exception for hardcopy:

> **(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established <u>--- but not including a document that is or has been produced from electronically stored information</u>.

Committee Note for the "Hardcopy Only" Limitation

The ancient documents exception to the rule against hearsay has been amended to specify that it is not applicable to information that is or has been electronically stored. The ancient documents exception remains helpful for certain kinds of litigation in which information is located only in hardcopy documents that have withstood the test of time. But the exception is subject to abuse when applied to electronically stored information (ESI). The need for old ESI that does not qualify under any other hearsay exception is diminished by the fact that *reliable* electronic information is, going forward, likely to be preserved electronically and admissible under a hearsay exception that guarantees reliability — e.g., Rule 803(6), Rule 807. And abuse is possible because unreliable electronic information could be widespread and would be admissible under the exception simply because it has been preserved electronically for 20 years.

By referring to a document that is "or has been produced from" electronically stored information, Rule 803(16) excludes from its coverage a hardcopy printout of electronic information.

The amendment provides an exception to the general definition in Rule 101(b)(6), under which a reference to any kind of writing includes electronically stored information. Nothing in the amendment is intended to undermine any other use of ESI under these Rules.

Reporter's Comment on Hardcopy-Only Drafting Alternative:

The problem with a rule distinguishing hardcopy from ESI is that the line between the two is not bright --- a point raised by members at previous meetings. A printout of a 20-year-old webpage is a product of ESI but it is in paper form. Indeed most ESI can be reduced to paper form, and so there is a challenge in drafting a proposal that would cover all ESI. The language "a document that is or has been produced from" ESI is an attempt to cover the problem.

One problem with the "hardcopy only" solution is, what to do when old documents (hardcopy records, microfiche, etc.) become digitized? The intent of the amendment would be to exclude such digitized old information, because otherwise every old book could become admissible under the ancient documents exception. But plaintiffs might well be concerned if a company started to digitize all the old stuff that is currently being admitted after having found it in old warehouses, etc., with the purpose of disqualifying the old hardcopy from admissibility under the ancient documents exception. Under the proposal above, that scheme would not work, because an amendment eliminating a document that "is or has been produced from" ESI would not seem to affect an old hardcopy that has been digitized. The old hardcopy has not, nor has it been produced from, ESI.

It should be noted, however, that the result is anomalous. It would mean that an old hardcopy would be admissible under Rule 803(16), but that a printout of the digitized old hardcopy would not be admissible. How does that make any sense? It's the same exact information.

A New Round of Public Comment for a "Hardcopy Only" Limitation?

As can be seen in the above discussion, the hardcopy-only limitation contains some thorny drafting problems. The change is responsive to the public comment, as the interests of the complaining parties would not be negatively impacted by the amendment, and so it could be argued that a new round of public comment is not necessary. But whether the amendment accurately limits the exception to hardcopy, and the impact of the amendment on hardcopy that is digitized, might be matters that could usefully be addressed in a new public comment period. In other words, unlike the relatively straightforward amendments to implement grandfathering or necessity, an amendment that draws a line between ESI and hardcopy might be thought to be more difficult to draft and interpret, and thus a better candidate for public comment. That would of course be a question for the Committee.

D. Add a Trustworthiness Burden-Shifting Provision

At the Hearsay Symposium, Professor Liesa Richter suggested that concerns over whether a hearsay exception actually guarantees reliability could be met by adding a trustworthiness provision to the suspect exception. She suggests a burden-shifting device in the nature of that set forth in the newly amended Rule 803(6), i.e., the statement, even if it fits the terms of the exception, can be excluded if the opponent can show that it is untrustworthy. In her view, if the concern about the ancient documents exception is reliability, then it should be fixed with a provision that addresses reliability.

An amendment to implement trustworthiness burden-shifting:

> **(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established, unless the opponent shows that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.
> .

Committee Note on Trustworthiness Burden-shifting

The rule has been amended to provide that documents offered under this exception may not be admitted for the truth of their contents if the opponent can show that the method or circumstances of preparation indicate a lack of trustworthiness. The rule incorporates language from Rule 803(6) to give judges discretion to exclude an untrustworthy ancient document. The fact that a record can be authenticated as an ancient document (see, e.g., Rule 901(b)(8)) does not mean that any or every statement in that document should be admitted for its truth; an old document can contain as many untruths as a new one. Moreover, the ancient documents exception is particularly subject to abuse when applied to electronically stored information. Unreliable electronic information could be widespread and would be admissible under the exception simply because it has been preserved electronically for 20 years. Therefore it is appropriate to allow the opponent an opportunity to show that the old information is untrustworthy.

As with Rule 803(6), the opponent, in meeting its burden of showing untrustworthiness, is not necessarily required to introduce affirmative evidence that an assertion in an ancient document is untrustworthy. For example, the opponent might argue that a document was prepared with a specific motive to falsify without needing to produce evidence on the point. A determination of untrustworthiness is dependent on the circumstances.

Reporter's Comment on Trustworthiness Burden-Shifting Alternative:

The proposal is based on burden-shifting as to trustworthiness and reaches for an analogy with business records, and particularly the 2014 amendment to Rule 803(6) that specifically imposes the burden on the opponent to show untrustworthiness. But that analogy is not perfect. As discussed above, the burden is put on the opponent to a business record to show untrustworthiness because a business record is in fact presumptively trustworthy. Because a business record must be regularly prepared in the course of regularly conducted activity, and must be recorded contemporaneously with the event, those requirements warrant a presumption that a business record will be accurate as a general matter. But as the Committee discussed at a previous meeting, the same presumption does not apply to ancient documents --- thus the presumption of trustworthiness is unwarranted and shifting the burden to the opponent is difficult to justify.

An alternative could be to shift the burden of proving trustworthiness to the *proponent* of the evidence. But if that is done, the exception comes very close to replicating the residual exception. And that proposal would clearly not mollify the public commenters, who are concerned about 1) the expense of showing reliability for each statement in an ancient document, and 2) the risk of inconsistent application from judge to judge.

The plaintiffs' concern about the costs of proving reliability of ancient documents would be ameliorated (though not eliminated) by a burden-shifting provision; but the risks of inconsistent application would probably remain a concern.

At a previous meeting, it was also argued with regard to burden-shifting that it would be unfair to opponents because, given the age of the documents, it would often be impossible to present proof of unreliability. That's a fair point, though the response could be that in the context of the amendment, that is not a ground of a complaint --- because under the exception as it currently exists, the opponent gets *no opportunity at all* to say anything about the reliability of the contents of an ancient document. At least under the amendment the opponent has an opportunity to try to get it excluded on reliability grounds.

But on the other hand if the premise is correct that unreliability will usually be impossible to prove, then it would not appear that this amendment advances the ball very far at all --- the end result will be admission of ancient documents for the truth of their contents.

A New Round of Public Comment?

There is a pretty good argument that a new round of public comment would be necessary for a reliability-based alternative. The basic thrust of the public comment is that it would be unfair and costly to determine the reliability of ancient documents. Shifting the burden of proving untrustworthiness to the opponent addresses some of that concern, but not completely. And it might be useful, if this amendment were proposed, to hear from opponents of ancient documents on how an unreliability argument could be made, and whether it would ever be effective.

E. Extending the Time Period From Twenty to Thirty Years

Some commenters suggest that if the Committee is concerned about the ESI problem, it could use a "stopgap" measure of extending the time period for the ancient documents exception from 20 years to 30 years. That suggestion would restore the 30-year period that was the common-law rule, and would be in accord with a number of states that retained the 30-year period, such as California. It would probably not have much effect on the cases pursued by the public commentators --- at least not for now --- because, generally speaking, those cases are relying on documents from the 50's to the 80's. (Although a few comments noted that they were using documents generated in the 90's). The thought behind the 30-year alternative is that the Committee could use an "extention" to consider the consequences of ESI, without having ESI

being admitted wholesale because, generally, it hasn't reached its 30-year birthday. When it does, the Committee can, it is suggested, cross that bridge when it comes to it.

An Amendment to Kick the Can Down the Road for Ten Years Would Look Like This:

> ***(16) Statements in Ancient Documents.*** A statement in a document that is at least ~~20~~ 30 years old and whose authenticity is established.

Draft Committee Note for a Thirty-Years Amendment

> The rule has been amended to return to the common law period of 30 years. The amendment is addressed to the explosion of electronically stored information (ESI), a large amount of which is nearing or has reached the current 20 year threshold in the exception. The exception may be subject to abuse when applied to ESI. The need for old ESI that does not qualify under any other hearsay exception is diminished by the fact that reliable electronic information is likely to be preserved electronically and could be used as proof under a hearsay exception that guarantees reliability — e.g., Rule 803(6), Rule 807. And abuse is possible because unreliable electronic information could be widespread and would be admissible under the exception simply because it has been preserved electronically for 20 years.
>
> The 20-year period for authenticating an ancient document remains unchanged. See Rule 901(b)(8).

Reporter's Comment

I found it difficult to write a Committee Note to justify this change. It seems hard to dress it up in a real rationale, as opposed to rulemaking realpolitik. What the Committee Note should say is, if being honest, is this:

> "Because the public comment was so negative, we are kicking the can down the road and will monitor the situation, and in ten years we will change 30 to 40 if we can't think of anything better to do. And we won't really know about how the ancient documents exception is used for ESI, because we are not letting that happen."

It can be argued that if there is no way to solve the problem of ESI and the ancient documents exception right now, the better course is to do nothing and then propose a real amendment once ESI starts coming in under the exception. That would only require one amendment, not two. The idea of extending the time to 30 years of necessity assumes that there

will be more than one amendment to this rule, i.e., one now and one later. That is the essence of kicking the can down the road. As a matter of rulemaking integrity, it is surely better to amend the same rule one time rather than two.

The counterargument is that under the do nothing proposal, if ESI starts flooding the ancient documents exception in, say, two years, the abuse will run another three years until a rule amendment becomes effective. In contrast the 30 year rule will prevent ESI from being admitted.

New Round of Public Comment?

As stated above, the 30-year plan is unlikely to affect the interests put forth by most of the public commenters. This is because they are typically relying on documents more than 30 years old. Moreover, the amendment makes no substantive change to any language in the Rule, and adds no language the interpretation of which might benefit from public comment.

But it does stand to reason that the 30 year rule will have impact on certain cases. It means that every litigant that currently relies on Rule 803(16) for documents generated between 1987 and 1997 will be disentitled from using the exception. For example, a case that one of the commentators extols as a perfect example of the need for an ancient documents exception involved two newspaper articles that were more than 20 and less than 30 years old. *See Brumley v. Albert E. Brumley & Sons,* 727 F.3d 574 (6th Cir. 2013). And in an oft-cited CERCLA case, a critical document admitted under the ancient documents exception was between 20 and 30 years old. *Kalamazoo River Study Group v. Menasha Corp.,* 228 F.3d 648 (6th Cir. 2000). So while the impact of the amendment is of course not as profound as elimination, it is a judgment call on whether a new round of public comment would be necessary to assess its possible impact.

F. Adding Reliance Language to the Rule

One commenter has suggested (as a proposal short of elimination) that language should be added to the ancient document exception requiring a showing that the statements in the document were subsequently acted on as true by those having an interest in the matters set forth in the statements. That would provide a circumstantial guarantee of reliability.

A reliance requirement can be found in the California ancient documents exception, Cal. Evid. Code §1331 ("Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted on as true by persons having an interest in the matter.").

There are two alternatives for adding a reliance requirement to Rule 803(16). One is to take the California approach and impose the obligation on the proponent to show conduct

consistent with the document. The other is to take the approach from Rule 803(15), the exception for statements of documents that affect an interest in property, and allow the document to be admissible unless the opponent shows conduct inconsistent with the document. The restylist will surely prefer the Rule 803(15) approach for purposes of consistency. And as a substantive matter, while the argument can be made that Rule 803(15) covers more reliable statements than Rule 803(16), it is somewhat difficult to explain why the trustworthiness burden would be imposed on the proponent in one exception and the opponent in the other --- especially when an old document pertinent to title might be admissible under *both* exceptions. Moreover, imposing the burden of showing reliance on the proponent suffers the same infirmity (in the mind of public commenters) as the residual exception --- significant costs and the risk of inconsistent applications.

With all that as background, the draft below sets forth both alternatives, with a separate Committee Note for each proposal.

An amendment that would add a reliance requirement to Rule 803(16):

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established <u>--- unless later actions by persons having an interest in the matter are inconsistent with the truth of the statement or the purport of the document [or --- if the statement has been since generally acted on as true by persons having an interest in the matter].</u>

Committee Note for Amendment Adding a Reliance Requirement

Burden-shifting alternative:

The rule has been amended to allow the opponent to argue that an ancient document is unreliable on the ground that persons having an interest in the matter acted inconsistently with the ancient document. The language is taken from Rule 803(15).

The ancient document exception can potentially be used to admit hearsay evidence that is unreliable. The contents of a document are not reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful. Moreover, there is a risk that the ancient documents exception will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the development and growth of electronically stored information, the exception has become subject to abuse, as no showing of reliability needs to be made to qualify under the exception. The opponent should therefore have an opportunity to argue and demonstrate that the ancient document

is unreliable because persons having an interest in the matter subsequently acted in a way that was inconsistent with the truth of the statement or the purport of the document.

California alternative:

The rule has been amended to require the proponent of an ancient document to show that it is reliable on the ground that persons having an interest in the matter acted consistently with the ancient document.

The ancient document exception can potentially be used to admit hearsay evidence that is unreliable. The contents of a document are not reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful. Moreover, there is a risk that the ancient documents exception will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the development and growth of electronically stored information, the exception has become subject to abuse, as no showing of reliability needs to be made to qualify under the exception. The proponent should therefore be required to demonstrate that the ancient document is reliable because persons having an interest in the matter subsequently acted in a way that was inconsistent with the truth of the proffered statement or the purport of the document.

Reporter's Comment:

This proposal is just a subset of the reliability proposal discussed above. Instead of requiring a review of the reliability of the ancient document, the proposal elevates one factor to be considered --- reliance. A strong argument can be made that this is a misguided attempt, and that if there is a real interest in addressing reliability, the better result would be to have everything decided under the residual exception. Essentially this is a half-measure reliability inquiry that is likely to please nobody.

The proposal will be opposed by most of the commenters, especially those representing asbestos victims and victims of sexual abuse. In those cases, the ancient documents are admitted precisely for the purpose that they were *not* relied upon. In many cases, reliance will be difficult to show. Take as an example records that indicate a toxic substance was transferred into a particular facility 50 years ago. How does a party show that these records were relied upon? Or not relied upon? Essentially this proposal will send many of the public commenters to the residual exception for relief --- precisely the result that they decry.

For reasons discussed above, the proposal will be more palatable to the commenters if the burden is shifted to opponents, as does Rule 803(15). But that amendment still raises the possibilities of cost and unpredictability that raised so much objection.

A round of public comment?

This proposal would be introducing a new admissibility requirement that was not even vetted by the Committee itself when it reviewed alternatives before proposing an amendment for public comment. Public comment would seem useful for the same reason that it would be useful for the broader reliability requirement, discussed above.

V. Taking a Wait-and-See Approach

The final alternative is to propose no amendment at all --- to wait and see whether and when parties start proffering ESI under the ancient documents exception. The Committee can monitor developments, and if ESI becomes commonly offered under Rule 803(16) it can propose an amendment that would prohibit ESI abuse of the ancient documents exception. This would at least answer much of the commentary that accuses the Committee of addressing a phantom problem. It would of course do nothing to address the basic fallacy of the exception itself --- the confusion of authenticity with reliability. But trying to treat that question head-on runs into the public and institutional interests that gave rise to the negative public comment.

If the Committee is going to take a wait-and-see approach, it must do more than monitor the published cases. What the public comment showed is that the published cases are not an accurate indication of the degree of reliance on the ancient documents exception in certain kinds of litigation. This kind of wait-and-see approach would be tailor-made for an FJC research project.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Summary of Public Comment on proposal to eliminate Rule 803(16)
Date: April 1, 2016

What follows is a summary of the public comments received on the proposed elimination of Rule 803(16), the hearsay exception for ancient documents. They are in the form that will be attached to the proposal should it be sent forward to the Standing Committee and the Judicial Conference. If a particular comment has made a point that is worthy of discussion, that will occur in the principal memo on the Rule 803(16) proposal, also included in this agenda book.

All the bold and italicized statements are my comments. They will be taken out of what is submitted to the Judicial Conference, but I just couldn't resist.

David Hird (EV-20015-0003-0003), is opposed to the elimination of the ancient documents exception to the hearsay rule, on the ground that it "could have a substantial negative effect in environmental cases by excluding significant evidence that is only available from older documents." He notes a case in which a key 1977 document appears on the opposing party's letterhead, "but our copy does not come from the opposing party's files. Without an Ancient Document Exception, the document could be excluded." This appears to be a reference to the difficulties of authenticating the document. The proposal to eliminate the ancient documents exception to the hearsay rule would leave the ancient document authentication rule (Rule 901(b)(8)) intact, however.

Erin Campbell (EV-2015-0003-0004), is opposed to the elimination of Rule 803(16). She states that the deletion of the hearsay exception will "suggest to trial court judges that ancient documents should never be admitted under the residual exception" and suggests that "if you still intend to delete Rule 803(16), you advise that ancient documents remain admissible if Rule 807 is satisfied."

Nathan Schachtman (EV-2015-0003-005), states that "[t]he proposed abrogation of this exception to the rule against hearsay is welcomed and overdue." He states that "[t]he fact that a document is old may perhaps add to its authenticity, but in many technical, scientific, and medical contexts, the 'ancient' provenance actually makes the content unlikely to be true. As such, the rule as now in effect is capable of much mischief and undermines accurate fact finding." He notes that "the statements in authenticated ancient documents remain relevant to the declarant's state of mind, and nothing in the proposed amendment would affect this use of the document" because such statements would not be hearsay.

Thomas Flaskamp (EV-2015-0003-007), states that eliminating the ancient documents hearsay exception "would restrict the use of valuable evidence and benefit corporations over people."

Kim Johannessen (EV-2015-0003-008), is opposed to the elimination of Rule 803(16). She states that the elimination will "undermine efforts to prove the existence of historical insurance coverage, particularly in cases involving environmental claims, toxic tort claims, and real property disputes." She contends that "[t]he result will be to make it impossible for individuals and small businesses to fund Superfund cleanups or respond to environmental claims, the end result of which will be to hinder cleanups of contaminated sites and place an ever increasing risk that the burden to do so will fall on the general public."

Paul Bovarnick (EV-2015-0003-009), declares that much of the evidence that can be used against corporations is old paper documents and that the elimination of Rule 803(16) "would create obstacles, some impossible to overcome, to the admission of this ancient evidence." He contends that the only thing the elimination would do "is help corporate defendants by denying juries the ability to see evidence whose authenticity is not really in doubt." The proposal, however, does not affect the rule on authenticity of ancient documents.

Florence Murray (EV-2015-0003-0010), is opposed to the elimination of Rule 803(16). She states that "there has never been a complaint or inequity in this rule" and suggests that a more equitable alternative is "to grandfather all documents before a current date." She is concerned that the deletion of the hearsay exception will "suggest to trial court judges that ancient documents should never be admitted under the residual exception."

Conard Metcalf (EV-2015-0003-0011), argues that the elimination of Rule 803(16) will have a negative impact on plaintiffs' claims in toxic torts cases where injuries have long latency periods. He states "that the internal corporate documents necessary to prove defendant's knowledge are almost always more than 20 years old" and that "[t]here is never any real question about the authenticity of these documents or the reliability of the statements contained in the documents." [It should be noted that if a document is offered to prove the defendant's knowledge, it is not hearsay at all, and so the elimination of Rule 803(16) would be irrelevant to admitting such a document.]

William Kohlburn (EV-2015-0003-0012), states that eliminating the ancient documents exception will "impede, not further, the search for the truth" in toxic tort cases "where long past

events are in issue." He argues that ancient documents are reliable because they are old and thus probably not made in anticipation of the litigation in which they are offered.

Richard N. Shapiro (EV-2015-0003-0013), argues that if any change to the ancient documents exception is required due to a concern about the advent of electronic information, it should be "a modification or addition to the rule that will only apply to documents that were capable of being electronically stored, created on or after January 1, 2000." He states that the elimination of the exception "would increase the economic cost on attorneys tremendously in circumstances where an older document needed to be authenticated" --- although the proposal to eliminate the hearsay exception leaves the rule on authentication unchanged.

David McCormick (EV-2015-0003-0013), is opposed to the elimination of the ancient documents exception to the hearsay rule.

Cynthia Brooks (EV-2015-0003-0015), opposes the elimination of Rule 803(16). She argues that it will have a negative impact on actions involving cleanup of contaminated facilities. In such cases, historic documents are necessary "to identify liable persons responsible for cleanup." She states that Rule 803(16) "is critical to establishing liability for cleanup of contaminated sites in order to ensure protection of human health and the environment."

Peter Nicolas (EV-2015-0003-0016), suggests several ways in which Rule 803(16) can be amended to prevent the admission of old and unreliable ESI, short of eliminating the rule: 1) Increase the necessary age for ancient documents from 20 years to 30 years; 2) Amend Rule 803(16) to provide that the only form of authentication is through the authentication rule for ancient documents (Rule 901(b)(8); 3) Amend the rule to provide that hearsay embedded in an ancient document is not admissible; or 4) Requiring that the ancient document be prepared before the controversy arose and that the document was subsequently acted upon by those with an interest in the matter set forth.

[As to those four suggestions, here are the responses:

1) is just kicking the can down the road;

2) is no solution because the problem is not authenticity but unreliable statements in the authenticated document;

3) is a straw man because Rule 805 already provides that hearsay within hearsay is inadmissible --- you don't need or want an amendment that tells the court nothing more than to follow a rule that already exists; and

4) the question is not whether the document precedes this controversy but whether it proceeds some controversy, and moreover, that is just one factor in the reliability inquiry; and the requirement that someone acted upon the document would be no answer to the objectors, because much of the documentation they want to have admitted is never acted upon; and at any rate, these are fine factors to argue under the

residual exception---once you start adding reliability factors to Rule 803(16) you might as well just send it all to the residual exception.]

Michael Gatto (EV-2015-0003-0017), believes that "the proposed rule change unfairly inures to the benefit of the defense" and that " it is the rare case when the defense wants to avail itself of this rule."

William Harty (EV-2015-0003-0018), is opposed to the elimination of the ancient documents exception to the hearsay rule. He states that there is no evidence of a problem that is occurring with unreliable electronic information being offered under the exception. He argues that "[b]y singling out only the ancient document exception for abrogation . . . the committee's action may convey to courts and litigants a blanket, unwarranted disapproval of ancient documents themselves" making it unlikely that even reliable ancient documents will be admissible under the residual exception.

Steve Rineberg (EV-2015-0003-0019), opposes the elimination of the ancient documents hearsay exception, on the ground that it will unfairly affect plaintiffs in toxic tort cases involving latent diseases. He states that "[a]ncient documents relating to property ownership, sales, decision-making, and state of the art are extremely important for purposes of litigation in cases such as this, and such documents are often the only evidence available. The individuals responsible for drafting these documents, however, are usually unable to be located or are deceased, given the amount of time that has passed."

Amy Heins (EV-2015-0003-0020), contends that "[e]liminating the ancient document exception will unilaterally eliminate the best evidence both sides have in cases of latent disease such as mesothelioma."

Michael Mudd (EV-2015-0003-0021), is opposed to the elimination of the ancient documents exception. His comment is identical to the comment submitted by Steve Rineberg, (EV-2015-0003-0019).

Robert Paul (EV-2015-0003-0022), opposes the proposed change, on the ground that ancient documents are necessary in asbestos litigation. He concludes that "[t]he elimination of the rule would impede if not prevent the ability [to prove knowledge about the dangerousness of asbestos] and would certainly increase cost and multiply motion practice before judges on these and similar ancient documents and prevent relevant and important evidence from reaching juries."

Frederick Jekel (EV-2015-0003-0023), is against the proposed elimination of the hearsay exception for ancient documents. He states that in "asbestos, lead paint and tobacco litigation . . . most of the knowledge based liability document are more than 20 years old."

[Though it is unclear why a hearsay exception is necessary to cover documents that are offered for knowledge.]

Henry Bullard (EV-2015-0003-0024), states that the proposal to eliminate Rule 803(16) "is a solution in search of a problem, and there is no problem."

Devin Robinson (EV-2015-0003-0025), is opposed to the elimination of Rule 803(16), on the ground that the change "is not needed and will radically effect many injured peoples' ability to seek compensation from at fault parties" especially in cases of latent injury, where often "no one exists to authenticate the documents."

Robert Beatty-Walters (EV-2015-0003-0026), states that "[e]liminating this rule simply makes the burden on the plaintiff unneccesarily higher when conduct by nefarious manufacturers is documented in older records."

Benno Ashrafi (EV-2015-0003-0027), is opposed to the elimination of the hearsay exception for ancient documents.

Darron Berquist (EV-2015-0003-0028), states that elimination of the ancient documents exception has a potential to impede access to justice in cases involving latent diseases. He contends that "plaintiffs in asbestos litigation often must rely upon ancient documents to prove their cases (e.g., asbestos content of products, a company's knowledge of the hazards of asbestos, a company's recommendation of the use of asbestos replacement parts, etc.)."

Thomas Melville (EV-2015-0003-0029), asserts that "[h]istoric documents are impossible to authenticate, unlike a modern document, because the author is likely long since retired from institutional employment or dead." He concludes that the proposed elimination of Rule 803(16) "will favor large corporations and tortious wrongdoers at the expense of future victims."

J.D. McMullen (EV-2015-0003-0030), states that eliminating Rule 803(16) **"**would allow companies to shield decades of knowledge as it relates to the hazards associated with the products they manufacture and sell to workers and consumers."

Patrick O'Hara (EV-2015-0003-0031), contends that "[i]t would be a mistake to delete or edit Rule of Evidence 803(16)" because "[m]any of these documents which are important to cases dealing with issues that happened decades ago will not be admissible without this rule."

Avery Waterman (EV-2015-0003-0032), opposes the elimination of Rule 803(16), because "sheer passage of time should not shield potentially dispositive evidence."

Gary Berne (EV-2015-0003-0033), states that the ancient documents hearsay exception "can be helpful in leading to a fair result in those rare instances where it is needed. In fact, it very well may be that the best reason to keep the rule is that it could be crucial in a rare instance."

Jared Placitella (EV-2015-0003-0034), states that the elimination of the ancient documents exception "will have a significant impact on toxic tort plaintiffs, leaving many people who have been harmed by corporate negligence uncompensated for their losses." He contends that a change is not yet necessary to prevent admission of old, unreliable ESI, because "we are at most only 10-15 years into the digital ESI age [and] many relevant documents and other evidence material to toxic tort and other litigation are largely still in paper-form."

Chris Placitella (EV-2015-0003-0035), opposes the elimination of Rule 803(16), on the ground that it "would significantly prejudice those wrongfully devastated in injury and mortality through no fault of their own." He states that the exception "is particularly important in latent disease cases where the injury does not manifest for many years after exposure. The need for this exception is further accentuated by the fact that defendants who have destroyed original documents often object to the introduction of fraud based evidence arguing that because there is no one to testify how documents were created the documents are not admissible."

James Bedortha (EV-2015-0003-0036), opposes eliminating the ancient documents exception to the hearsay rule, on the ground that "numerous parties would be deprived of their ability to offer relevant, compelling and in most cases dispositive evidence of activities, knowledge or awareness of other parties reflected in documents subject to this rule." He argues that "[t]he only beneficiaries of eliminating this rule would be those parties whose potential misconduct, culpable knowledge, or awareness of dispositive facts are reflected in such ancient documents."

James Pettit (EV-2015-0003-0037), states that eliminating the ancient documents exception "means that the search for truth in the courtroom will be reduced to allowing current corporate personnel testifying about their memories of speaking with now-deceased persons, or testifying about their belief about corporate practices decades ago."

Scott Frost (EV-2015-0003-0038), opposes elimination of the ancient documents exception to the hearsay rule, concluding that the rationale of the rule is sound and there have been "no real changes in practice or procedure" that would require elimination of the rule.

Scott Marshall (EV-2015-0003-0039), declares that "[t]he elimination of F.R.E. 803(16) will not advance justice; instead it will impede it by allowing corporate defendants the ability to deny juries the opportunity to see important evidence that is rightfully admissible."

David Aubrey (EV-2015-0003-0040), argues that the elimination of Rule 803(16) will prevent plaintiffs with mesothelioma and lung cancer from the evidence necessary to prove that defendants had knowledge of the dangerousness of asbestos.

Jason Steinmeyer (EV-2015-0003-0041), filed a comment identical to that of David Aubrey (EV-2015-0003-004).

Robert Jacobs (EV-2015-0003-0042), states that the ancient documents hearsay exception "is invaluable" in litigation seeking to prove the existence or value of an old insurance

policy. He argues that "the continued use of paper regardless of computer storage warrants this rule to remain."

Shawn Acton (EV-2015-0003-0043), concludes that "[t]he abrogation of FRE 803(16) would have a devastating effect on Plaintiffs and Defendants who have to prove or defend their claims using documents that are decades old" because with old documents "there is often not a witness that can qualify an authentic document under a hearsay exception other than FRE 803(16)."

Susannah Chester (EV-2015-0003-0044), opposes the elimination of Rule 803(16). She states that the exception is needed for property records and that it is unlikely such records will be admissible under other exceptions such as for business records or the residual exception.

Perry Browder (EV-2015-0003-0045), opposes the elimination of Rule 803(16) on the ground that it will be "harmful to any litigation that involves older cases."

Tina Bradley (EV-2015-0003-0046), states that Rule 803(16) is "used frequently as too often, no other proof is available because parties are defunct and no longer in existence." She also states that "even if the opportunity exists to authenticate ancient documents, it is often a very expensive process." Accordingly she opposes the elimination of Rule 803(16).

Lillian Talbot (EV-2015-0003-0047), states that in litigation involving latent diseases, "[a]ncient documents relating to property ownership, sales, decision-making, and state of the art are extremely important [and] are often the only evidence available. The individuals responsible for drafting these documents, however, are usually unable to be located or deceased, given the amount of time that has passed." Accordingly, she opposes the elimination of Rule 803(16).

Margaret Samadi (EV-2015-0003-0048), argues that "[e]liminating Rule 803(16) would result in grave injustice for latent disease sufferers." She states that "[i]t is the rare case when my client can find a defendant's representative who recalls the events of 40 years prior in detail. . . . Often the best evidence of what actually occurred . . . is contained in documents created at the time of my client's exposure." She concludes that "[a]llowing corporations to keep this evidence from the jury prevents the jury from weighing all evidence of the occurrence at issue."

Andrew Balcer (EV-2015-0003-0049), opposes the elimination of Rule 803(16) because it would have a negative effect on plaintiffs who are "victims of latent disease, which only now manifest, despite their exposures to dangerous products occurring many decades ago." He states that the residual exception is not an adequate substitute because it is designed to be only rarely invoked, and that the business records exception is not an adequate substitute because it is often not possible to find a custodian for old documents.

John Kerley (EV-2015-0003-0050), opposes the elimination of the ancient documents exception to the hearsay rule because "[i]n many cases, the exception is the only way to prove or disprove material facts in dispute. The exception helps both sides of litigation and needs to be left in place."

Steven Perbix (EV-2015-0003-0051), urges retention of the ancient documents exception to the hearsay rule, because it is still necessary for documents that are not electronically stored, "especially as to documents stored at sites in rural areas that have not availed themselves of technology for documents that date back into the 1970s, 1980s, and even early 1990s."

Christopher Madeksho (EV-2015-0003-0052), states that "[a]brogating the historical document hearsay exception would take away the chance for cancer-stricken Americans like my clients to seek justice for having been wrongfully exposed to carcinogens that take decades to cause their cancer. Once the hearsay exception is abrogated, cancer-causing companies will say they had no knowledge of hazards or they never made such a product with no way for anyone to dispute them. Those people who could authenticate the documents which are decades old are either dead, unavailable or unwilling to cooperate."

Mark Bratt (EV-2015-0003-0053), is opposed to the elimination of Rule 803(16), arguing that the result would be "a huge windfall for large corporations and insurance companies as they will be able to use the passing of time as a sword in defending themselves in lawsuits." He concludes that "[t]he inherent trustworthiness of these 'ancient documents' has not changed, and therefore this rule should not change."

Michael Patronella (EV-2015-0003-0054), argues that "[a]uthentication of ancient documents is very costly and expensive" and that the proposed change "benefits large multi - million and billion dollar defendants." He concludes that "[p]laintiffs already have an uphill battle when it comes to finding and authenticating evidence, and this amendment will make many colorable claims even more difficult to prove."

Brent Zadorozny (EV-2015-0003-0055), opposes the amendment on the ground that it would have a negative impact on plaintiffs' claims in asbestos litigation, "in which the latency period for the asbestos diseases range from up to 40 to even 80 years. This means that documents held by companies or government agencies consistently are decades old before their relevance is understood. In those situations in which such documents are available there are often no witnesses to attest to their creation or foundation sufficient to admit them at the time of trial. However their maintenance in the library, or in a company's files, or in a government agency's records generally confirms their reliability and should be a basis under the current ancient documents exception to the hearsay rule to admit them."

Leonard Sandoval (EV-2015-0003-0056), opposes the proposal to eliminate Rule 803(16) on the ground that the result would be to "deprive victims of latent injuries (e.g. lung cancer, mesothelioma, etc.) of a significant source of evidence in cases related to asbestos exposure."

Marc Willick (EV-2015-0003-0057), states that "[e]liminating the ancient records exception will destroy proof necessary for prosecution and defense in thousands of cases across the country that turn on long held evidence." He therefore opposes the proposed amendment.

Jon Neumann (EV-2015-0003-0058), states: “Altering Rule of Evidence 803(16) would be a mistake. Without the ancient document exception to the hearsay rule, evidence that may presently be admissible to support a victim's case will no longer be available for consideration by the trier of fact.”

Ari Friedman (EV-2015-0003-0059), argues that the proposed elimination of Rule 803(16) “is advanced under theoretical and hypothetical concerns that may (or may not) arise in the future.” He concludes that Rule 803(16) should not be abrogated because “ more often than not the only thing to have survived the passage of time are the documents subject to this exception, as the people who can speak to the issues in the documents tend to move away, have faded memories, or worst of all, pass away.”

Thomas Plouff (EV-2015-0003-0060), opposes the elimination of Rule 803(16) on the ground that “[t]here are some cases, particularly involving minors or others under a disability, where ancient documents may be necessary proof.”

Matthew McLeod (EV-2015-0003-0061), states that the ancient documents exception to the hearsay rule “is a well-reasoned and important exception that provides a measure of fairness for victims of negligence to make their cases that would not otherwise be possible simply due to the passage of time.”

Brian Wendler (EV-2015-0003-0062), opposes the elimination of the ancient documents hearsay exception because it “would be a travesty to scores of attorneys who have relied on its existence to forego depositions to save client costs.”

Barrett Naman (EV-2015-0003-0063), states that “[t]his unnecessary rule change would detrimentally affect thousands of cases that rely upon these documents to prove events that occurred decades ago.”

Nicholas Cronauer (EV-2015-0003-0064), opposes elimination of the hearsay exception for ancient documents. He argues that the exception “preserves evidence and permits evidence to be admitted at trial that otherwise would be barred due to incompetence of a party or the passage of time.”

Thomas Bevan (EV-2015-0003-0065), opposes the proposed elimination of Rule 803(16) on the ground that asbestos victims’ claims “are often admitted at trial pursuant to the ancient document rule. The elimination of the rule will further victimize these people and provide cover for the corporations who injured them.”

Scott Britton-Mehlisch (EV-2015-0003-0066), states that in asbestos litigation, “corporate personnel with knowledge of the facts at the time of the ancient documents' generation will have died or left employment making authentication and introduction of [relevant] documents into evidence impossible.” He concludes that eliminating the hearsay exception for ancient documents “will disproportionally impact plaintiffs who will have to expend substantial amounts of resources in order to authenticate and prove up these valuable documents in order to use them at trial.”

Jonathan Forbes (EV-2015-0003-0067), opposes the elimination of the ancient documents exception, in a comment identical to that provided by Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-004).

Barry Castleman (EV-2015-0003-0068), a public health worker, opposes the elimination of the ancient documents hearsay exception. He states that "[j]uries have the ability to give appropriate weight to [ancient] documents, once admitted, for their consistency with other evidence, their importance and truthfulness."

Valerie Farwell (EV-2015-0003-0069), states that the elimination of the ancient documents hearsay exception would have a negative impact on plaintiffs in asbestos litigation. The result would be "more delay and expense in the litigation process when these large corporations seek to prevent the admission of ancient documents without additional authentication."

Alexandra Caggiano (EV-2015-0003-0070), states that in cases involving latent injuries, the ancient documents hearsay exception "is a tremendous help in bringing in evidence that is obviously authentic but cannot be admitted into evidence via another exception. Abrogating this rule would allow the real defendant to escape accountability."

Jeffrey Simon (EV-2015-0003-0071), opposes the elimination of the ancient documents hearsay exception. He contends that "[a] party virtually never has a legitimate doubt that a document purporting to be older than 20 years old is an authentic document or a precise copy of one. Yet, some parties object to the authenticity of older documents, knowing that with the passage of many years, a witness who wrote or received the document cannot be located. That objecting party has no legitimate reason to believe that the document has been altered or fabricated; rather, that party simply wants to elevate form over substance to keep the document from the purview of the jury." He concludes that "[t]he ancient documents exception to the hearsay rule provides a crucial basis to offer and authenticate documents where no sponsoring witness can be found, yet there is no genuine reason to believe the document has been fabricated."

[Of course this comment confuses authenticity with hearsay and fails to note that the rule on authenticity will not be changed.]

Christian Hartley (EV-2015-0003-0072), argues that for cases involving conduct that occurred many years earlier, elimination of the ancient documents hearsay exception "would create a de facto statute of limitations by allowing the passage of time to extinguish the evidence." He asserts that if the use of old electronically stored information becomes a problem, "the best way to determine if a change is necessary is wait for courts to deal with the issues in the context of a controversy."

Michael Shepard (EV-2015-0003-0073), opposes the elimination of the ancient documents hearsay exception. He states that the exception "is used more often than realized, and when it is needed, it is often crucial to either proving a plaintiff's claim, or proving a defendant's defense."

Shane Hampton (EV-2015-0003-0074), opposes the proposed amendment. He argues that in cases involving latent injuries, "older documents are provided by parties to the case, and it would frustrate the search for truth if they became inadmissible." He also states that "[t]here are circumstances when older documents may vindicate a defendant, who was not negligent, or who did not cause the alleged injury, and this amendment would hurt those defendants rights to defend themselves." Thus the elimination of the exception is "not a plaintiff v. defendant issue."

David Norris (EV-2015-0003-0075), believes that "all of the good reasons for the creation of FRE 803(16) still exist" and that it is "an important tool for both plaintiffs and defendants." Thus he opposes elimination of the ancient documents hearsay exception.

Jason Beale (EV-2015-0003-0076), states that "abrogating the ancient document exception to the hearsay rule, outright, would directly and severely prejudice" victims of mesothelioma "and unfairly allow a negligent party to have an unnecessary, unfair, and prejudicial advantage."

Angela Bullock (EV-2015-0003-0077), states that if not for the ancient documents hearsay exception, a defendant corporation in a case involving a latent disease "would unfairly benefit" from a plaintiff being barred from introducing relevant records. She concludes that "[m]any of the sources of these ancient documents are companies of bad actors --- most of which are defunct and therefore, cannot be deposed and otherwise examined on the documents." She therefore opposes elimination of the hearsay exception for ancient documents.

Samuel Elswick (EV-2015-0003-0078), opposes the elimination of Rule 803(16). He states that the ancient documents exception is necessary in asbestos cases to qualify documents showing knowledge of the dangers of asbestos, as well as documents indicating the defendants' choice to utilize asbestos rather than some other material.

Jonathan Ruckdeschel (EV-2015-0003-0079), opposes the proposed elimination of Rule 803(16) on the ground that it would prevent recovery for victims of mesothelioma. In the alternative, he urges "that any alteration act only prospectively. That is, that it only apply to documents created after the amendment of the rule. To do otherwise will result in the denial of compensation to terminally ill Americans."

Bruce Carter (EV-2015-0003-0080), opposes the elimination of the ancient documents exception to the hearsay rule. He states that "[t]he rule has substantial safeguards to assure authenticity of the documents" and that "d]epriving the parties of the ability to use historic documents will deny both parties the ability to be adequately represented."

Christopher Meisenkothen (EV-2015-0003-0081), states that "[t]he ancient document exception to the hearsay rule should not be eliminated. It is a vital part of many cases involving

long-latent injuries where ancient documents are often important pieces of evidence." He concludes that "[e]liminating the ancient document exception would severely hamper both the prosecution and defense of these types of cases."

Michelle Whitman (EV-2015-0003-0082), states that "[a]bolishing the ancient document exception to the hearsay rule would no doubt be detrimental to so many on both sides of the bar who rely on these documents in proving their cases."

Carla Guttilla (EV-2015-0003-0083), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that the change "would preclude parties on both sides of litigation from utilizing ancient documents for which no other form of authentication exists due to the passage of time and death of the authors. These documents are paramount in latent disease cases to show what actually happened and what was known or not known during the relevant periods for these cases, where exposure or injury occurred decades ago."

Marc Weingarten (EV-2015-0003-0084) --- who provided written comment and testimony at the public hearing --- is opposed to the elimination of Rule 803(16). He argues that it will impose new costs on the proponent to establish the admissibility of an ancient document, which he maintains runs contrary to recent Rules Committee projects designed to make federal litigation less expensive. He contends that any amendment to Rule 803(16) short of abrogation should be opposed, because an amendment would add more reliability and/or necessity requirements, requiring additional expenditure to meet those requirements. He states that ancient documents are necessary to prosecute claims against asbestos manufacturers, and that many of these documents have been found "in garages, musty warehouses, in other out of the way, and decidedly non-corporate places, and often in old file cabinets, folders and boxes" and they "cannot be authenticated in a traditional manner because there is no one from the company who is capable of doing so."

Mark Wintering (EV-2015-0003-0085), opposes the elimination of Rule 803(16), on the ground that "[t]he ancient document exception to the hearsay rule has been crucial to the full and fair presentation of evidence in asbestos and other toxic tort cases, where key documents were not electronically preserved."

Charles Soechting, Jr. (EV-2015-0003-0086), opposes the elimination of the ancient documents hearsay exception. He asserts that "more often than not given their age there are no longer individuals able to provide the necessary testimony to authenticate [such] documents, despite their importance to the underlying litigation."

Mike Bilbrey (EV-2015-0003-0087), states that abrogation of the ancient documents exception would have an unfair impact on plaintiffs' claims of latent disease, where "[a]ncient documents are routinely used to provide evidence of the Defendant's knowledge of the dangers from these poisons, toxins and harmful substances."

Rachel Moussa (EV-2015-0003-0088), opposes the elimination of the ancient documents hearsay exception. She concludes that "[v]ictims who have suffered injuries from latent defects will be unable to prove their claims" because "evidence demonstrating a history of

negligence or knowledge, must be produced in order to be successful" and the ancient documents exception is necessary for proof of these matters.

William Minkin (EV-2015-0003-0089), states that the ancient document exception "has been instrumental in holding wrongdoers accountable in civil litigation, particularly in cases of latent diseases, such as asbestos, lead and tobacco" because Rule 803(16) "is very often the only way" to admit the critical documents.

Michael Burnworth (EV-2015-0003-0090), opposes the elimination of the ancient documents exception to the hearsay rule, in a written comment that is identical to that provided by Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-004).

Lamont McClure (EV-2015-0003-0091), opposes the elimination of the ancient documents hearsay exception on the ground that the authentication requirements for ancient documents "already provide[] sufficient safeguards to the possibility of the use of fraudulent documents."

Beth Gori (EV-2015-0003-0092), opposes the elimination of the ancient documents exception to the hearsay rule, in a written comment that is identical to that provided by Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-004).

Kenneth Wilson (EV-2015-0003-0093), states that the ancient documents exception should be retained, because "[a]s time passes, witnesses become unavailable or pass away, memories fade, companies get sold or go out of business" and "oftentimes the only available evidence is in the form of ancient documents. These 'silent witnesses' may be the only way to prove a case when other forms of evidence have vanished."

Mike Riley (EV-2015-0003-0094), states that in toxic tort cases, "[l]egitimate and relevant documents are often admitted at trial pursuant to the ancient document rule, and the elimination of the rule would not serve the interests of justice."

David Layton (EV-2015-0003-0095), states that the ancient documents hearsay exception "is particularly important for cases with injuries that have long latency periods." He concludes that the exception "is neutral and is often relied upon by both parties" and what without the exception, "the finder of fact will be deprived of key information."

Taylor Kerns (EV-2015-0003-0096), opposes the elimination of the ancient documents hearsay exception, on the ground that it "has been, and will continue to be, necessary to protect the rights of plaintiffs and defendants alike in areas of litigation in which information is located only in hardcopy." He states that "[t]o the extent the Committee believes ESI must be addressed, there are mechanisms by which this can be accomplished without the radical remedy of total abrogation, such as limiting the exception for hardcopy documents."

Dimitri Nichols (EV-2015-0003-0097), opposes the elimination of the hearsay exception for ancient documents, on the ground that it will "injure the rights" of plaintiffs in asbestos litigation, "whom already face a deck stacked against them when they seek justice."

Chris Romanelli (EV-2015-0003-0098), argues that "[o]lder documents are noteworthy for their truth and reliability" and that eliminating the hearsay exception for ancient documents "frustrates the search for the truth."

Christopher Hickey (EV-2015-0003-0099), argues that the elimination of the ancient documents exception "will adversely affect Americans suffering from latent disease, including our military veterans."

John Kane (EV-2015-0003-0100), objects to the elimination of the hearsay exception for ancient documents. He argues that Rule 803(16) "is a practical rule that understands that after several decades the original author of an ancient document may not be available to testify but the contents of the document are still relevant and typically critical to the case."

Holly Peterson (EV-2015-0003-0101), opposes the elimination of the ancient documents exception, emphasizing its impact on plaintiffs in latent disease cases. "Abrogation of this rule will mean I must argue [the hearsay] issue to judges in every single case -- a colossal waste of attorney time and judicial resources."

Justin Shrader (EV-2015-0003-0102), contends that the ancient documents exception to the hearsay rule "has an important place in modern practice, despite the growing prevalence of ESI." He argues that the exception is especially important in cases involving toxic torts and latent injuries: "Every asbestos trial our firm has been involved in has relied on FRE 803(16) to enter into evidence key historical documents to impute knowledge to a defendant that may otherwise be inadmissible." He therefore opposes any amendment that would limit the ancient documents hearsay exception.

[Again, if a document is offered for knowledge it is not hearsay and so you never get to the ancient documents exception.]

Keith Patton (EV-2015-0003-0103), states that "[t]he ancient documents exception is necessary in cases that require the use of documents that pre-date modern technology, such as latent injury cases." He declares that "by eliminating the exception, the proposal will prevent trial judges from exercising their discretion in determining the admissibility of these documents -- a role judges are well-equipped to handle."

Bradley Evetts (EV-2015-0003-0104), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that provided by Beth Gori, (EV-2015-0003-0092), Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-004).

Erin Jewell (EV-2015-0003-0105), states that "[a]ncient documents often form a quintessential part of the proof in latent disease cases, where the plaintiff is forced to prove that the defendant companies knew, had reason to know or should have known about the dangers of asbestos in the 1940s, 1950s, 1960s and 1970s, long before documents were stored electronically. Most, if not all of the witnesses are long dead, and only the documents remain to shed light on the facts of these cases; no other form of authentication exists." She concludes that "[e]liminating the ancient document exception will only benefit corporations, at the expense of innocent victims."

Todd Neilson (EV-2015-0003-0106), asserts that Rule 803(16) "is in fact invoked frequently" and that eliminating the hearsay exception "will ultimately increase the time and expense of litigation."

John Kopesky (EV-2015-0003-0107), contends that without the ancient documents hearsay exception "individuals who suffer injuries from latent defects will be unable to prove their claims" because "[i]f the company that originated the [ancient] document no longer exists, there may be no way to authenticate the document."

Amy Gabriel (EV-2015-0003-0108), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that provided by Bradley Evetts, (EV-2015-0003-0104), Beth Gori, (EV-2015-0003-0092), Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-004).

Laurel Halbany (EV-2015-0003-0109), opposes the elimination of the ancient documents hearsay exception, arguing as follows: "The existence of electronically stored information for newer documents does not change the value of existing ancient documents, nor render them hearsay. As the rule already requires authenticity of ancient documents, there is no new evidentiary concern; the only function of this rule would be to exclude previously admissible, highly relevant evidence."

Lance Pomerantz (EV-2015-0003-0110) --- in a written comment and in testimony at the public hearing --- contends that the ancient documents exception has continuing vitality in land title litigation, and that the exception originated in land title cases under the common law. Thus any proposal to limit the ancient documents hearsay exception should leave some way for old documents to be admitted in land title litigation. One possibility might be to "grandfather" old documents and allow the abrogation to apply only to those documents generated after a certain date.

Nathaniel Mudd (EV-2015-0003-0111), is "deeply concerned about the proposed rule to abrogate FRE 803(16) regarding the admissibility of ancient documents." He states that in asbestos cases, it is often impossible to authenticate old documents by calling on a custodian, and the companies that generated those documents are often defunct. He concludes that without the ancient documents hearsay exception, many asbestos claims could not be brought.

Stacey Kurich (EV-2015-0003-0112), argues that without the ancient documents hearsay exception, many asbsestos claims could not be brought because the authors of the relevant documents are long deceased.

Kelly Battley (EV-2015-0003-0113), states that "[t]here are many kinds of litigation in which the only available and admissible evidence may be the ancient documents exception to hearsay. The rule continues to work in those situations. The Committee should consider a new or different rule to address a new and different concern."

Peter Janci (EV-2015-0003-0114), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it will have a negative effect on plaintiffs' claims of sexual abuse when that abuse occurred many years before the action is brought. He states that the ancient documents exception is essential because it allows "a corporation's own internal documents to be admitted as evidence of what it knew about a danger and how it responded."

The example provided --- the corporation's own documents offered against it --- is a weak one because those documents would be admissible as party-opponent statements.

Clayton Thompson (EV-2015-0003-0115), opposes the proposal to eliminate the ancient documents hearsay exception, emphasizing its negative effect on the claims of victims of mesothelioma. He states the plaintiff must put on evidence "of what the defendant knew about the hazards of asbestos, when it used asbestos, and in which products or at which jobsites." These facts ordinarily must be proved through ancient documents. He concludes that "[a]brogating the Rule of Evidence as proposed would permit defendants to avoid responsibility for the harm their conduct and their products caused to innocent and hardworking men and women and their families."

John Harp (EV-2015-0003-0116), contends that eliminating the hearsay exception for ancient documents "would harm a substantial number of workers in fields such as the railroad industry."

Anthony Petru (EV-2015-0003-0117), opposes the elimination of the ancient documents hearsay exception, based on his experience in representing clients "who have illnesses and injuries as a result of various forms of cumulative trauma and exposure." He states that "[f]requently the only way to prove that the entities are responsible for the exposure and injury is through the use of ancient documents." The documents "often either are explicit admissions, or evidence of available information which would make a reasonable person take notice and act to protect the users."

[The examples referred to would easily qualify as party-opponent statements or as statements offered to show knowledge, which are not hearsay.]

Kristoffer Mayfield (EV-2015-0003-0118), argues that the consequence of eliminating the ancient documents exception to the hearsay rule will be that "many types of cases, where people have been very badly injured, killed, or made very sick, will not be adequately prepared and presented on the merits." He states that "[t]he issue is that corporate knowledge is extremely important to prove notice and culpability and to deter bad conduct by the world's most powerful corporations."

[Again, the example does not invoke the ancient documents exception, because showing knowledge is not within the hearsay rule.]

Victor Russo (EV-2015-0003-0119), argues that the ancient documents exception to the hearsay rule must be retained, because defendants destroy their relevant documents; "in response to this, attorneys and some expert witnesses have developed and maintain libraries of documents obtained through diligent work. As time passes those documents become 'ancient', as we use that term of art." He concludes that Rule 803(16) is necessary to qualify design guides, internal memoranda, safety suggestions, risk management assessments, and "all manner of documents that existed some years ago [and] cannot be found now, in a current litigation, because a defendant has decided to destroy them."

Christina Stephenson (EV-2015-0003-0120), opposes the elimination of the hearsay exception for ancient documents, stating: "I don't believe that developments in technology are sufficient at this time to justify the change."

The Association of the Bar of the City of New York (EV-2016-0121), through its Committee on Federal Courts, opposes the elimination of the ancient documents exception to the hearsay rule. The Committee "appreciates the Advisory Committee' s desire to be proactive to preempt any possible problem that might arise in the future with electronically stored information that survives for more than twenty years." But it states that no such problem has arisen to date. It also contends that there is a guarantee of reliability in the fact that ancient documents "must be authenticated pursuant to Rule 901(b)(8)." The Committee further opines that "Rule 403 could be used to exclude ancient documents in cases when a problem actually arises." Finally, the Committee concludes that the abrogation could lead to "unintended consequences" because other hearsay exceptions (such as Rules 803(6) and 807) may not be sufficient to qualify reliable ancient documents.

[There are several inaccuracies here, but just to mention three: 1. Ancient documents don't have to be authenticated under Rule 901(b)(8) --- they can be authenticated in any way that any other document can be authenticated; 2. It's a fallacy to say that authentication on any ground is a guarantee of the reliability of the contents; 3. It's just wrong to say that Rule 403 can exclude evidence that the trial court finds unreliable; if that were true, you wouldn't need a hearsay rule (or exception) at all --- you could just leave it up to Rule 403. And you wouldn't need language in Rules such as 803(6) which allow a court to exclude a business record if unreliable under the circumstances. As the Symposium definitely showed, we do not have a system allowing the trial court to exclude hearsay under Rule 403 because it is unreliable.]

Gilion Dumas (EV-2015-0003-0122), opposes the elimination of the ancient documents hearsay exception, arguing that it is necessary for the prosecution of claims of sexual abuse that occurred many years ago. Old documents "show what the defendants knew about child molesters in their ranks, when they knew it, and what these defendants did with that knowledge." While these documents "appear authentic as required by FRE 803(16), they may be difficult to actually authenticate." Mr. Dumas recognizes that many of the documents offered under the ancient documents exception "are arguably admissible as non-hearsay 'notice' evidence, excluded from the hearsay rule as admissions of a party opponent, or are admissible under other exceptions to the hearsay rule such as the business records exception or the (always risky) catch-all exception." But he states that "the effort and inefficiency of arguing the admissibility of every page - and every secondary or tertiary hearsay statement within each page - would make the battle almost impossible for most plaintiffs." He concludes that "[o]nly the ancient documents rule can cut through all these irrelevant, time-wasting, side arguments to allow in relevant, authentic evidence to prove these claims."

James Campbell (EV-2015-0003-0123), opposes the elimination of the ancient documents rule on the ground that it will have a negative effect on the prosecution of cases involving latent diseases. He states that "[t]he elimination of the ancient document exception to the hearsay rule would effectively bar such suits from being brought in federal court, foreclosing a significant avenue of relief for cancer patients and victims of other diseases that were wrongfully caused by exposure to toxic substances."

Gregg Meyers (EV-2015-0003-0124), urges retention of the ancient documents exception to the hearsay rule, claiming that it is "[v]ital in work involving sexual abuse cases . . . where records were kept but are hidden."

James Stang (EV-2015-0003-0125), contends that the ancient documents exception to the hearsay rule is necessary in cases involving "institutional cover-up of sexual abuse and the efforts to put assets beyond the reach of abuse survivors." He concludes that "[e]limination of the exception will perpetuate the historical wrong these children suffered."

Will Nefzger (EV-2015-0003-0126), opposes the elimination of the ancient documents hearsay exception. He states as follows: "Not only is it still useful, I have yet to hear one good reason to abolish it. Perhaps in another generation, it might make sense, but not now."

Raeann Warner (EV-2015-0003-0127), argues that the ancient documents exception to the hearsay rule should be retained because of its importance is cases involving asbestos contamination, as well as cases alleging sexual abuse allegedly condoned by institutions. She states that "[i]t is in the instances of the greatest cover-ups or latent diseases that don't develop for many years that these documents are the most critical to victims of corporate negligence."

Michele Betti (EV-2015-0003-0128), opposes the elimination of the ancient documents exception to the hearsay rule. She argues that the exception is essential for the admission of evidence indicating that institutions were aware of sexual abuse perpetrated by agents and employees many years before the litigation is brought.

[The examples given are all about knowledge, so not hearsay at all.]

Edward Cook (EV-2015-0003-0129), argues that the ancient documents exception should be retained because of its importance in proving liability for injuries suffered by rail workers.

Lori Watson (EV-2015-0003-0130), argues that the ancient documents hearsay exception should be retained due to its importance in proving cases involving past sexual abuse. She explains as follows: "Often these victims have repressed or suppressed the memories of this abuse for years, and are only in a position to come forward years after the abuse occurred. Many of these cases include significant claims of fraudulent concealment and conspiracy against large institutional defendants that permitted or ratified the abuse. These defendants often have records dating back decades that are the evidence to establish these claims, and make these cases viable. Often the authors of the documents and/or witnesses referred to in the documents are deceased, therefore making the document unusable if the ancient document rule is eliminated."

Peter Kraus (EV-2015-0003-0131), states that "[f]or attorneys representing the victims of toxic injuries, Rule 803(16) is a key tool to prove liability in these already very difficult cases." He notes that "[a]lthough other exceptions to the hearsay rules may be available in some instances, the best and clearest path to the admissibility of relevant evidence from industry trade groups and other companies similarly situated to the defendant is Rule 803(16), the ancient documents exception."

Jonathan Redgrave (EV-2015-0003-0132) --- in written comment and in testimony at the public hearing --- supports the proposal to eliminate the ancient documents exception to the hearsay rule. He observes that "a document does not become more reliable from one day to the next by having a birthday." He states that if the rule is not abrogated, "litigants may seek to admit ESI that contains unreliable hearsay into evidence simply because the ESI is old enough to come within the ancient documents exception to the hearsay rule. The initial trickle will turn into a flood as the universe of ESI that reaches the magical 20 year milestone grows at an exponential rate." He concludes that "[u]nreliable evidence should not be admitted, whether it is in hardcopy or ESI regardless of age" and that "the only practical effects of abrogating Rule 803(16) will be to require litigants to establish the reliability of ESI before offering it for the truth of its contents, and to prevent abuses of the ancient documents exception to the hearsay rule. Both results are desirable." He argues that "the foresight of the Committee should be commended and that the Committee should not wait for a foreseeable problem to come to fruition before acting." Finally, he finds the concerns expressed in other comments about the inapplicability of the business records exception to ancient documents "overstated because there are ways to meet the requisites of Rule 803(6) without a contemporaneous witness who had personal knowledge of the records being created."

Tahira Merritt (EV-2015-0003-0133), states that the ancient documents hearsay exception is "a vital tool to hold institutions accountable in cases involving alleged sexual abuses that were caused or suppressed by institutions "because the institution's pattern and practice is

often found in the institution's ancient documents." Therefore she opposes the elimination of the ancient documents hearsay exception.

Ashley Vaughn (EV-2015-0003-0134), states that the ancient documents hearsay exception "is invaluable in cases with extended statutes of limitation, such as child sexual abuse cases, and advances in technology do not dispense with the need for the rule." She argues that "[t]he evidence necessary to prove claims for child sexual abuse that occurred many years ago is often found in 'ancient documents' such as magazines, newspaper articles, and documents published by the organization at fault" and "the articles may be otherwise difficult to authenticate except through FRE 803(16)."

Mark Gallagher (EV-2015-0003-0135), states that "Federal Rule of Evidence 803(16) is absolutely necessary to parties seeking to hold accountable individuals and institutions for offenses which occurred years ago" including acts of sexual abuse. He therefore opposes any attempt to eliminate the ancient documents hearsay exception.

Richard S. Walinski (EV-2015-0003-0136), supports the proposed amendment to eliminate the ancient documents exception to the hearsay rule. He reasons that "Rule 803(16) simply sets an unprincipled, 20-year expiration date for all hearsay considerations based on the bland happenstance that a statement was reduced to writing long ago, regardless of whether the author's purpose was to record fact,fiction, malice, poetic insight, or pure fancy." He states that Rule 803(16) "transfers the burden of producing the percipient witness to the opposing party without any showing or reason to presume that the opposing party is in any better position to produce the percipient-but-absent witness than is the party who would ordinary bear that burden." He concludes that Rule 803(16) is "unnecessary" because reliable ancient documents can qualify for admissibility under other Rules. He recognizes that "[e]very alternative to that Rule would require something more than merely demonstrating the meaningless fact that the statement was written down along time ago." But he concludes that "[a]brogation of Rule 803(16) will merely reinstate the same criteria for the admissibility of ancient statements that have been applied to other kinds of out-of-court declarations."

David Romine (EV-2015-0003-0137) --- in a written submission and in testimony at the public hearing --- opposes elimination of the ancient documents exception to the hearsay rule. He argues that the exception is critical in proving cases brought under CERCLA and denaturalization cases. He contends that the authentication requirement under Rule 901(b)(8) is sufficient to guarantee that the content of an ancient document is reliable. He states that "[c]ourts are no more likely to admit unreliable ESI because it is an ancient document, or vice-versa, than to admit unreliable evidence in any other form." He concludes that the business records exception is not a substitute because no custodian will be found for ancient documents; and the residual exception is not a substitute because it is disfavored by the courts. Finally, he expresses concern that abrogation of Rule 803(16) "will lead to increased tangential litigation as the question of admissibility of ancient documents is pushed from the ancient documents exception to the residual exception, resulting in increased expense for litigants and increased burdens for judges."

1. Regarding the residual exception: It is notable that Mr. Romine, in his statement, uses as an example of a reliable ancient document the newspaper article in the famous Dallas County case. But the court in Dallas County did not admit the article as an ancient document. Rather it found it admissible under the residual exception.

2. It is surely true that there will be additional expense in using the business records exception and the residual exception rather than Rule 803(16). But that is because Rule 803(16) carries no guarantees of reliability of content. The fact that something is easy because there are no standards doesn't make it preferable to a rule with some rational standards. Under Mr. Romine's rationale, we should have no hearsay rule at all because it makes the parties undertake the cost of showing that evidence is reliable.

Randy Reagan (EV-2015-0003-0138), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would have "an extremely negative impact" on the ability of plaintiffs in toxic tort cases to prove critical facts. He states that "with many of the responsible parties filing for bankruptcy protection, we find ourselves seeking proof through documents that date back decades from an entity that is now defunct. These documents are frequently necessary to prove liability by documenting mergers between corporations, chain of command, etc." He argues that "[t]here is already an uneven playing field between the injured parties that we represent and the corporations that are responsible for their injuries" and that the abrogation of Rule 803(16) would accentuate that imbalance.

Ross Stomel (EV-2015-0003-0139), opposes the elimination of the ancient documents hearsay exception, on the ground that it will have a negative impact on plaintiffs' claims in asbestos litigation. He states that "[d]iscovery in litigation over the past 40 years has resulted in the production of millions of pages of corporate and trade organization documents from these past decades that demonstrate widespread knowledge of the dangers of asbestos" and that the truth of the contents of these documents "nearly always cannot be established by other means" because the authors are deceased. He fears that these documents, "admissible for their truth prior to the amendment (and not seriously challenged), would become inadmissible overnight and unavailable as proof, allowing the companies to deny the undeniable and avoid the damaging admissions made decades and decades ago that continue to claim the lives of thousands of Americans every year."

Christopher Paulos (EV-2015-0003-0140), opposes the elimination of the ancient documents exception to the hearsay rule. He contends that the exception should not be altered in response to electronically stored information because "in an age when everything can be created or deleted with just one click, if something can survive long enough to be considered 'ancient' then it is more reliable than not, and the truth of its contents, likely created when the case at bar had not yet been set in motion, should be presumed."

Michael Blanchard (EV-2015-0003-0141), states that "[d]oing away with the ancient document exception to the hearsay rule would be a great injustice to many claimants who must

rely on ancient documents that are clearly acceptable but cannot get into evidence any other way."

Richard Cook (EV-2015-0003-0142), states that the ancient document exception to the hearsay rule "is essential in a number of cases" and eliminating the exception "will increase the cost and difficulty of establishing the truth and satisfying one's burden of proof." He concludes as follows: "Whether the case involves decades old capital crimes, sexual abuse, exposure to cancerous substances, disputes involving real property transactions, or other disputes which are slow in developing, the ancient document exception is essential in order for the finder of fact to get to the truth of the matter."

Professor Roger Park (EV-2015-0003-0143), opposes the elimination of the ancient documents exception to the hearsay rule. He contends that "[t]he strongest ground for excluding hearsay is the danger of adversarial abuse. Were there no rule excluding it, adversaries might create hearsay as a substitute for live testimony, hoping that dubious witnesses will make themselves scarce so that the hearsay can take their place. The notion that this machination might occur 20 years before the evidence is needed is so fanciful as not to be worth considering." He argues that the fact that the business records exception and the residual exception would be available for admission of reliable ancient documents, "is a reason for fear, not comfort. It's an invitation to partisan judges to screen out reliable evidence on grounds of untrustworthiness. It's a destroyer of predictability because the outcome of that screening cannot be known beforehand."

Allyson Romani (EV-2015-0003-0144), objects to "the proposed amendment to FRE 901(8) [sic]." She notes the difficulty of authenticating documents in mesothelioma cases due to the passage of time.

Sidney Cominsky (EV-2015-0003-0145), is opposed to the elimination of the ancient documents hearsay exception on the ground that it would "hurt ordinary citizens."

Nathan Finch (EV-2015-0003-0146), states that "the ancient document rule is often the only way to get an important and reliable old piece of information before a jury, because frequently the company that made and kept the record no longer has any living employees who can testify to its creation." He suggests that "[i]f any editing is done to the rule, at most it should be clear that documents created prior to 1990 --- when electronic data storage first became widely available --- are still subject to the rule in its current form."

Joseph Rice, together with the members of Motley Rice LLP (EV-2015-0003-0147), is opposed to the elimination of the ancient documents exception to the hearsay rule. He notes that the firm has "recently used the ancient documents rule to have evidence admitted in Court for situations where there is no longer a living witness to call upon who could lay a foundation to meet the business records exception to the hearsay rule. Therefore, ancient documents are vital even in litigation today." He concludes that "if a document has been preserved for more than 30 years in hard copy, and in some cases 50, 60, 70 or 80 years, it is likely there is a reason for that preservation and highly probable that the document is significant, relevant and reliable."

Ben DuBose (EV-2015-0003-0148), states that elimination of the ancient documents hearsay exception, "would create an undue burden on the parties and increase the costs of litigation" --- especially in cases involving latent diseases.

Jackalyn Olinger (EV-2015-0003-0149), states that elimination of the ancient documents hearsay exception "would prolong the discovery process, and would often make it impossible to track down the information needed for victims of latent diseases like mesothelioma. It would also increase the cost of litigation, as companies, businesses, and municipalities would be required to put their ancient documents in electronic form. That cost would then likely be transferred to the victims."

Jeffrey Kaiser (2015-EV-0003-0150), opposes eliminating the ancient documents hearsay exception on the ground that it "would have a negative impact on victims of asbestos diseases --- a process the typically takes decades and often 50 or more years to manifest." He argues that "[h]istorical documents are often the only evidence in these cases as those who have authored them are deceased."

Dan Brown (2015-EV-0003-0151), states that the ancient documents is necessary to allow admission of documents that "may serve as a critical basis for establishing liability and provide an important historical context for the jury in many asbestos cases." He argues that "[e]ven with the Rule in place, the court retains the ability to serve as a gatekeeper and make determinations on admissibility of a particular document."

[It is just not true that the court can serve as a gatekeeper and exclude an ancient document because it is unreliable.]

Bart French (2015-0003-0152), states that "[m]any of the documents showing knowledge of the dangers of asbestos date back several decades. These 'ancient documents' are well known and accepted by all parties." To eliminate the ancient documents hearsay exception "would be to promote inefficiency and increase costs for all parties, both plaintiffs and defendants."

Sarah Gilson (2015-0003-0153), opposes the elimination of the ancient documents hearsay exception, stating as follows: "Ancient documents are regularly critical in establishing liability, finding proof for the material content of defective products, and showing corporate knowledge and failure to act on hazards to the public. These documents are essential to the basic needs of the practice of an asbestos litigator."

Trusha Goffe (2015-EV-0003-0154), opposes the elimination of the ancient documents exception, stating that the exception "is vital in litigation of child sexual abuse cases involving conduct decades ago" because "documents from the 1960s, 1970s and 1980s are key to both plaintiff and defense lawyers in prosecuting and defending claims." For plaintiffs' lawyers, "these documents are often the only proof of institutional actions and knowledge due to the passage of time and unavailability of witnesses." She concludes that "[t]he exception continues to be relevant even with the development of ESI and will continue to be very valuable for this type of litigation."

Brett Powers (2015-EV-0003-0155), objects to the elimination of the ancient documents hearsay exception, arguing that "the burden required for a sick and injured worker, or his widow and orphans to prove their case is difficult enough under the current civil justice system." He concludes that "[t]his amendment will simply lead to prolonged and increased litigation if not increase corporate immunity for bad acts."

Brian Kelley (2015-EV-0003-0156), asserts that the ancient document exception to the hearsay rule "is an essential rule that is necessary for several claims to be heard fairly" and that eliminating the rule "would exclude relevant evidence and provide no additional benefits to any cases."

Greg Lisemby (2015-EV-0003-0157), opposes the elimination of the ancient documents exception on the ground that it would result in the exclusion of important documentary evidence in asbestos cases. He states that "[i]t is typical in such cases to acquire documents from third-party repositories that identify a defendant's asbestos-containing products and/or a defendants' knowledge regarding the dangers of asbestos. Documents of this nature are typically not in electronic format, and defendants typically will not agree to the authenticity or admissibility of such documents."

Lin Thunder (2015-EV-0003-0158), opposes the elimination of the ancient documents hearsay exception on the ground that it would negatively impact plaintiffs in asbestos litigation. She concludes that "[t]he ancient document exception to the hearsay rule helps those whose cases involve actions that stretch back decades and has no negative impact" and that "[r]etaining the rule costs nothing and serves the interests of justice by preventing the passage of time from obscuring the truth."

Mary Nold Lattimore (2015-EV-0003-0159) --- in written comment and in testimony at the public hearing --- supports the elimination of the ancient documents exception to the hearsay rule. She states that "[t]he proposition that a document should be considered reliable, probative, admissible evidence based solely on the age and authenticity of the document is unsupportable" and that "[w]hether the document does or does not predate the litigation does not mean that the author of the document has provided reliable, credible and probative information that would be admitted into evidence if the author was a witness at the trial." She asserts that "[i]t is frightening to think that personal assertions by non-parties in the form of personal emails, blogs,Tweets, Facebook posts, text messages, chat room dialog, voicemails, will become admissible 'evidence' once they are twenty years old." She concludes that "[t]he Committee's proposal is sound and well-reasoned. I very much appreciate that the Committee is acting in a proactive manner to ensure the integrity of the evidence presented at trials."

William A. Rossbach (2015-EV-0003-0160) --- in written comment and in testimony at the public hearing --- is opposed to the elimination of the ancient documents hearsay exception. He notes ancient documents are critical evidence in many cases, not only those involving asbestos, and that any concern about old unreliable ESI being admitted under the exception should not result in abrogation of the exception; he states that the concern should be "addressed with targeted and specific standards, appropriate to that unique type of evidence." For example,

he suggests that the ancient documents exception might be amended to preclude coverage of ESI. Finally, he argues that there are many hearsay exceptions that are questionable in allowing potentially unreliable evidence to be admitted, so there is no call for singling out the ancient documents exception.

Robert J. Gordon (2015-EV-0003-0161) --- in written comment and in testimony at the public hearing --- is opposed to the elimination of the ancient documents hearsay exception. He states that ancient documents are critical in asbestos litigation. He argues that "[t]here is no widespread or growing abuse of the rule that calls into question whether the ancient documents are reliable." He is also concerned that elimination of the exception will result in more motion practice and costs for the litigants, who will have to establish that the ancient document is reliable under another exception, and that there will be inconsistent application of admissibility standards to these documents under the other exceptions.

Annesley DeGaris (2015-EV-0003-0162) --- in written comment and in testimony at the public hearing --- is opposed to eliminating the ancient documents hearsay exception, on the ground that "[i]t places those injured by products with long latency periods at a disadvantage." He suggests consideration of amending the rule rather than eliminating it, and adopts the suggestions for amendment made by Peter Nicolas (2015-EV-0003-0016).

Marc P. Weingarten (2015-EV-0003-0163) --- in written comment and in testimony at the public hearing --- opposes the elimination of the ancient documents hearsay exception. He argues that ancient documents are critical in many cases, such as asbestos cases, and that without the ancient documents exception litigating those cases "would become more costly, time-consuming, and also increase the challenges to obtaining a just recovery for injured plaintiffs." He predicts that "[w]hat will happen is an entirely new series of motions, briefing, oral arguments and court decisions concerning documents which were once routinely deemed admissible." He is also concerned that "if the rule is abrogated, documents which were once routinely admitted into evidence would then become the subject of rulings by different judges in different jurisdictions, coming to different results." For these reasons, he also opposes any amendment to Rule 803(160 that would add any further admissibility requirement to the rule.

Tracy Saxe (2015-EV-0003-0164) --- in written comment and in testimony at the public hearing --- is opposed to eliminating the ancient documents exception to the hearsay rule. He states that the exception "is incredibly important for insurance policyholders seeking coverage" because "occurrence-based liability insurance policies offer coverage that frequently lasts indefinitely, and activate when a claim is made based on something that occurred during that long ago policy term" and so in many instances very old policies are implicated in coverage disputes between insurers and policyholders. He concludes that "in a case involving a missing policy from multiple decades ago, the only reliable way to establish the contents of a policy is through use of the Ancient Documents hearsay exception" because "[o]nly rarely will a person with knowledge of the policy still be around to testify and fulfill the requirements of the business records exception." He asserts that the residual hearsay exception is not a good substitute because courts hold that it is to be rarely applied.

James Begley (2015-EV-0003-0165), contends that the elimination of the ancient documents hearsay exception "would essentially be the end of toxic torts." He explains that elimination of the exception would "increase the costs and expense to all parties in attempting to authenticate" the necessary documents "and, even with the added cost and expenses, authentication would likely be unsuccessful, as the author and recipient(s) of those documents will not be found or have passed away."

Gregory Lynam (EV-2015-0003-0166), opposes the elimination of the ancient documents exception to the hearsay rule. He states that "the abrogation of Rule 803(16) is unnecessary and will do significant harm to those who are attempting to receive redress for acts that occurred decades prior, but the injury did not become evident until later."

The Federal Magistrate Judges Association (EV-2015-0003-0167), endorses the proposed elimination of the ancient documents hearsay exception "for the reasons stated in the Advisory Committee Report."

Joseph Whyte (EV-2015-0003-0168), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would lead to "unjust results" for plaintiffs in asbestos litigation.

John Camillus (EV-2015-0003-0169), states that Rule 803(16) "is an important rule that is critical to permitting the admissibility of relevant evidence that otherwise would not be admissible." He suggests that "[a]nother possibility, which I would oppose but which would make a lot more sense than removing the rule altogether, would be would be to change the definition of ancient records as, for instance, records created prior to the year 2000."

Jose Becerra (EV-2015-0003-0170), opposes the elimination of the hearsay exception for ancient documents, in a written statement that is identical to that of Gregory Lynam (EV-2015-0003-0166).

Mike Finnegan (EV-2015-0003-0171), states that without the ancient documents exception "child sex offenders and the institutions that protect them might escape justice." He explains that "[t]he evidence relative to these cases rarely involves any electronically stored information. These survivors have to rely on paper documents. Often the writers of the documents are dead and without the ancient document exception juries and judges would never be able to consider this evidence."

Molly Burke (EV-2015-0003-0172), opposes the elimination of the ancient documents hearsay exception, on the ground that it will prejudice plaintiffs suing for childhood sexual abuse. She states that without the exception, critical documents "although relevant and highly probative to show what an institution knew about problem actors and the risk of sexual abuse of children, would be inadmissible."

[Again, if it is offered for knowledge, you don't need a hearsay exception.]

Tim Hale (EV-2015-0003-0173), states that the ancient documents exception to the hearsay rule is essential for plaintiffs who are survivors of childhood sexual abuse. He asserts that eliminating the exception "will decrease abuse survivors' opportunities for justice, and decrease the likelihood of success of litigation that forces institutional transparency and makes today's children safer."

Marc Pearlman (EV-2015-0003-0174), states that the ancient document exception to the hearsay rule "is of paramount importance to survivors of childhood sexual abuse" in which the documents regarding institutional knowledge are often "the key to proving the survivors case." He contends that "[n]one of the other hearsay exceptions or the residual rule are sufficient to ensure these documents' admission." He concludes that "[g]iven what we know about how few survivors of sexual abuse come forward and how long it takes those that do come forward to do so, this rule is critical to the victims of sex abuse and their ability to seek some sort of justice and closure."

Anonymous (EV-2015-0003-0175), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that in cases brought by adult survivors of childhood sexual abuse, cases often turn on ancient documents, because "[o]rganizations and individuals in these cases keep ancient documents which become critical to the case" and "Rule 803(16) is one of the most important ways that these documents get into evidence."

Erica Brady (EV-2015-0003-0176), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that of Jose Becerra (EV-2015-0003-0170), and Gregory Lynam (EV-2015-0003-0166).

Lance Pomerantz (EV-2015-0003-0177), posted a comment that is a follow-up to a question that was raised during his testimony at the public hearing --- whether instead of eliminating the ancient document exception completely, the amendment would provide a "grandfathering" provision. He states: "I believe a grandfathering approach would be preferable to abrogation, but that the better approach (short of status quo) would be to leave the bright-line hearsay exception in place while limiting the rule's applicability to evidence involving proof of title."

Michael Dunlavy (EV-2015-0003-0178), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that of Erica Brady (EV-2015-0003-0176), Jose Becerra (EV-2015-0003-0170), and Gregory Lynam (EV-2015-0003-0166).

Michael Reck (EV-2015-0003-0179), opposes eliminating the ancient documents hearsay exception on the ground that it will have a negative effect on cases brought by adult survivors of sexual abuse. He explains that "[i]n cases against large institutions, plaintiffs' lawyers rely heavily on the exception to be able to shed light on decades of knowledge possessed by" those institutions.

Daniel Monahan (EV-2015-0003-0180), states that "[v]ictims of childhood sexual abuse often don't understand the harm caused by sexual abuse until years later. Documentary evidence

is often the only evidence available to prove up cases due to the passage of time. The ancient document exception continues to be necessary in the litigation of these types of cases." Accordingly he opposes the elimination of the ancient documents exception to the hearsay rule.

Jeff Anderson (EV-2015-0003-0181), states that Rule 803(16) "is one of the most important evidentiary rules for survivors of childhood sexual abuse." He explains that "documents indicating the facts of abuse as well as institutional knowledge about it go back decades, often times with all of the individuals involved deceased except for the survivor. In some cases, these documents may be the only way that the survivor can prove their case, making Rule 803 (16) critical." Accordingly he opposes the elimination of the ancient documents exception to the hearsay rule.

Troy Chandler (EV-2015-0003-0182), would retain the ancient documents exception to the hearsay rule, arguing that it is critical for plaintiffs in toxic tort cases involving latent injuries. He states that in such cases the ancient documents exception is necessary to qualify documents that establish the state of mind of defendants. He concludes that "[a]brogation of FRE 803(16) would reward a defendant who profited many years ago for harm they knew the taxpayers, and their victims, would absorb today."

Ben Snipes (EV-2015-0003-0183), argues that "[t]he use of historical documents could not be more imperative to the fair litigation of asbestos claims." He gives as an example documents from manufacturers that they sold products to a facility, to prove that asbestos was used in that facility, after the operator of the facility had destroyed all its records. He concludes that "[t]he use of this information at trial would have been impossible if not for the ancient documents exception" and that "[i]n the context of a disease with latency periods consisting of several decades, such as asbestos related disease, abolishing the ancient documents exception would substantially impair justice."

Joshua Grunda (EV-2015-0003-0184), states that in cases brought by plaintiffs for injuries from toxic substances, "the proposed change to FRE 803(16) would have a dramatic negative impact on my clients' ability to present critical evidence in court." Therefore he opposes the elimination of the hearsay exception for ancient documents.

Mickey Landry (EV-2015-0003-0185), states that the proposal to eliminate Rule 803(16) "purports to fix a problem that does not exist and will or could exclude extremely important documents." Therefore he opposes the proposed amendment.

Gary Brayton (EV-2015-0003-0186), believes that "the concerns intended to be addressed by the proposed amendment to Rule 803 can be successfully addressed with outright abrogation of Rule 803(16)." He states, however, that Rule 807 is unlikely to be an easy means of admitting ancient documents, because abrogation of the ancient documents exception "could reasonably be interpreted by trial judges as a repudiation of its underlying policy considerations, or, at a minimum, as a demotion of their importance." He concludes that "any judge already viewing Rule 807 with a jaundiced eye would almost certainly regard proffered ancient document evidence as bearing additional stigma on account of being stripped of a previously existing specific exception."

Glenn Draper (EV-2015-0003-0187), would retain the ancient documents hearsay exception. He emphasizes that in mesothelioma cases, Rule 803(16) "allows juries a window into what the corporations knew and when they knew it." He recognizes that "[i]n some instances, these documents may be admissible under another rule" but states that "often showing another hearsay exception applies is impossible or cumbersome."

Mark Berry (EV-2015-0003-0188), opposes the elimination of the ancient documents exception to the hearsay rule, noting its importance in asbestos cases. He states that "[w]ithout this rule, it is literally impossible to find a witness to prove up a document that was written 40 years ago. Obviously, the document is of great importance because it shows the state of mind of the defendant at the time of the alleged wrongdoing."

Shelby Reed (EV-2015-0003-0189), is opposed to the elimination of the ancient documents exception to the hearsay rule, concluding that "[a]brogation of this long-standing rule of evidence without justification would constitute radical activism."

Anthony Carr (EV-2015-0003-0190), states that in cases involving asbestos-related diseases, elimination of the ancient documents exception to the hearsay rule "would significantly increase the time and costs associated with our litigation of these cases, reducing the amount that should rightfully go to Plaintiffs." He concludes that "the only thing this rule change would accomplish is to make it even more difficult and costly for plaintiff's lawyers to work up cases involving events that took place 20+ years ago."

Alyssa Segawa (EV-2015-0003-0191), states that in toxic tort cases, "the ancient document rule is essential in demonstrating individuals were exposed to certain products" and that "[e]limination of this rule would prevent countless individuals who have been harmed by toxic substances from obtaining any compensation for their injuries."

United Policyholders (EV-2015-0003-0192), is opposed to the elimination of the ancient documents exception to the hearsay rule, on the ground that it will have a negative impact in cases involving insurance coverage. It states that "[p]erhaps there is a manner in which the concerns about electronic documents can be addressed without abrogating the rule in its entirety by limiting FRE 803(16) to hard copies."

Senators Edward Markey, Sheldon Whitehouse, Jeff Merkley, Barbara Boxer, Richard Durbin, Patrick Leahy, and Al Franken (EV-2015-0003-0193), oppose the elimination of the ancient documents exception to the hearsay rule. They state that the proposal "is especially troublesome because, in latent-injury, toxic-tort, products-liability, and other cases alleging corporate misconduct, abrogating Rule 803(16) could make it more difficult for plaintiffs --- including the Federal Government --- to prove their claims." The Senators assert that it is "premature" to eliminate Rule 803(16) out of concern that it will be used as a vehicle to introduce unreliable ESI. They conclude that eliminating the ancient documents exception "would place a significant hurdle in the way of litigants seeking to pursue . . . congressionally created federal claims in cases in which the misconduct occurred long ago, and would thereby undermine Congress's desire for injured parties to be able to seek a remedy."

The Thornton Law Firm, LLP (EV-2015-0003-0194), states that "[t] he abrogation of FRE 803(16), or the ancient documents exception to the hearsay rule, would deeply impact and diminish the likelihood of plaintiff success in toxic torts cases, particularly those filed against defunct, bankrupt or otherwise wholly acquired entities" because Rule 803(16) is necessary "for authenticating 'smoking gun' ancient documents and records that are vital in the successful litigation." The firm asserts that the other hearsay exceptions are not an alternative because "a representative of a bankrupt, defunct, or otherwise wholly acquired corporation rarely exists for authentication purposes."

Members of the American Bar Association Criminal Procedure Committee (EV-2015-0003-0195), oppose the elimination of the ancient documents exception to the hearsay rule. The members "agree with the Advisory Committee that the exception has not been used much, and that many statements that fit within the exception would fit within other hearsay exceptions as well." They "also recognize that just because a document is old does not necessarily mean that it is reliable. Nevertheless, we believe that the exception has value and that eliminating it at this time would be a mistake." The members state that "Rule 803(16) is crisp and categorical in nature; it is easily applied, and its application is easy for lawyers to predict" whereas "the residual exception is necessarily open-ended." The members conclude that "the most prudent course for now is to adopt a policy of watchful waiting, perhaps with a commitment to re-examine the matter in five years" and that if "change now is necessary, it would be better to amend the Rule rather than abrogate it."

Kathy Byrne (EV-2015-0003-0196), opposes the elimination of the ancient documents exception, on the ground that it will have a negative impact in cases involving latent diseases. She states that ancient documents in such cases "provide essential evidence of what was known of toxic hazards before and at the times of exposure."

Clarisse Kobashigawa (EV-2015-0003-0198), states that "the current Ancient Documents exception makes practical sense legally and most importantly, it prevents corporations from conveniently hiding from documents that shine a magnifying glass on their knowledge and intent in continuing to use harmful products to the detriment of their unknowing victims so many years ago."

David Barrett (EV-2015-0003-0199), states that in cases involving latent diseases, eliminating the ancient documents exception to the hearsay rule "will divest the prosecuting attorney of a critical evidentiary tool, and will deprive the trier of fact of an important piece of evidence in the pursuit of truth and justice."

The American Association for Justice (EV-2015-0003-0200), opposes the elimination of the ancient documents exception to the hearsay rule. It states that "[t]he use of this straightforward, century-old exception to the hearsay rule is well-established. It has served as a means to provide fairness and protect the public interest in a variety of cases. By limiting significant, relevant and necessary evidence on the speculative premise that it could be admitted through another avenue is an insufficient protection that will lead to uncertainty, unnecessary utilization of court resources and an unfair impediment to victims' legal rights." It concludes that

"[a]brogating Rule 803(16) will allow responsible parties to go without accountability for harms caused and endanger public safety. The justification for such a result simply does not exist."

The Academy of Rail Labor Attorneys (EV-2015-0003-0201), opposes the elimination of the ancient documents exception to the hearsay rule. The Academy states that ancient documents are critical in cases involving latent injuries, and that "the proposed amendment would increase the cost of litigation because of the necessity to have the documents authenticated."

Ilana Waxman (EV-2015-0003-0202), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would deprive plaintiffs of evidence in environmental and toxic-tort litigation. She states that "[w]hile some amendment of the rule might be appropriate to address the Committee's concerns regarding ESI, a complete abrogation would only serve to make it even more difficult for litigants to address old wrongs. This would not serve the interests of justice."

Samantha Flores (EV-2015-0003-0203), objects to the elimination of the ancient documents exception to the hearsay rule, "as this would adversely affect the type of clients … who were exposed to toxic substances 40, 50, 60 or 70 years ago and developed diseases that have taken their lives."

J. Kirkland Sammons (EV-2015-0003-0204), states that "abrogating the ancient documents exception would serve to further encourage 'corporate amnesia.'" He asserts that without the ancient documents exception, evidence about what corporations knew about the dangers of asbestos and other substances would be inadmissible.

Sherilyn Pastor (EV-2015-0003-0205), urges the Committee "to reconsider its proposal abrogating the ancient documents exception set forth in Federal Rule of Evidence 803(16) given the adverse, and likely unintended, impact it will have on policyholders and insureds pursuing coverage under insurance policies issued twenty or more years ago, but nonetheless covering bodily injury and property damage claims asserted by claimants against them today." She concludes that the ancient documents exception" is an important rule for policyholders seeking to prove their right to insurance coverage" and that "[w]ithout it, insureds face increased difficulty and expense proving the existence and terms of their incomplete or missing insurance policies."

Professor Jeffrey Stempel (EV-2015-0003-0206), opposes the elimination of the ancient documents hearsay exception. He contends that the problem of old unreliable ESI being admitted under the exception will not be serious because "separating the wheat from the chaff has always been the task of adjudication." He concedes that "the Rule 807 residual exception is perhaps available to fill some of the void that would be created by abrogation of Rule 803(16)" but argues that Rule 807 "contains additional requirements that place a substantially higher burden on the party seeking to introduce evidence than does Rule 803(16), including a requirement of advance notice of intended use."

David Donadio (EV-2015-0003-0207), opposes the elimination of the ancient documents exception to the hearsay rule, stating as follows: "It is commonplace in my firm's practice (asbestos litigation) to encounter reliable ancient documents that cannot qualify under any other exception. Asbestos litigation without exception involves the proof of events which occurred 30-60 years ago or more. To the extent that there are written records from these time frames that shed light on such events, such records were frequently created by businesses long defunct. As a consequence, the foundational witnesses necessary to establish the requisite elements for a business record exception even if living are impossible to identify or locate." He offers several examples of ancient documents that could not have been admitted either as non-hearsay or some other hearsay exception: 1) Records of a business that employed a plaintiff in the past which reveal the manufacturer of asbestos-containing products to which plaintiff had been exposed; 2) Records of a defunct manufacturer of an asbestos product which reveal the identity of the supplier of the asbestos fibers used; and 3. Records of a premises owner which establish the identity of contractors or asbestos products involved in projects at which a plaintiff or decedent worked and suffered asbestos exposures.

Amanda Kessler (EV-2015-0003-0208), opposes the elimination of the ancient documents hearsay exception, stating as follows: "Frequently in toxic tort litigation, the corporate officers, directors and employees with knowledge of a product that was manufactured over 40 years ago are deceased or incapacitated and unable to testify. Plaintiffs are forced to rely on company documents from many years ago, and must invoke the ancient document rule to do so."

Joseph Cirilano (EV-2015-0003-0209), objects to the elimination of the ancient documents exception, stating that the rule is needed to allow asbestos victims to prove their exposure. He notes as an example a case in which records obtained from the archives in Washington, D.C. helped corroborate a plaintiff's testimony concerning his asbestos exposure aboard the ships he served on while in the Navy.

Robert Buck (EV-2015-0003-0210), is opposed to the elimination of the ancient documents exception to the hearsay rule, noting that in product liability cases, "important facts relevant to both the claims and defenses being asserted in a case can only be established through introduction into evidence, as a hearsay exception, various engineering drawings, product specifications, internal corporate communications, product catalogs and brochures, as well as other forms of ancient documents because there are no living witnesses or other mechanisms to prove the facts contained in the ancient documents."

David Rancilio (EV-2015-0003-0211), opposes the elimination of the ancient documents hearsay exception. He states that in asbestos cases, "[d]efendants have consistently avoided placing documents in paper form and microfiche into an electronic format to frustrate and burden the plaintiffs bar. Now, defendants seek to be awarded for their intransigence by continuing to avoid the incorporation of these ancient documents into their electronic files, and simply wipe the relevance of these ancient documents from the record."

David Butler (EV-2015-0003-0212), opposes the elimination of the ancient documents exception, stating that in cases involving latent diseases, "[t]he abrogation of FRE 803(16) will

do serious harm to the ability of innocent victims to hold those responsible accountable for their actions."

The Evangelical Lutheran Church of America (EV-2015-0003-0213), opposes the elimination of the ancient documents exception to the hearsay rule, expressing concern that it "is likely to prejudice churches and similar organizations in identifying and proving historical insurance coverage." It elaborates as follows: "By recommending the abrogation of Fed. R. Evid. 803(16), the Committee gives insurers a powerful weapon to deny coverage under policies purchased and paid for years ago. Even when a local congregation finds documents referencing a policy of insurance, the insurers can simply interpose a hearsay objection that will be almost impossible for a local congregation to overcome in a coverage action. Who will be able to testify as to the reliability of the contents of a letter from 1972? Given that most local congregations lack the wherewithal to litigate an insurance coverage action, the proposed abrogation will tilt the playing field in favor of insurance carriers and against the insureds. In addition, by facilitating the denial of coverage, the proposed abrogation will deny plaintiffs and other claimants the most likely and substantial source of possible compensation."

[So the proposed change is hated by both plaintiffs and defendants in sex abuse litigation. That's saying something.]

Kay Gundersen Reeves (EV-2015-0003-0214), states that "[t]he abrogation of FRE 803(16) will significantly diminish the ability of the victims of toxic exposure to prove their cases, people suffering from cancer that develops after a latency period that is measured in decades." She notes that the Committee had considered and rejected the option of limiting the ancient document exception to hardcopy, and comments that "[w]hile I appreciate the drafting difficulties posed by this alternative, it seems profoundly unfair to throw the hard copy baby out with the ESI bathwater simply because it is difficult to draft an ESI-specific proposal." She states that "[o]ne alternative might be to limit the exception to documents prepared before a particular date, say, January 1, 1996."

[This is the possible grandfathering option.]

John Cooney (EV-2015-0003-0215), opposes the elimination of the ancient documents hearsay exception, noting that is it especially needed "in cases which involve conduct from decades ago that was accurately memorialized for non-litigation purposes at the time and the authors have since passed away."

N. Dean Nasser (EV-2015-0003-0216), opposes the elimination of the ancient documents hearsay exception, stating that "there is simply no good reason to require ancient evidence of the reliability of an ancient document when the dispute (99% of the time) did not even exist and was not even envisioned when the ancient (but authenticated) document was created."

Richard Grant (EV-2015-0003-0217), opposes the elimination of the ancient documents hearsay exception, arguing that in cases involving latent diseases, "crucial evidence such as

packing slips, purchase orders, inter-office memos and reports, shipping invoices, and bills of lading, amongst many other documents that cannot be properly authenticated under other hearsay exceptions play a significant part in litigation." He states that "[r]emoving this exception will likely make it either impossible or cost prohibitive to obtain certain important evidence, thus depriving the parties of their complete rights and remedies under the law." He suggests that any concerns about ESI being admitted under Rule 803(16) "can be addressed by prospective amendments specifically limited to those concerns."

Bart Baumstark (EV-2015-0003-0218), states that "[t]he ancient document rule is crucial in cases where toxic exposures cause cancer and other diseases decades after the exposures occurred" and that "[i]n many cases, old corporate knowledge documents would not otherwise be admissible if not for this well accepted, well grounded rule of evidence."

Gerson Smoger (EV-2015-0003-0219 and 0220), opposes the elimination of the ancient documents exception, arguing that the exception guarantees that evidence admitted under it is reliable, and that in his experience, parties never object to admissibility of documents offered under Rule 803(16).

Final general comment: There was a lot of pushback from the assertion in the Committee Note that

"The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable."

So there was a lot of talk about the fact that there is still a lot of old stuff out there that hasn't been digitized. It might be useful to temper that comment by saying something like "the rise of ESI means there is less of a reason to allow old evidence to be admissible without any showing of reliability at all."

At any rate, if the elimination is still to be proposed, the note needs to be beefed up considerably:

1. Showing some sympathy for the fact that costs will be increased but that it is for a good cause – reliability.

2. Stating more strongly that the concern for ESI is real.

3. Stating an intent to have the residual place as a ready home for ancient documents.

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FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposal to add Rule 902(13) and (14) -- public comment and final action
Date: March 15, 2016

At its Spring 2015 meeting, the Evidence Rules Committee unanimously approved amendments that would add two new paragraphs --- (13) and (14) --- to Rule 902, the rule on self-authentication. Rule 902(13) would allow a qualified person to authenticate electronic data by way of a certificate rather than in-court testimony. Rule 902(14) would provide the same method of authentication for copies of electronic data. The Committee's proposal was unanimously approved by the Standing Committee, and as a result the proposed amendments to Rule 902 (and the Committee Note explaining them) were released for public comment in August.

The public comment was sparse, but generally favorable. A few of the comments provide suggestions for additions to the Committee Note. And one comment, by professors, makes an argument that Rule 902(13) is in tension with the Confrontation Clause.

At this meeting, the Committee will determine whether to recommend to the Standing Committee that the proposed amendments be sent to the Judicial Conference. This memo is intended to assist the Committee in that determination.

This memo is divided into four parts. Part One recounts the Committee's actions to date on the proposed amendments to Rule 902. Part Two will discuss three possible changes to the Committee Note provided in the public comment. Part Three will consider, once again, the alleged Confrontation Clause issues. Part Four sets forth the possible package to be sent to the Standing Committee --- Rule, Committee Note, and summary of public comment.

I. Background on Proposed Rules 902(13) and (14)

A. Committee Action

Rule 902(13) would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. Rule 902(14) would provide a similar certification procedure for a copy of data taken from an electronic device, media or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up conceding authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under Rules 902(11) and (12), a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes.

The minutes of the Spring, 2015 meeting describe the action of the Committee regarding the proposed amendments to Rule 902:

> At the Committee's direction, the Reporter prepared formal proposals for amending Rule 902. The Committee reviewed the proposals at the meeting and provided a number of suggestions for improvement. Among them were:
>
> ● Clarifying in proposed Rule 902(14) that what will be admitted through the certification is not a copy of an electronic device, but rather a copy of data taken from an electronic device.
>
> ● Streamlining the draft by tying the requirements of notice to those already set forth in Rule 902(11). This change had the added advantage that, if the notice provisions of Rule 902(11) were to be amended as part of a uniformity project, Rules 902(13) and (14) would not have to be changed.
>
> ● Streamlining the draft by tying the certification requirements to those already set forth in Rule 902(11) as to domestic certifications and Rule 902(12) as to foreign certifications.

● Adding material to the proposed Committee Note to Rule 902(13) to clarify that the goal of the amendment was a narrow one: to allow electronic information that would otherwise be established by a witness under Rule 901(b)(9) to be established through a certification by that same witness.

A motion was made and seconded to recommend to the Standing Committee that the proposed amendments to Rule 902, together with the proposed Committee Notes, be issued for public comment. The motion was unanimously approved by the Committee.

At the Standing Committee meeting, members thought that the Committee Note could be more helpful if it included some examples of how the rules would work, and if it would clarify that the rules only operate to satisfy authentication requirements, and do not foreclose a challenge to the reliability of machine-generated evidence. Those changes were made and the proposal was released for public comment.

B. Proposed Rules and Committee Notes as Released for Public Comment

Proposed Rules 902(13) and (14) and the Committee Notes, as released for public comment, provide as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) ***Certified Records Generated by an Electronic Process or System*****.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

COMMITTEE NOTE

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony

once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility on other grounds. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable --- the authentication establishes only that the output came from the computer.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

(14) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

COMMITTEE NOTE

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than

through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

C. Examples of How the Rules Will Work

John Haried, who first proposed the changes to Rule 902 in his presentation at the Committee's Symposium on electronic evidence, has been kind enough to provide some examples of how these rules might work and the advantages they will provide. What follows are his examples.

Examples of how Rule 902(13) can be used:

1. Proving that a USB device was connected to (i.e., plugged into) a computer: In a hypothetical civil or criminal case in Chicago, a disputed issue is whether Devera Hall used her computer to access files stored on a USB thumb drive owned by a co-worker. Ms. Hall's computer uses the Windows operating system, which automatically records information about every USB device connected to her computer in a database known as the "Windows registry." The Windows registry database is maintained on the computer by the Windows operating system in order to facilitate the computer's operations. A forensic technician, located in Dallas, Texas, has provided a printout from the Windows registry that indicates that a USB thumb drive, identified by manufacturer, model, and serial number, was last connected to Ms. Hall's computer at a specific date and time.

Without Rule 902(13): Without Rule 902(13), the proponent of the evidence would need to call the forensic technician who obtained the printout as a witness, in order to establish the authenticity of the evidence. During his or her testimony, the forensic technician would typically be asked to testify about his or her background and qualifications; the process by which digital forensic examinations are conducted in general; the steps taken by the forensic technician during the examination of Ms. Hall's computer in particular; the process by which the Windows operating system maintains information in the Windows registry, including information about USB devices connected to the computer; and the steps taken by the forensic examiner to examine the Windows registry and to produce the printout identifying the USB device.

Impact of Rule 902(13): With Rule 902(13), the proponent of the evidence could obtain a written certification from the forensic technician, stating that the Windows operating system regularly records information in the Windows registry about USB devices connected to a computer; that the process by which such information is recorded produces an accurate result; and that the printout accurately reflected information stored in the Windows registry of Ms. Hall's computer. The proponent would be required to provide reasonable written notice of its intent to offer the printout as an exhibit and to make the written certification and proposed exhibit available for inspection. If the opposing party did not dispute the accuracy or reliability of the process that produced the exhibit, the proponent would not need to call the forensic technician as a witness to establish the authenticity of the exhibit. (There are many other examples of the same types of machine-generated information on computers, for example, internet browser histories and wifi access logs.)

2. Proving that a server was used to connect to a particular webpage: Hypothetically, a malicious hacker executed a denial-of-service attack against Acme's website. Acme's server maintained an Internet Information Services (IIS) log that automatically records information about every internet connection routed to the web server to view a web page,

including the IP address, webpage, user agent string and what was requested from the website. The IIS logs reflected repeated access to Acme's website from an IP address known to be used by the hacker. The proponent wants to introduce the IIS log to prove that the hacker's IP address was an instrument of the attack.

Without Rule 902(13): The proponent would have to call a website expert to testify about the mechanics of the server's operating system; his search of the IIS log; how the IIS log works; and that the exhibit is an accurate record of the IIS log.

With Rule 902(13): The proponent would obtain the website expert's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the registry key, then the proponent would not need to call the website expert to establish authenticity.

3. Proving that a person was or was not near the scene of an event: Hypothetically, Robert Jackson is a defendant in a civil (or criminal) action alleging that he was the driver in a hit-and-run collision with a U.S. Postal Service mail carrier in Atlanta at 2:15 p.m. on March 6, 2015. Mr. Jackson owns an iPhone, which has software that records machine-generated dates, times, and GPS coordinates of each picture he takes with his iPhone. Mr. Jackson's iPhone contains two pictures of his home in an Atlanta suburb at about 1 p.m. on March 6. He wants to introduce into evidence the photos together with the metadata, including the date, time, and GPS coordinates, recovered forensically from his iPhone to corroborate his alibi that he was at home several miles from the scene at the time of the collision.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Mr. Jackson's iPhone's operating system; his search of the phone; how the metadata was created and stored with each photograph; and that the exhibit is an accurate record of the photographs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibits and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the proponent would not have to call the technician to establish authenticity.

4. Proving association and activity between alleged co-conspirators: Hypothetically, Ian Nichols is charged with conspiracy to commit the robbery of First National Bank that occurred in San Diego on January 30, 2015. Two robbers drove away in a silver Ford Taurus. The alleged co-conspirator was Dain Miller. Dain was arrested on an outstanding warrant on February 1, 2015, and in his pocket was his Samsung Galaxy phone. The Samsung phone's software automatically maintains a log of text messages that includes the text content, date, time, and number of the other phone involved. Pursuant to a warrant, forensic technicians examined

Dain's phone and located four text messages to Ian's phone from January 29: "Meet my house @9"; "Is Taurus the Bull out of shop?"; "Sheri says you have some blow"; and "see ya tomorrow." In the separate trial of Ian, the government wants to offer the four text messages to prove the conspiracy.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Dain's phone's operating system; his search of the phone's text message log; how logs are created; and that the exhibit is an accurate record of the iPhone's logs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the court would make the Rule 104 threshold authenticity finding and admit the exhibits, absent other proper objection.

Hearsay Objection Retained: Under Rule 902(13), the opponent – here, criminal defendant Ian – would retain his hearsay objections to the text messages found on Dain's phone. For example, the judge would evaluate the text "Sheri says you have some blow" under F.R.E. 801(d)(2)(E) to determine whether it was a coconspirator's statement during and in furtherance of a conspiracy, and under F.R.E. 805, to assess the hearsay within hearsay. The court might exclude the text "Sheri says you have some blow" under either rule or both.

Example of how Rule 902(14) can be used

In the armed robbery hypothetical, above, forensic technician Smith made a forensic copy of Dain's Samsung Galaxy phone in the field. Smith verified that the forensic copy was identical to the original phone's text logs using an industry standard methodology (*e.g.*, hash value or other means). Smith gave the copy to forensic technician Jones, who performed his examination at his lab. Jones used the copy to conduct his entire forensic examination so that he would not inadvertently alter the data on the phone. Jones found the text messages. The government wants to offer the copy into evidence as part of the basis of Jones's testimony about the text messages he found.

Without Rule 902(14): The government would have to call two witnesses. First, forensic technician Smith would need to testify about making the forensic copy of information from Dain's phone, and about the methodology that he used to verify that the copy was an exact copy of information inside the phone. Second, the government would have to call Jones to testify about his examination.

With Rule 902(14): The proponent would obtain Smith's certification of the facts establishing how he copied the phone's information and then verified the copy was true and accurate. Before trial the government would provide the certification and exhibit

to the opposing party – here defendant Ian -- with reasonable notice that it intends to offer the exhibit at trial. If Ian's attorney does not timely dispute the reliability of the process that produced the Samsung Galaxy's text message logs, then the proponent would only call Jones.

II. Suggestions From Public Comment for Changes to the Committee Notes

A. Clarifying the Certification Requirement

Judge Paul Grimm sent me the following email, with compliments about the proposals but a suggestion for a slight clarification in the Notes about the meaning of the certification requirement. The email reads as follows:

> I have just finished reading the proposed amendments to the evidence rules to add 902(13) (certified copies of electronic records produced as a result of a process or system producing reliable results) and 902(14) (certified data copied from an electronic device) and I think that these two rules will be an enormous benefit to the bench and bar.
>
> I do have one observation, founded on my recent experience on the civil rules committee where amendments that the committee thought crystal clear nonetheless drew comments demonstrating substantial confusion. So if my concerns seem farfetched, ignore them.
>
> Each of the rules requires a certification complying with the certification requirements of 902(11) or (12). My reading of this language is that the certification must be, as stated in 902(11) and (12,) from "a qualified person that complies with a federal statute or rule prescribed by the Supreme Court." But, a very literal (and unintended) reading of the proposed rule language could result in an interpretation that the certificate also had to meet the requirement of 803(6) which is language in the clause that introduces the requirements of the certificate. I would not recommend any change to the rule language, but perhaps the advisory note could be tweaked to make it clear that the business record foundation is not an additional component of the required certificate.

Reporter's Comment:

Judge Grimm is of course right that there is no intent to incorporate any requirement about the substantive business records requirements in these proposals. These proposals are for authentication only. They specifically do not deal with hearsay concerns --- and they do not deal with business records, because such records can already be authenticated with a certificate.

Therefore if there is any risk of misconception that could be cleared up by tweaking the Note, there is good cause for adding that clarification.

The change to the Rule 902(13) Note to accommodate Judge Grimm's concern might look like this:

> The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.
>
> Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.
>
> A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.
>
> <u>The reference to the "certification requirements of Rule 902(11) or (12)" refers only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.</u>
>
> A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility on other grounds. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude

an objection that the information produced is unreliable --- the authentication establishes only that the output came from the computer.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

The change to the Rule 902(14) Note to accommodate Judge Grimm's concern might look like this:

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

<u>The reference to the "certification requirements of Rule 902(11) or (12)" refers only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule</u>

902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

B. Techie Change to the Committee Note to Rule 902(14)

Professor Pat Jarvis, a law professor at St. Thomas Law School who has a Ph.D. in computer science, suggested a few tweaks to the passage of the Rule 902(14) Committee Note that discusses hash values. Here is how his suggestion would be implemented:

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a ~~unique alpha-numeric sequence of approximately 30 characters that an algorithm determines~~ number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Essentially the changes make the description of hash values less absolute. I checked these suggested elaborations/clarifications with another computer whiz --- my son --- who agreed that the change is a more precise description of hash value and a more precise statement of the consequences of a hash value match. And John Haried reports that his tech person at DOJ agrees with the changes. Therefore it would appear that these tweaks would be useful in the final Committee Note to Rule 902(14).

C. Changes to the Committee Note Suggested by the Federal Magistrate Judges Association

The Federal Magistrate Judges Association supports the proposal to add Rules 902(13) and (14). The FMJA makes two separate suggestions for additions to the Committee Note.

1. Suggestions in the Note about the notice requirement.

The FMJA states that challenging the authenticity of electronic evidence "may require technical information about the system or process at issue, including possibly retaining a forensic technical expert" and that judges should keep this possibility in mind in deciding what notice is "reasonable" under the rule. The FMJA recommends that the Committee Note include a suggestion "that judges specify a date for serving the notice in the initial scheduling order and that, in civil cases, judges enforce the requirements of Fed. R.Civ.26(e) concerning timely supplementation of discovery disclosures."

Reporter's Comment:

Theoretically it could be useful to provide some guidance about how the notice requirement should be managed, but it should be noted that no such guidance is provided in Rules 902(11) and (12). Two points might be made about the lack of specific guidance on what is "reasonable" notice under Rule 902(11) and (12), as applied to the Committee Note for the current proposal:

> 1) There don't appear to be many, or any, problems in establishing notice requirements under Rule 902(11) and (12), after 16 years of practice under those rules, so the need for some Committee Note guidance as to these new rules does not seem established.
>
> 2) There might be possible confusion in establishing more specific guidance for applying the notice requirement for Rule 902(13) and (14), when there is no extra guidance for notice under Rule 902(11) and (12). Should this new guidance apply to the older provisions? If not, why not? Is there something different and more problematic about authenticating electronic evidence than in authenticating business records? (Arguably the answer could be "yes" because there may be an interest in calling a techie to challenge machine-generated evidence, whereas that might be less likely with business records; but business records might have other issues on which the need to call a challenging might be useful).

If the Committee decides that some guidance might be useful regarding notice, despite the fact there is no such guidance in the older rules, the question then is whether the Magistrate Judge suggestions would be helpful guidance. The FMJA puts forth two separate suggestions about notice:

1. Guidance regarding the initial scheduling order. Suggesting that judges "specify a date for serving notice in the initial scheduling order" sounds like it might be helpful, but the specification might need to be so conditional that its usefulness as a general instruction may not be that great. At the time of the scheduling order, it may well be unknown whether Rule 902(13) or (14) will come into play. And when it does come into play, it might be under different factual situations as the case plays out --- so that, for example, an instruction in the scheduling order requiring notice to be given "30 days before trial" would not cover situations in which the evidence is subject to a motion *in limine*. So the scheduling order would have to be general (something like "30 days before the evidence will be considered") and it will probably need to include a good cause exception. Given the necessarily tepid nature of the reference to notice in the scheduling order, it might be questioned whether it should be the subject of a Committee Note. Perhaps better left to the discretion of the individual judge. But if the instruction is itself very general --- essentially just raising the possibility --- then it may have some use as a flagging device.

2. Suggesting that judges enforce the requirements of Fed. R.Civ.P. 26(e). In contrast, an instruction in the Committee Note that judges enforce the requirements of Rule 26(e) seems misguided. It is not ordinarily the function of a Committee Note to tell courts to enforce the rules. Rule 26(e) is on the books --- it requires the proffering party to supplement disclosures --- so if the proponent violates the rule, the court doesn't need a Committee Note to tell it that the rule should be enforced.

If the Committee agrees with both of the FMJA suggestions about amending the Committee Note to deal with notice issues, the addition to the Committee Note for each rule might look like this (including the change previously discussed):

902(13) Note

> The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.
>
> Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" refers only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility on other grounds. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable --- the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided. Parties may be assisted in complying with the notice requirement if the court specifies a date for serving the notice in the initial scheduling order --- recognizing that some flexibility is required for subsequent developments. In addition, in civil cases, judges should enforce the requirements of Fed. R.Civ. P. 26(e) concerning timely supplementation of discovery disclosures.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

The change to the Rule 902(14) Note to accommodate the FMJA suggestions regarding notice might look like this (including changes previously discussed):

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11) or (12)" refers only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other

grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided. Parties may be assisted in complying with the notice requirement if the court specifies a date for serving the notice in the initial scheduling order --- recognizing that some flexibility is required for subsequent developments. In addition, in civil cases, judges should enforce the requirements of Fed. R.Civ. P. 26(e) concerning timely supplementation of discovery disclosures.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

2. Suggestion Regarding the Possible Overlap Between Rules 902(13) and 902(14)

The FMJA states that the distinction between "records generated by an electronic process or system" and "data copied from an electronic device" is "not self-evident." It recognizes that trying to make a distinction is probably not important because "both types are handled in the same way." Nevertheless, the FMJA suggests that "adding some additional examples of each type to the Advisory Committee notes may help the bench and bar avoid unnecessary arguments."

Reporter's Comment:

When data is copied from an electronic device, the result is a record (i.e., the copy) that is ordinarily generated by an electronic process (because the copy is generated electronically). So the FMJA is right to say that the electronic information that is covered by Rule 902(14) could also for the most part (but not completely) be covered by Rule 902(13).[1] The overlap does not

[1] It is not a complete overlap, however. John Haried provides this explanation in an email:

> I think it's a close call, but I'm not sure that the FMJA's conclusion (that 902(14) copies are all subsumed into 902(13)) would be shared by all judges. To obtain a hash value, a person would use one of the industry standard algorithms. Examples are MD5, SHA-1, and SHA-2. It is possible – and in some scenarios likely - that the person who determines the hash value of the known original file and the person who determines the hash value of the copy file are different and doing it at different points in time. For example, say computer technician #1 obtains a hard drive (*e.g.,* from the plaintiff in a civil action or the subject of a search warrant). He used SHA-1 to obtain the hard drive's hash value. A month later, for the purpose of undertaking a forensic exam of the hard drive, computer technician #2 creates a copy of the hard drive's contents that will be used for the examination. Likewise, he used SHA-1 to verify that his copy is identical to the original hard drive. Both technicians used the same hashing software, but they did the hash

run very far the other way, however; that is, records generated by an electronic system may well not be a "copy" of anything.

Is there a rational basis for having two separate subdivisions, given the overlap? There is a very strong argument for having a separate subdivision for copying, because the process of authenticating a copy --- usually through hash value --- is unique and specific. That subdivision is in large part directed to a fairly specific problem --- cloning hard drives and offering the clone rather than the original, through a hash value match. The process of authenticating machine-generated evidence more broadly can be satisfied by a number of different methods. Put another way, the copying processes that serve for authentication under Rule 902(14) do only one thing --- assuring that there is no change between the copy and the original. In contrast, other machine-generated evidence may involve many more processes, such as evaluating and processing various inputs, organizing information, and so forth. So the bottom line is that there is a rational basis for breaking out a small subset of machine-generated evidence (copying hard drives, phones, and the like) for individual treatment.[2]

It should be noted that it is not unusual for one piece of information to be potentially qualified under more than one Evidence Rule. There are many Evidence Rules that overlap. A single item of evidence might be authenticated by a witness with personal knowledge, but also by circumstantial evidence. A hearsay statement might be admissible as both an excited utterance and a present sense impression. If there are two grounds of admissibility, there is nothing at all wrong in allowing the proponent to pick the one they want to use. So one might easily conclude that there is no reason to add anything to the Committee Note about a possible overlap in the provisions.

If, however, the Committee determines that there should be something added to the Committee Note, it is submitted that whatever explanation is given should be added to Rule 902(14) only. That is the provision which is essentially a specialized subset of the broader 902(13).

Language in the Committee Note to Rule 902(14) to address the overlap between the two provisions might look like this.

> There is no intent to draw a bright-line distinction between the information that can be authenticated under this rule and the information that can be authenticated under Rule 902(13). There is an inevitable overlap, but that overlap is of no moment because the same result --- self-authentication --- is specified under either rule. Generally

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determination separately on different computers. Are they employing "a process or system"? Certainly they are employing two very similar processes, based upon their use of the same hashing software, but some judges would balk at concluding that different people using the same tool at different times is the same process or system. The touchstone of 902(14) is the reliability of the data identification as shown by the hash value.

[2] Another possible reason for breaking out the copying process from authenticating machine-generated evidence more broadly is that different constitutional concerns may at least arguably apply in criminal cases. See the discussion in the next section.

speaking, authenticating a copy of electronic data is a standardized process --- as shown in the discussion of hash value, above --- while authenticating other electronic information will vary under the circumstances. Accordingly it was determined that providing separate treatment for copies of electronic data would be useful to the bench and bar.

III. Confrontation Question

Richard Friedman and other law professors are concerned that Rule 902(13) authorizes certificates that, when introduced into evidence, would violate the defendant's right to confrontation under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). *Melendez-Diaz* held that a certificate from a lab indicating a positive result on a test for drugs (found in the defendant's car) violated the defendant's right to confrontation because the certificate was prepared solely for purposes of trial and therefore was "testimonial."

It would seem like a certificate of authenticity would be testimonial as well, because it would be prepared for purposes of a trial. But it is not that simple, because the *Melendez-Diaz* Court carved out certain certificates from the constitutional proscription. The Committee has been over this ground at least twice before ---- once when *Melendez-Diaz* was decided and the Reporter provided a lengthy memorandum on whether a certificate authenticating a record would be considered testimonial under that case. The memorandum was necessary because Rules 902(11) and 18 U.S.C. §3505 authorize business records in a criminal case to be self-authenticated by a certificate of a government witness.[3] The Confrontation issue regarding authentication by certificate was raised again when the Committee reviewed Rules 902(13) and (14) before issuing the rules for public comment.

The heart of the Confrontation question, as applied to certificates of authenticity, is a passage in *Melendez-Diaz* in which the majority was responding to the dissent's argument that certificates of authenticity were admitted at common law, even though they would have fit the majority's new-found definition of testimoniality (and thus that the majority was wrong in its assertion that its limitations on testimonial hearsay were historically-grounded). Here is that passage from *Melendez-Diaz,* 557 U.S. at 322-23:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its

[3] Rule 902(11) applies to domestic business records and section 3505 applies to foreign business records in criminal cases. Rule 902(12) also provides for self-authentication of foreign business records, but it only applies in civil cases and so cannot possibly violate anyone's right to confrontation. Friedman asserts that Rule 902(12) is constitutionally questionable because it was adopted in 2000, during a "nadir of understanding of the Confrontation Clause," but that is clearly a misfire.

> substance or effect." State v. Wilson, 141 La. 404, 409, 75 So. 95, 97 (1917). See also State v. Champion, 116 N.C. 987, 21 S.E. 700, 700–701 (1895); 5 J. Wigmore, Evidence § 1678 (3d ed.1940). The dissent suggests that the fact that this exception was "narrowly circumscribed" makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. *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. (Emphasis added).

This language in *Melendez-Diaz* has been relied on by every circuit court that has evaluated the admissibility of certificates of business records offered under Rule 902(11) or section 3505. Every court has held that such certificates do not violate the Confrontation Clause. A typical analysis is found in *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011), where the court held that a Rule 902(11) certificate authenticating phone records as business records was properly admitted over a confrontation objection:

> Justice Scalia [in *Melendez-Diaz*] expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record * * * . 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* [a case which had rejected a confrontation challenge to the use of Rule 902(11)]. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 (AContrary 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.@).

Here are the other cases relying on the *Melendez-Diaz* carve-out to hold that authenticating certificates do not violate the Confrontation Clause:

● *United States v. Albino-Loe*, 747 F.3d 1206, 1211 (9th Cir. 2014) (no confrontation violation where the "certifications at issue here did not accomplish anything other than authenticating the A–File documents to which they were attached. In particular, they did not explicitly state anything about Albino–Loe's alienage.").

● *United States v. Thompson*, 686 F.3d 575, 581 (8th Cir. 2012): There was no confrontation violation when employment records were authenticated by certificate where "the Mardesen Affidavit declares that the record was 'made by, or from information transmitted by, a person with knowledge of those matters ... at or near the time that the wages were earned and reported' * * *, that the records were 'kept in the course of regularly conducted business activities' of the IWDA as part of its regular business practices" and that "the IWDA makes and maintains individual employment records for the purpose of providing employment services to the individual and the employing unit.'" Because "the record itself was not created for the

purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights."

● *United States v. Johnson*, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question, because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

● *United States v. Anekwu*, 695 F.3d 967, 976 (9th Cir. 2012): "Here, the certifications of the foreign business records (mailbox applications and bank records) stated that the records were: (1) created at or near the time of the events they purported to establish, by someone with knowledge of those events; (2) kept in the course of regularly conducted business; (3) made as part of that business's regular practice; and (4) true and correct copies. * * * Following the reasoning of *Yeley–Davis*, the certificates authenticated otherwise admissible records. See *Melendez–Diaz*, 557 U.S. at 324, 129 S.Ct. 2527. If so, then the admission of the authenticating certificates for the mailbox applications and bank records would not have violated the Confrontation Clause. Thus, we cannot conclude that the district court plainly erred by admitting the certificates for the foreign business records."

● *United States v. Brinson*, 772 F.3d 1314, 1323 (10th Cir. 2014): "The prosecution presented the certificate in part to authenticate the debit card records under Federal Rule of Evidence 902(11). This rule permits a party to establish the authenticity of documents as domestic business records through a declaration from the records' custodian. * * * Mr. Brinson relies on *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009). There, the Supreme Court held that affidavits showing the results of a forensic analysis are testimonial statements. * * * *Melendez–Diaz* does not apply. Our certificate does not contain any "analysis" that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity. See *Yeley–Davis*, 632 F.3d at 681 ("The Court's ruling in Melendez–Diaz does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.").

Friedman's Analysis

Friedman essentially concedes that certificates offered under Rule 902(11) and section 3505 are not testimonial. He does not challenge the existing, uniform case law. He also concedes that Rule 902(14) is probably constitutional, because the certificate there simply certifies a copy --- and the majority in *Melendez-Diaz* explicitly authorizes the use of certifications that a document is an accurate copy. Friedman's complaint is that Rule 902(13) is problematic because 1) it allows more than simply a certification of a copy, because the certification can provide that the electronic evidence to be admitted is from a process or system that produces an accurate result; *and* 2) this additional certification can apply to machine output that was produced after the litigated controversy arose. Thus, in his opinion, a case like *Yeley-Davis* is acceptable

because what was authenticated was electronic information that *pre-existed* the dispute. He states that a certificate of authentication is problematic when is used "to leverage into evidence documents that have been created for the purpose of litigation."

Reporter's Comment

It is true that some of the machine-generated information that will be authenticated under Rule 902(13) will be generated in anticipation of litigation. One example would be the output of a gas chromatograph machine on a substance obtained when the defendant was arrested. But that does not mean that a Confrontation Clause violation occurs with the certification of such information. That is because, while the machine output might be prepared for litigation, *it is not testimonial because it is not hearsay. See, e.g., United States v. Moon*, 512 F.3d 359 (7th Cir. 2008) (readings from an infrared spectrometer and a gas chromatograph did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."). So why should it make any difference that it is prepared for the litigation? It is outside constitutional purview and the only question is whether the certificate of authenticity is testimonial. If an authentication under Rule 902(11) is sound because it authenticates data that is not testimonial (as Friedman concedes) then there is no reason why an authentication under Rule 902(13) would be problematic when it, too, authenticates non-testimonial evidence. The difference in *Melendez-Diaz* is that the certificates interpreted the test results that were testimonial. That is not being done in a Rule 902(13) certification. Friedman never explains why certifying documents prepared for litigation is problematic when the documents themselves create no constitutional concern. The case law does not support his view that authentication of non-testimonial evidence could violate the Confrontation Clause. See, e.g., *United States v. Anekwu,* 695 F.3d 967, 976 (9th Cir. 2012)(finding no confrontation problem where "the certificates authenticated otherwise *admissible* records") (emphasis added).

It should be noted that the fountainhead case for allowing certificates of authenticity under *Crawford* is *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006). That case involved admissibility of the results of a drug test taken after the defendant was driving erratically. These records were authenticated by a Rule 902(11) certification. The court found no confrontation violation, on the ground that the certificate did no more than authenticate non-testimonial evidence. The important point for purposes of the current discussion is that the record was prepared *after the controversy arose. Ellis* preceded *Melendez-Diaz* but the *Yeley-Davis* court, supra, specifically held that "the Supreme Court's recent opinion supports the conclusion in *Ellis*" --- i.e., there is no Confrontation problem in certifying the admissibility of an *otherwise admissible* record. Thus, the line that Friedman seeks to draw --- between certification of reports made before and after a controversy arose --- cannot be found in the cases. The line that *is* drawn is between certification of admissible and inadmissible reports.

But even if Friedman is correct in his distinction between pre- and post- controversy reports, that critique does not affect the large number of certifications that will be made under Rule 902(13) of electronic evidence that *precedes any controversy.* That is, in many cases --- probably most cases --- the certification under Rule 902(13) *will be certifying electronic information that was generated before the litigation arose.* Take the examples addressed above:

● a printout of the Windows Registry to prove that a thumb drive was connected to a laptop;

● an internet service log that records internet access;

● metadata of whether and when a picture was taken on an iPhone;

● a log of text messages between coconspirators.

All of the above would have been generated before a controversy arose. None is substantively different from the phone records in *Yeley-Davis*, or the wage records in *Thompson*. So at the very least, Rule 902(13) certifications would, even under the Friedman argument, be properly admitted in the large number of situations in which the authenticated information was generated before the litigation arose.

It should also be noted that in a large number of cases the 902(13) certificate *will not be admitted at trial.* As Betsy Shapiro puts it in an email:

> As for the certificate itself, this seems like a red herring. Often times it is never offered into evidence; it goes to the court for its determination as to foundation, but is not otherwise before the jury.

If a certificate is not admitted at trial it obviously presents no confrontation problem. Thus, the cases really being addressed by Friedman narrow further, to a sliver of cases.

Certifying Accuracy

Friedman's next argument is that the certification under Rule 902(13) is problematic because the preparer will certify that the process or system "produces an accurate result." This certification is apparently distinguished from that properly provided in a Rule 902(11) certification. But when one drills down into this argument, one could well conclude that the distinction is evanescent at best, and hopefully not the kind of difference (if any) on which the Constitution relies.

A certificate admitted under Rule 902(11) does far more than authenticate a copy. It contains the factual assertions, as seen in *Anekwu, supra,* that the records were:

> (1) created at or near the time of the events they purported to establish, by someone with knowledge of those events; (2) kept in the course of regularly conducted business; (3) made as part of that business's regular practice; *and* (4) true and correct copies.

Such a certification, to be effective, will also provide the factual predicates for the first three conclusions, which are necessary to establish admissibility under the business records exception. Essentially what the affiant is certifying is that the record is *reliable* – it fits the

reliability requirements of the business records exception. If that certification is permissible, as Friedman concedes, then what is the problem with a certificate that shows that the record is a product of a process that produces an accurate result? The distinction can't be that it is permissible to certify that a record satisfies reliability criteria but not permissible to certify that the record is likely to be accurate. There is no substantive difference between reliability and accuracy. The *Crawford* line of cases is riddled with counter-intuitive fine line distinctions, but this one seems too fine even for *Crawford.*[4]

In sum, it would appear that the concern about the proposed amendments under the Confrontation Clause is quite overstated, because:

- The concern is limited to Rule 902(13), as Rule 902(14) is limited to certification of copies.

- The concern about authenticating information prepared after the litigation arose is misguided because 1) most of the information authenticated under Rule 902(13) will have been produced before the litigation arose; and 2) machine-generated information that is produced after the litigation arises will not be testimonial (and if it is, it would be subject to confrontation objection on its own ground, and will not be saved by Rule 902(13)).

- The concern about certifying accuracy is no different from certifications found acceptable under Rule 902(11) in which the certification establishes reliability.

One final point. Friedman's comment is the only one that raises the Confrontation Clause concern about Rule 902(13). It is interesting that other groups with an incentive to raise the issue did not so comment. In particular, the NACDL has, over the last 20 years, never missed an opportunity to raise a legitimate concern when a proposed amendment to the Evidence Rules might have a negative impact on criminal defendants. Yet the NACDL made no comment on Rule 902(13). It is not that silence is deemed assent; but one could think that if there were a true confrontation problem with Rule 902(13), it would have been raised more frequently than in a single letter from some law professors.

How to Respond to Friedman's Concerns

There are several possibilities.

1. *Do nothing.* A strong argument can be made that there is no need to respond to the Friedman comment, because, for reasons outlined above, it is not persuasive, and there is little to no risk that Rule 902(13) will be found to violate the Confrontation Clause (especially given the current and possibly future configuration of the Supreme Court).

[4] Perhaps it is worth mentioning that any worry about whether a statement is on the frontier of *Crawford* or outside it should be tempered by the fact that the Court is unlikely to reach out to extend or even apply *Crawford* at this time, given the fact that there is now a 4-4 split in the Court about how *Crawford* should be applied, if it is to be applied at all.

2. *Add to the Committee Note that the Confrontation Clause concerns have been considered and rejected.* History shows that it is a bad idea to opine about consistency with the Confrontation Clause in a Committee Note. Two examples should suffice. The first is the original Advisory Committee Note on the Confrontation Clause and the hearsay rule --- which reeks of the lamp. The second is the backstory behind the Committee Note to the 2010 amendment to Rule 804(b)(3). That Note provided an explanation of how a statement admissible as a declaration against penal interest would satisfy the defendant's right to confrontation. While that analysis was surely correct and has proven to be so, the Supreme Court rejected it and required the Advisory Committee to rewrite the Note. There thus appears to be little to be gained by predicting in a Note how a rule will comply with the Confrontation Clause.[5]

3. *Add to the Committee Note that there is an intent to limit the application of the rule if the certification goes to electronic evidence that was generated before a controversy arose.*

That addition might go something like this:

> In a criminal case, this Rule is not intended to allow a certificate to be admitted into evidence if it is certifying the accuracy of electronic evidence that was generated after the controversy arose.

That sounds harmless, but there are two concerns: 1) It is a passage that is subject to being overtaken by changes in the law of confrontation generated by a change in court personnel; and 2) more importantly, it is contrary to the text of the Rule itself, which imposes no such limitation.

4. *Adding a notice-and-demand provision to Rule 902(13), for certificates offered by the prosecution in a criminal case.*

A notice-and-demand provision would definitely answer any constitutional concern about certification under Rule 902(13). That procedure was established as a constitutional fix in *Melendez-Diaz*, and was employed by the Advisory Committee to fix the Confrontation problem inherent in Rule 803(10), covering certifications of the absence of public records.

But a notice-and-demand provision would be a drastic solution and would be the equivalent of squashing a gnat with a sledgehammer. Including a notice-and-demand provision might limit the effectiveness of the provision, because the defendant can simply avoid the certificate by making the demand --- if only to make the prosecution go to the effort of producing the authenticating witness. Thus the whole point of the amendment --- to save costs --- might be limited in criminal cases. While that is acceptable if the alternative is that the Rule will surely be struck down without it, it seems far less acceptable if the risk of that result is remote, as it appears to be with respect to Rule 902(13).

[5] It is true that the Committee Note to the 2013 amendment to Rule 803(10) cited *Melendez-Diaz*, but that is because the Rule had to be amended on account of that case, and the amendment hewed to the instructions laid down by the Court. That is not the same as a Note dismissing confrontation concerns.

That said, while the Department's preference would be not to include notice and demand language, Betsy Shapiro, in an email, states that "the usefulness of the rule is not materially diminished by adding the notice and demand." She explains that "if the rule includes notice and demand, even if some defense lawyers demand the live testimony, there is still a benefit from knowing that in advance and being able to plan."

But even if Betsy is right about the effect of a notice-and-demand provision, there is another concern, one of rulemaking: it is to say the least odd, and awkward, to include a notice-and-demand provision in a Rule *that will already have a notice provision*. The two notice provisions would be serving different functions. The basic notice provision would provide the opponent an opportunity to meet the evidence. The notice-and-demand notice provision would provide the opponent an opportunity to demand production of the witness. It is difficult to have one notice provision cover both concepts --- especially when the general notice requirement is written with flexible standards and the notice-and-demand provision is written with specific time periods.[6] And two separate notice provisions in the same rule is balky at best, and is likely to result in confusion and difficulties of application.

But even if a notice-and-demand provision does not cripple the rule, or make it overly complicated, there are other costs in adding it. By Friedman's own admission, a notice-and-demand provision is completely unnecessary for the many situations in which Rule 902(13) is used to authenticate electronic information that is generated before the litigation arose. It is surely bad policy to institute a procedural requirement that by definition is unnecessary to solve any problem. Thus, at a minimum, the notice-and-demand language should be limited to the narrow situation of electronic evidence generated for purposes of litigation. (And recall that it is a stretch even to require it for that kind of information, as it will by definition have to be nontestimonial).[7]

Finally, any inclusion of a notice-and-demand provision will raise a red flag about the *lack* of such a provision in Rule 902(11) and 18 U.S.C. §3505. Given the very minor difference between an authenticating certificate under those rules and under Rule 902(13), including a notice-and-demand provision in the new rule might well be seen to operate as a concession that similar provisions should be added to the older rules --- even though they have universally been upheld as is by the federal courts.

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[6] Specific time periods for a notice-and-demand provision should be mandated for two reasons: 1) the notice-and-demand provision in Rule 803(10) has those specific time periods and there is no good reason to have a different approach in Rule 902(13) --- that would just lead to more disuniformity in the notice provisions; and 2) more importantly, the Court in *Melendez-Diaz* approved notice-and-demand provision with specific time periods, so if the whole point of the enterprise is to comply with *Melendez-Diaz*, it makes little sense to draft a notice-and-demand provision that in any way varies from what the Court approved in that case. (That does not mean that a flexible notice-and-demand provision is necessarily insufficient under *Melendez-Diaz* but it does mean that it is unwise to vary if the point is to comply.)

[7] If the problem instead is the certificate that asserts the record is accurate, there is the following anomaly: a general notice-and-demand provision would cover far more records than is necessary, while a narrow notice provision would look silly. Something like: "if the affiant asserts that the record is accurate, then notice and demand must be provided." What does that mean?

For all these reasons, a notice-and-demand provision should probably not be added to Rule 902(13). But if it is, it might look like this:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) ***Certified Records Generated by an Electronic Process or System*****.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11). In addition, in a criminal case, a prosecutor who intends to offer a certification regarding electronic evidence that was generated for purposes of litigation must provide written notice of that intent at least 14 days before trial, and the certificate is not admissible if the defendant objects in writing within 7 days of receiving the notice. The court may set a different time for the notice or the objection.

The Committee Note might add something like this (with much trepidation):

> The notice and demand provision is added to address possible Confrontation Clause concerns when a certificate is used to authenticate electronic information that is generated for purposes of litigation --- as opposed to a certificate authenticating pre-existing information. See Rule 803(10).

And perhaps it would be appropriate to add something to the Committee Note to Rule 902(14), to explain the difference between the two provisions:

A notice-and-demand provision is not included in this Rule (compare Rule 902(13)), because a certification under this Rule establishes only that the item is an accurate copy. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322-23 (2009).

IV. The Formal Proposal

What follows is the proposed amendments to Rule 902(13) and (14) in the format that they will, upon Committee approval, be sent to the Standing Committee for final approval. The format includes, as seen below, a summary of public comment and a description of changes in light of public comment.

The proposal includes all the suggestions for change to the proposed Rules and Committee Note, as discussed above, with the following exceptions: 1) the FMJA suggestion that judges enforce the supplementation requirements of Rule 26 is not included; and 2) there is no response to the Friedman comments. If the Committee decides to make a change either to the text or Notes of the proposed rules to add the FMJA suggestion or to respond to the Friedman comments, those changes can easily be added, as suggested above.

Rule 902(13) begins on the next page.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 902(13)

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" refers only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility on other grounds. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable --- the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert;

such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided. Parties may be assisted in complying with the notice requirement if the court specifies a date for serving the notice in the initial scheduling order --- recognizing that some flexibility is required for subsequent developments.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

Minor adjustments were made to the Committee Note to clarify the meaning of the certification requirement and to emphasize the importance of reasonable notice.

SUMMARY OF PUBLIC COMMENTS

James Lundeen (2015-EV-0003-0002), argues that authentication of foreign records cannot be authorized by the Evidence Rules.

The Committee on Federal Courts of the Association of the Bar of the City of New York (2015-EV-0003-0121), supports the proposed addition of Rule 902(13), stating that the rule "should avoid the need to call authentication witnesses in many cases where there is no real dispute about authenticity."

Jonathan Redgrave (2015-EV-0003-0132), supports the proposed addition of Rule 902(13). He states that "[s]hifting the burden of questioning the authenticity of such records to the opponent of the evidence (who will have a fair opportunity to challenge both the certification

and the records themselves) will streamline the process by which these items can be authenticated, reducing the time, cost, and inconvenience of presenting this evidence at trial or on summary judgment." He concludes that the proposed amendment "will lead to increased efficiency without sacrificing the integrity of the Rules of Evidence."

The Federal Magistrate Judges Association (2015-EV-0003-0167), supports the proposed addition of Rule 902(13). The Association notes that the notice provided by the rule "should not come so shortly before the trial or hearing that the adverse party cannot realistically do the investigation required for a challenge." It suggests that "judges specify a date for serving the notification in the initial scheduling order." It further states that some electronic information might be authenticated under either Rule 902(13) or (14), but that "[a]s a practical matter, the distinction may not make a difference because both types are handled in the same way."

Members of the American Bar Association Criminal Procedure and Evidence Committee (2015-EV-0003-0197), oppose the proposed addition of Rule 902(13) insofar as it would allow a certification to authenticate electronic information that was prepared in anticipation of a criminal prosecution. The members state that in criminal cases the Confrontation Clause does not permit authentication by a certificate where that certificate is "used to leverage into evidence documents that have been created for the purpose of the litigation."

Advisory Committee on Evidence Rules

Proposed Amendment: Rule 902(14)

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(14) ***Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

COMMITTEE NOTE

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of

producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

There is no intent to draw a bright-line distinction between the information that can be authenticated under this rule and the information that can be authenticated under Rule 902(13). There is an inevitable overlap, but that overlap is of no moment because the same result --- self-authentication --- is specified under either rule. Generally speaking, authenticating a copy of electronic data is a standardized process --- as shown in the discussion of hash value, above --- while authenticating other electronic information will vary under the circumstances. Accordingly it was determined that providing separate treatment for copies of electronic data would be useful to the bench and bar.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11) or (12)" refers only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence

given the notice provided. Parties may be assisted in complying with the notice requirement if the court specifies a date for serving the notice in the initial scheduling order --- recognizing that some flexibility is required for subsequent developments.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

Minor adjustments were made to the Committee Note to clarify the meaning of the certification requirement, to emphasize the importance of reasonable notice, and to address the relationship between Rules 902(13) and (14).

SUMMARY OF PUBLIC COMMENTS

James Lundeen (2015-EV-0003-0002), argues that authentication of foreign records cannot be authorized by the Evidence Rules.

The Committee on Federal Courts of the Association of the Bar of the City of New York (2015-EV-0003-0121), supports the proposed addition of Rule 902(14), stating that the rule "should avoid the need to call authentication witnesses in many cases where there is no real dispute about authenticity."

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible amendments to certain notice provisions
Date: April 1, 2016

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules. What follows is a short description of the Committee's resolutions to date:

● The project is now focused on four of the rules with notice provisions: 404(b), 609(b), 807, and 902(11). The notice provisions of Rules 412-415 have been excluded from the project, for two reasons: 1) they were enacted directly by Congress; and 2) they are bound up with the underlying actions involving sexual assault, and so raise different issues from the other more generic notice provisions.[1]

● The Committee has unanimously agreed to propose two amendments independently of any uniformity project: 1) delete the provision in Rule 404(b) that requires the defendant to demand notice; and 2) add a good cause provision to Rule 807.

● There was no Committee enthusiasm for an amendment to Rule 807 that would require the proponent not only to provide notice of the hearsay, but also to specifically require the proponent to provide notice of intent to offer the hearsay under Rule 807.

[1] It should be mentioned that Rule 803(10), as amended in 2013, also contains a notice provision--- allowing the government to dispense with calling a witness to prove the absence of a public record if notice is given and demand to produce is not made by the defendant. This provision was also dropped from a uniformity project, for two reasons: 1. It is more than a notice provision --- it involves notice *and demand* and so cannot possibly be made uniform with provisions that are only about notice; and 2. It replicates the notice-and-demand provision that the Supreme Court found to satisfy Confrontation Clause concerns in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and given the uncertain state of the law in this area, it is risky to deviate from the provision that the Court approved.

● The Committee resolved to consider a template for Rules 404(b), 609(b), 807, and 902(11) proposed by Paul Shechtman. That template would provide a uniform notice provision for those rules. Paul's proposal implements both of the substantive changes discussed above --- deleting the demand from Rule 404(b) and adding a good cause provision to Rule 807.

● One complicating factor in the template is that it would extend the notice requirement in Rule 404(b) to civil cases ---- a change that is opposed by the Justice Department, and that would probably be unnecessary as a substantive matter because notice of such evidence is usually provided in civil discovery. Accordingly, the template is considered below with the modification that the Rule 404(b) notice provision remains limited to criminal cases.

● If the Committee decides that a template providing uniformity is worth proposing, then the Committee will need to determine the outcome of four textual changes to one or more of the rules that would be imposed.

1. Should written notice be required? Currently Rules 609(b) and 902(11) require written notice while Rules 404(b) and 807 do not. Discussion at the last meeting indicated substantial support for requiring notice to be in writing (which of course includes electronic notice under Rule 101(b)(6)). Committee members stated that a written notice requirement would help to eliminate the possibility of a dispute over whether notice was ever given.[2] This matter is further discussed below.

2. Two of the notice provisions (404(b) and 609(b)) require notice to be provided "before trial" while the other two (807 and 902(11)) require notice to be provided "before the trial or hearing." If the decision is made to employ a template, then these provisions should be made uniform --- and the question for the Committee is whether a reference to a hearing should or should not be included in these notice provisions. That matter is discussed below.

3. Currently, the notice requirement runs both ways in Rules 609(b), 807 and 902(11): it applies to proponents on both sides of the "v." But Rule 404(b) (besides being limited to criminal cases) runs only one way: the prosecutor, but not the defendant, is required to provide notice. The template provides that the notice in Rule 404(b) will be two-way in criminal cases: both the prosecutor and the defendant must provide notice. The Committee may wish to consider the merits of applying the notice requirement in Rule 404(b) to criminal defendants.

4. In providing a uniform term for the information that must be disclosed in the notice --- i.e., the "substance" of the evidence --- the template rejects the varying language in the individual rules. Currently, Rule 404(b) requires disclosure of the

[2] The other side of the argument would be that a written notice requirement would lead to more litigation when a party fails to provide notice in writing --- the question then being whether the evidence should be excluded. *See, e.g., United States v. Komasa*, 767 F.3d 151 (2nd Cir. 2014) (excusing lack of written notice under Rule 902(11) where the defendant had actual notice).

"general nature" of the evidence. Rule 807 requires disclosure of the "particulars, including the declarant's name and address." And there is no reference to the content of disclosure in Rule 609(b) or 902(11). (This is probably because the content of the disclosure is obvious in those rules --- the conviction itself under Rule 609(b) and the record and certification in Rule 902(11)). The Committee may wish to review the merits of a change to a uniform term, "substance."

This memo is divided into three parts. Part One sets forth the template for a uniform notice provision for Rules 404(b), 609(b), 807, and 902(11). It will discuss the drafting issues that the Committee must resolve. Part Two sets forth the proposed amendments and Committee Notes for uniformity-based changes to the four rules. Part Three will set forth the proposed amendments and Committee Notes for the substantive changes to Rules 404(b) and Rule 807 that have already been agreed upon --- these would be proposed if the Committee decides not to proceed with a template for all four Rules.

I. Template For Uniform Notice Provisions

Here is the template that Paul provided.

> **The proponent must give an adverse party reasonable [written] notice of an intent to offer evidence under this rule -- and must make its substance available to the party -- so that the party has a fair opportunity to meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses a lack of earlier notice.**[3]

It should be noted at the outset that there are, of necessity, some modifications that need to be made to the template from rule to rule. For example, Rule 902(11) provides for an *opportunity to inspect* the record and certification, and that specific requirement must be accommodated within that notice provision (and surely is not to be added to the other provisions). And, as stated above, the Rule 404(b) notice provision is to be applied only to criminal cases (whereas limiting the other provisions to criminal cases, solely in the name of uniformity, would be nonsensical). These accommodations will be made below when setting forth proposed language for an amendment and Committee Note for each of the four rules. What remains are the following:

[3] This template is as approved by style consultants Joe Kimble and Bryan Garner.

1. Whether notice should be written.

2. Whether the notice provisions should apply to "trial or hearing" or only to "trial."

3. Whether the notice requirement of Rule 404(b) should apply to criminal defendants.

4. Whether to define the content to be provided in each rule as the "substance of the evidence."

We now proceed to a discussion of these four drafting questions.

A. Written Notice

The costs and benefits of a written notice requirement have been discussed at previous meetings. The benefit is in clarity --- it notice is written, there can be no dispute that it was given. This limits litigation on the question of whether notice was provided. The cost is the risk of litigation when no written notice is provided and the proponent argues that the requirement should be excused because the opponent received actual notice. It is hard to assess which risk of litigation is greater --- that is a question for the Committee.

However the Committee decides, the drafting question is simple --- either include the word "written" or don't. Given the previous Committee discussion on this matter, the proposals below include the word "written" but that can obviously be changed.

B. "Trial or Hearing"

As discussed above, two rules apply the notice requirement to the "trial or hearing" and two do not. I have found no explanation for this difference. One question is whether there could even be a hearing in which the notice requirements would be applicable. The Federal Rules of Evidence are not applicable to most hearings. For example, suppression hearings, preliminary injunction proceedings, psychiatric release proceedings, juvenile transfer proceedings, and supervised release revocation proceedings are all outside the jurisdiction of the Federal Rules of Evidence. See Federal Rules of Evidence Manual §1101.02. Nor are the rules of admissibility applicable to a hearing on the admissibility of evidence. Federal Rule 104(a).

It could be argued that the notice provisions should at least be applied to *in limine* hearings on evidence offered under the Rule itself --- so, for example, when a party moves *in limine* to admit evidence under Rule 807 or 902(11), it should give the prior notice required by that rule. But of course such *in limine* motions will themselves, by definition, give notice of the intent to introduce the evidence.

But there is one hearing to which the rules of evidence do apply --- a summary judgment hearing.[4] This is because, under Civil Rule 56(c), facts proffered in support of or in opposition to summary judgment must be those that would be admissible in evidence. So if, at the hearing, a party would seek to support or oppose summary judgment by presenting evidence, a notice requirement could be operative and important. The opponent could invoke the evidence rule and claim they were entitled to notice "before the hearing." Indeed, there are several reported cases in which the notice requirement has been invoked and applied in summary judgment hearings. *See, e.g., Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1553 (9th Cir. 1989) (S-1 registration statement was properly admitted as residual hearsay to prove ownership in opposition to a motion for summary judgment: "The Registration Statement was made known to Feiner & Co.sufficiently in advance of the summary judgment hearing to provide Feiner & Co. with a fair opportunity to prepare to meet it"); *Cynergy, LLC v. First American Title Ins. Co.*, 706 F.3d 1321, 1330 (2013) ("Cynergy was provided notice of the affidavit [offered as residual hearsay on summary judgment] months before briefing on the dispositive motions took place.").

If the notice requirement is relevant for summary judgment hearings, then why is the notice requirement limited to trials in Rules 404(b) and 609(b)? There is no explanation in the legislative history, but there is a plausible distinction for each of these Rules, at least as related to summary judgment hearings: 1) The Rule 404(b) requirement applies to criminal cases only, so there would be no reason to add the term "hearing" to cover summary judgment proceedings; 2) Rule 609(b) covers evidence that would be offered for impeachment, but impeachment evidence is not considered on summary judgment because the credibility of a witness is a classic jury question.[5]

So unless one can think of a hearing in which the Evidence Rules --- and then the notice requirements of Rules 404(b) and 609(b) --- would be applicable, it would appear to be a plausible result that the reference to "hearing" should be retained in Rules 807 and 902(11) and left out of Rules 404(b) and 609(b). It would be confusing if, solely for purposes of uniformity, the word "hearing" were added to Rules 404(b) and 609(b) when in fact it would never be applicable. But the result of non-action is another blow to the uniformity movement: two of the rules refer to a hearing while two do not.

If the Committee decides to cover hearings, then the template needs to be changed as follows:

> The proponent must give an adverse party reasonable written notice of an intent to offer evidence under this rule -- and must make its substance available to the party -- so that the party has a fair opportunity to meet it. The notice must be provided before <u>the</u>

[4] There may well be other hearings in which the Evidence Rules apply and therefore the notice requirements would also apply, but it is enough for present purposes to establish that there is one such kind of hearing.

[5] This is not to say that the failure to add the term "hearing" was a conscious choice by the drafters. Maybe it was. But it is only to say that there is a plausible distinction that can be articulated.

trial or hearing -- or during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

C. Applying the Notice Requirement in Rule 404(b) to Criminal Defendants

As stated above, Rule 404(b) is the only rule in which notice runs one way. A uniformity approach would require the notice requirement to be imposed on the defendant --- or, to put it another way, any push toward uniformity would be undermined by retaining Rule 404(b) as a one-way rule, as at some point the retained differences in the rules would make a uniformity project untenable.

It is a rarity for criminal defendants to use Rule 404(b) evidence; but it happens from time to time. For example, the defendant may wish to introduce bad acts for some non-character purpose to show that a third party did the crime. *See, e.g., United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991) (error to exclude "reverse 404(b)" evidence where probative to show a third party's modus operandi).

The notice requirement was added to the Rule in 1991 (at a time when the Evidence Advisory Committee was disbanded). It is unclear why the notice requirement was not extended to defendants. The Committee Note to the 1991 amendment specifically recognizes "a few reported decisions" in which criminal defendants used Rule 404(b), but the Note does not attempt to explain why the notice requirement does not apply to defendants. One inference from the 1991 Committee Note might be that the defense use of 404(b) evidence is so infrequent that it was not worth worrying about.[6]

On the merits, it would seem that extending the Rule 404(b) requirement to criminal defendant makes sense. This would not be uniformity just for uniformity's sake. This would be uniformity when there is no reason to have the notice requirements differ from rule to rule. There is no reason why criminal defendants must provide pretrial notice for residual hearsay or old convictions, but not for Rule 404(b) evidence. The interest in allowing the adversary to prepare to meet the evidence appears to be the same. Rule 404(b) evidence --- even "reverse Rule 404(b) evidence" --- can well be outcome-determinative; and the opponent might well need time to figure out how to challenge the evidence. Moreover, notice requirements in the Evidence Rules

[6] The rationale could not have been a concern about constitutionality --- a concern that animates much of the limitations on criminal discovery. Reasonable notice requirements are clearly constitutional, and preclusions of defense-proffered evidence for failure to comply with a notice requirement have been upheld. *Michigan v. Lucas,* 500 U.S. 445 (1991) (preclusion for failure to provide notice under a rape-shield statute); *Williams v. Florida,* 399 U.S. 78, 85 (1970) (upholding preclusion for failure to comply with a notice of alibi requirement; observing that the notice requirement "by itself in no way affected [the defendant's] crucial decision to call alibi witnesses.... At most, the rule only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that [he] planned to divulge at trial."). Moreover, the Rule 807 notice requirement clearly applies to criminal defendants, and would present the same constitutional concerns if they existed. And yet evidence offered by criminal defendants under Rule 807 has been rejected for failure to comply with the notice requirement. *See, e.g., United States v. Coney,* 51 F.3d 164 (8th Cir. 1995).

are good policy, especially in criminal cases where pretrial discovery may be restricted. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (notice requirements are "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system").

The question is of course one for the Committee. If the Committee decides not to extend the notice requirement to criminal defendants, then a change to the template would have to be made in Rule 404(b). The change to the template would simply retain the word "prosecutor" instead of substituting it with "proponent." But again, the more individual differences retained, the less sense it makes to embark on a uniformity project.

D. The "Substance" of the Evidence.

Unlike some of the other differences among the notice provisions discussed above, any differences with regard to the content of the notice to be provided are understandable --- because the evidence that is subject to notice varies from rule to rule. For example, Rule 404(b) bad act evidence is in most cases different from the hearsay statements covered by Rule 807. But a problem under the existing rules not so easily explained (as discussed in the memo on notice provisions submitted for the previous meeting) is that there is an inconsistency in tone between the content requirements for Rule 404(b) ("general nature") and Rule 807 ("particulars, including the declarant's name and address"). There is no apparent reason for that disparity. The difference is illustrated by a case such as *United States v. Watson,* 409 F.3d 458 (D.C.Cir. 2005), where the prosecution gave pretrial notice that it would offer the testimony of a "cooperating witness" about the defendant's "bad acts," but it did not provide the name of the witness, nor the facts and circumstances covered by the proposed testimony. The court found that this notice was sufficient because it provided the "general nature" of the testimony. It clearly would not have been sufficient under Rule 807. Other examples of vague notice found sufficient under the Rule 404(b) "general nature" language include *United States v. Kern,* 12 F.3d 122, 124 (8th Cir.1993) (holding that the government's statement that it "might use evidence from some local robberies" was sufficient to describe the general nature of the acts under Rule 404(b)); *United States v. Schoeneman,* 893 F.Supp. 820, 823 (N.D.Ill.1995) (rejecting the defendant's motion that the government provide notice of the dates, times, places and persons involved in the acts it planned to admit under Rule 404(b)).

Another problem with the current content provisions is Rule 807's requirement that the declarant's address be disclosed. In the typical case in which residual hearsay is offered, the declarant is unavailable. This is because if the declarant is available, the hearsay is unlikely to satisfy the residual exception requirement that it be "more probative" than the declarant's testimony. See, e.g., *Larez v. City of Los Angeles,* 946 F,2d 630 (9th Cir. 1991) (newspaper accounts were improperly admitted as residual hearsay where reporters who provided those accounts were available to testify --- the newspaper accounts were not "more probative" than the testimony that the reporters could have provided). It is difficult to see the value of producing the address of a declarant who is unavailable – and the requirement is just an absurdity when the declarant is dead. Moreover, disclosing the address of a declarant is in tension with the e-Government rules, which require redaction of the home address of an individual in any court filing. See Fed.R. Crim.P. 49.1. ("Tension" and not "conflict" is the correct word because a Rule

807 notice is not necessarily going to be in a court filing.) Finally, a proponent's failure to disclose an address has often been excused, raising the question of how important it really is. *See, e.g., United States v. Burdulis*, 753 F.3d 255, 264 (1st Cir. 2014) ("We agree with Burdulis that the government fell short under the rule by failing to provide * * * an address for SanDisk." But no plain error found because "SanDisk's address could have been easily obtained through a simple online search.").

While the use of the term "substance" will provide uniformity, and will address the problems discussed immediately above, there are some questions that remain on the merits of the proposal.

First, does the term "substance" adequately capture what *should* be disclosed under Rule 404(b) and Rule 807? One can argue that the term appropriately requires a basic description of the evidence that is flexible enough to apply to both bad act evidence and hearsay. It is certainly no more vague than "general nature" or "particulars." Moreover, the term "substance" may be thought to have an advantage over the current Rule 807 requirement that apparently demands disclosure of a declarant's address whether it would make any difference or not: "substance" could be construed to be case-dependent. The courts could apply the basic principle that the proponent must provide whatever information might be reasonably necessary to allow the opponent to fairly challenge the evidence. On the other hand, the term "substance" could be subject to varying interpretations.

It is notable that the word "substance" is found in one other place in the Rules, that might be used by courts to inform the scope of a notice requirement: Rule 103(a)(2) requires a party making an offer of proof to inform the court of the "substance" of the evidence it seeks to admit. This requires counsel to state "with specificity what he or she anticipates will be the witness's testimony . . ." *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285 (8th Cir. 1995). Perhaps a Committee Note to an amendment requiring disclosure of the "substance" of the evidence might usefully provide a helpful cross-reference to Rule 103. But the bottom line is that inclusion of a new word may lead to some growing pains on what content must actually be disclosed.

Second, using a single term for Rules 404(b) and 807 is somewhat at odds with the fact that the current standards applicable to those two rules are varied in strictness, or at least in tone. "General nature" sounds far less rigorous than "particulars" and as discussed above the difference has been reflected in some case law. On the merits, there is no reason for this difference, as the notice provisions are equally important and the opponent's need to prepare would seem equally strong under both rules. So the use of a single standard may be a welcome change. But one caution is that the new standard may well be a change to *both* rules, because "substance" sounds more rigorous than "general nature" but less rigorous than "particulars."

That raises the question of whether the case law on the content requirements for the two rules is being retained when the text is changed to require disclosure of the substance of the evidence. The answer would appear to be, no, the prior case law is not controlling. It rings somewhat hollow to say that the use of a uniform word is only for purposes of style-uniformity, when in fact it sounds somewhat different from the words currently used in each of the two rules.

Therefore it should probably be recognized that if the text is changed to require disclosure of "substance", the prior case law may be informative but not determinative.[7]

Third, Rules 609(b) and 902(11) don't need a description of the content of the notice. Rule 609(b) covers convictions and, pretty clearly, the proponent must disclose the conviction --- that *is* the substance of the evidence. And Rule 902(11) specifically provides that the proponent must make the certification and the underlying business record available for inspection --- that *is* the substance of the evidence. So adding the term "substance of the evidence" to either Rule 609(b) or to Rule 902(11) would be of no use and probably would result in confusion as to what is intended. It would be uniformity for uniformity's sake, which should not be done at the cost of dislocation and possible confusion. Accordingly, Paul's template does not call for adding the term "substance" to either Rule 609(b) or 902(11) --- which is a good call, but once again there is a drift away from uniformity that leads to the question whether a uniformity initiative has a sufficient payoff.

II. Applying the Uniformity Template to Rules 404(b), 609(b), 807 and 902(11)

What follows are the four rules amended in an attempt to provide uniformity, with the following provisos:

1. The Rule 404(b) notice provision is limited to civil cases;

2. The Rule 902(11) notice provision also allows for inspection of the record and certification;

3. Written notice is required though that can be changed if the Committee decides to go the other way;

4. The notice provisions of Rules 807 and 902(11) apply to hearings, while the notice requirements of Rules 404(b) and 609(b) do not;

5. The term "substance of the evidence" is used in Rules 404(b) and 807 as a substitute for the current language on the content of the notice --- but no change as to content requirement is made in either Rule 609(b) or 902(11).

[7] It should be noted that when the template was discussed at the January Standing Committee meeting, Judge Graber, a member of the Committee, sent a note to the Chair which states as follows: "'Substance' is great. We've had some cases with silly arguments over 'particulars.'"

A. Rule 404(b)

(b) Crimes, Wrongs, or Other Acts

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ In a criminal case, the ~~prosecutor~~ proponent must~~:~~

(A) ~~provide~~ give an adverse party reasonable written notice of ~~the general nature of any such evidence that the prosecutor intends to offer at trial; and~~ an intent to offer evidence under this rule --- and must make its substance available to the party --- so that the party has a fair opportunity to meet it; and

(B) do so before trial --- or during trial if the court, for good cause, excuses a lack of ~~pretrial~~ earlier notice.

Draft Committee Note to Rule 404(b) Notice Amendment

The notice provision has been amended to provide more uniformity with some of the other notice provisions in the Evidence Rules, and also to make four changes in the operation of the Rule. [The notice provisions in Rules 412-415 remain unchanged in

deference to [Congress and to] the particular and sensitive concerns addressed in those Rules.]

The requirement of a request before notice must be provided has been dropped. That requirement is not found in any other notice provision in the Federal Rules of Evidence, and it has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, the benefit to the government of the requirement is minimal, because many local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is inevitably provided anyway when the government moves *in limine* for an advance ruling on admissibility of Rule 404(b) evidence. The request requirement has thus become a technicality that has outlived any usefulness it may once have had.

The notice provision has also been amended to apply to the defendant in a criminal case, in the rare instance when the defendant seeks to admit evidence of uncharged misconduct for a non-character purpose. Providing a "two-way" notice requirement is consistent with the other rules, and recognizes that the prosecution's need for advance notice to respond to Rule 404(b) evidence is no less than that of the defendant.

The Rule requires the proponent to disclose the "substance" of the evidence. This term --- also added to Rule 807 --- is intended to require a description of the evidence that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). [Prior case law on the obligation to disclose the "general nature" of the evidence may be instructive, but not dispositive, of

the proponent's obligation to disclose the "substance" of the evidence under the Rule as amended.]

Finally, the Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually made.

The notice provision remains applicable only to criminal cases. Extending the notice requirement to civil cases was found unnecessary given the possibility of broad pretrial discovery in civil cases.

B. Rule 609(b)

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of an intent to ~~use it~~ offer evidence under this rule so that the party has a fair opportunity to ~~contest its use~~ meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses a lack of earlier notice.

Draft Committee Note to Rule 609(b)

The notice provision has been amended to provide more uniformity with some of the other notice provisions in the Evidence Rules. [The notice provisions in Rules 412-415 remain unchanged in deference to [Congress and to] the particular and sensitive concerns addressed in those Rules.] No substantive change is intended.

C. Rule 807

(b) Notice. The ~~statement is admissible only if, before the trial or hearing the~~ proponent ~~gives~~ must give an adverse party reasonable written notice of ~~the~~ an intent to offer ~~the statement and its particulars, including the declarant's name and address,~~ evidence under this rule -- and must make its substance available to the party -- so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Draft Committee Note to Rule 807 Notice Provision Amendment

The notice provision has been amended to provide more uniformity with some of the other notice provisions in the Evidence Rules, and also to make two changes in the operation of the Rule. [The notice provisions in Rules 412-415 remain unchanged in deference to [Congress and to] the particular and sensitive concerns addressed in those Rules.]

The Rule requires the proponent to disclose the "substance" of the evidence. This term --- also added to Rule 404(b) --- is intended to require a description of the evidence that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). [Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the evidence under the Rule as amended.]

The Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually made.

The pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay.

The Rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as

a continuance, to assure that the opponent has time to prepare for the particularized kind of argument that is necessary to counter hearsay offered under the residual exception.

D. Rule 902(11)

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. ~~Before the trial or hearing, the~~ The proponent must give an adverse party reasonable written notice of ~~the~~ an intent to offer ~~the record~~ evidence under this rule -- and must make the record and certification available for inspection -- so that the party has a fair opportunity to ~~challenge them~~ meet it. The notice must be provided before the trial or hearing -- or during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Draft Committee Note to Rule 902(11) Amendment to Notice Provision

The notice provision has been amended to provide more uniformity with some of the other notice provisions in the Evidence Rules, and also to make two changes in the operation of the Rule. [The notice provisions in Rules 412-415 remain unchanged in

deference to [Congress and to] the particular and sensitive concerns addressed in those Rules.]

The Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually made.

III. Draft Amendments for the Substantive Changes to Rules 404(b) and 807 That the Committee Has Agreed Upon

The Committee has already voted unanimously to propose two minor changes independently of any amendments that would promote uniformity. Those changes are: 1) Deleting the requirement in Rule 404(b) that the defendant must request notice; and 2) Adding a good cause exception to Rule 807. What follows are the draft textual changes and Committee Notes for those proposals --- with no broader uniformity attempt being made.

A. Rule 404(b)

Rule 404. Character Evidence; Crimes or Other Acts

*** * ***

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent,

preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ In a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Draft Committee Note to the Deletion of the Request Requirement

The requirement of a request before notice must be provided has been eliminated. That requirement is not found in any other notice provision in the Federal Rules of Evidence, and it has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, the benefit to the government of the requirement is minimal, because many local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is inevitably provided anyway when the government moves *in limine* for an advance ruling on admissibility of Rule 404(b) evidence. The request requirement has thus become a technicality that has outlived any usefulness it may once have had.

Amendment to Text: [And thanks to Joe Kimble for the style suggestions.]

Rule 807. Residual Exception

*** * ***

(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. The notice must be provided before the trial or hearing --- or during the trial or hearing if the court, for good cause, excuses a lack earlier of notice.

Draft Committee Note for Adding a Good Cause Exception to Rule 807

The pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay.

The Rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent has time to prepare for the particularized kind of argument that is necessary to counter hearsay offered under the residual exception.

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Best Practices for Authenticating Digital Evidence

Hon. Paul W. Grimm

Gregory P. Joseph, Esq.

The Judicial Conference Advisory Committee on Evidence Rules

I. Introduction

Digital evidence is now offered commonly at trial. Examples include emails, spreadsheets, evidence from websites, digitally-enhanced photographs, PowerPoint presentations, texts, tweets, Facebook posts, and computerized versions of disputed events. Does the fact that an item is electronic raise any special challenges in authenticating that item?

In Federal Courts, authenticity is governed by Rule 901(a), which requires that to establish that an item is authentic, a proponent must produce admissible evidence "sufficient to support a finding that the item is what the proponent claims it is."[1] Rule 901(b) provides many examples of evidence that satisfies the standard of proof for establishing authenticity, including testimony of a witness with knowledge,[2] circumstantial evidence,[3] and evidence describing a process or system that shows that it produces an accurate result.[4] The standards and examples provided by Rule 901(a) and (b) are flexible enough to adapt to all forms of electronic evidence.

That does not mean that authenticating digital evidence is automatic. There are a large number cases dealing with authentication of digital evidence over the last 15 years; and such evidence can present challenges in establishing that it has not been altered and that it comes from a certain source. The Judicial Conference Advisory Committee on Evidence Rules, surveying this case law, considered whether to propose an amendment to Rule 901(b) that would provide for a list of relevant factors for establishing the authenticity of the new types of digital evidence encountered by the courts --- such as email, text, chats, internet postings, and social media communications. The Advisory Committee decided not to proceed with a proposal, for a number of reasons: 1) there would be a problematic interface between any new rule and the existing, flexible rules that are currently being used to govern authentication of electronic evidence; 2) listing factors relevant to authentication would run the risk of misleading courts and litigators

[1] Evidence proffered to support authenticity of a challenged item must itself be admissible. See, e.g., United States v. Bonds, 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception).

[2] Fed. R. Evid. 901(b)(1).

[3] Fed. R. Evid. 901(b)(4).

[4] Fed. R. Evid. 901(b)(9).

into thinking that all of the listed factors can or should be weighed equally; 3) no existing evidence rule is structured as a list of relevant factors; and 4) given the deliberate nature of the rulemaking process—with a minimum of three years between formal consideration of an amendment and its adoption—it would be possible that authentication rules on electronic evidence would be outmoded by the time they became law.

The Advisory Committee decided that a better alternative for providing guidance to courts and litigants on authentication of digital evidence would be to prepare and publish a "Best Practices Manual" for each of the major new forms of digital evidence that are being offered in the courts. The Advisory Committee has collaborated with Hon. Paul Grimm and Gregory P. Joseph, Esq. to prepare this Best Practices Manual, to be distributed by the Federal Judicial Center.

This Manual begins with an analysis by Judge Grimm of the basic rules on authenticating evidence, with a focus on digital evidence and the interplay between Evidence Rules 104(a) (providing that the judge is to decide admissibility factors by a preponderance of the evidence) and Rule 104(b) (providing that for questions of conditional relevance --- such as authenticity --- the standard of proof for admissibility is enough evidence sufficient to support a finding).

Following Judge Grimm's introduction, this Manual sets forth some guidelines on authentication of the kinds of electronic evidence that are most frequently offered in litigation today: 1) emails; 2) texts; 3) chatroom conversations; 4) web postings; and 5) social media postings.[5] Finally, the Manual considers whether and when the proponent might argue that the court can take judicial notice of the authenticity of certain digital evidence.

At the outset it is important to emphasize that the standard for establishing authenticity of digital evidence is the same mild standard as for traditional forms of evidence. None of the checklists set forth below are going to be required to be met in toto before digital evidence is found authentic. They are just relevant factors, and usually satisfying one or two of any of the listed factors will be enough to convince the court that a juror could find the digital evidence to be authentic. But the factors will need to be applied case-by-case.

[5] This Best Practices Manual covers the relatively new forms of electronic communications. Parties have been authenticating more traditional forms of electronic evidence for many years --- examples include telephone conversations, audiotapes, and video recordings. See, e.g., United States v. Taylor, 530 F.2d 639 (5th Cir. 1976). (video evidence from a bank security camera was properly authenticated where testimony revealed the camera was present on the day in question and was facing the events of an armed robbery, and was functioning properly). This pamphlet does not cover such traditional forms of electronic communication. For more on authentication of such information, see Saltzburg, Martin & Capra, Federal Rules of Evidence Manual §901 (11th ed. 2015), which provides relevant case law and commentary.

II. An Introduction to the Principles of Authentication for Electronic Evidence: The Relationship Between Rule 104(a) and 104(b).

This Manual is designed to provide answers to the fundamental evidentiary questions of how to authenticate digital evidence. But before turning to the authentication rules themselves, there are two preliminary rules that must be discussed and understood, because without them, authentication decisions are apt to be erroneous. These rules are Fed. R. Evid. 104(a) (which states the general rule governing preliminary questions about the admissibility of evidence) and Fed. R. Evid. 104(b) (the so-called "conditional relevance" rule[6]). Understanding these two rules is essential to making correct decisions about the authentication of digital evidence.

We start with Rule 104(a). Its text is deceptively straightforward: "[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, *or evidence is admissible*. In so deciding, the court is not bound by evidence rules, except those on privilege." (emphasis added). Most decisions about admissibility of evidence, whether digital or otherwise, are made by the judge alone. They include decisions about whether evidence is relevant, constitutes hearsay (or fits within one of the many hearsay exceptions), or is excessively prejudicial when compared to its probative value, whether experts are qualified and the extent of opinion testimony that will be allowed, and most questions regarding application of the original writing rule. When the judge makes a ruling under Rule 104(a) he or she is the sole decision maker as to whether the evidence may be heard by the jury. If admitted, of course, the jury is free to give the evidence whatever weight (if any) they think it deserves. This is familiar turf to trial judges, but with digital evidence, there is a greater likelihood that the judge alone may not be the final decision maker regarding admissibility. The jury also may have a part to play in the admissibility decision, and this is where Rule 104(b) comes in.

Rule 104(b) qualifies Rule 104(a). It provides "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later." Read in isolation, Rule 104(b) seems too abstract to be helpful. But, in the case of disputes over the authenticity of digital evidence, it can be an important qualifier to the general rule of 104(a) that the trial judge decides questions about the admissibility of evidence. An illustration will help bring things into focus. Imagine the following variations of a common theme. In an employment discrimination case the plaintiff, a woman, alleges that her supervisor, a man, intentionally discriminated against her in deciding to promote a lesser qualified man to a position that the plaintiff sought. As evidence of intentional discrimination, the plaintiff wants to introduce an email that she asserts her supervisor sent to her that says: "Jane, stop bugging me about the sales supervisor position. Your track record compared to the men in our sales group is terrible, and confirms what I always have suspected. Women just don't have the stuff it takes to get out there and sell our products. You should be glad you still have your sales job, and quit trying to be something you can never do well. Bob." The email is from the company email account (Bob@company.com), addressed to the plaintiff (Jane@company.com), apparently signed by the supervisor (Bob), discusses a subject matter about which the supervisor has knowledge, and is dated on a day and time the supervisor was known to be at the office. Plaintiff

[6] Fed. R. Evid. 104(b) (1972) Advisory Note.

contends that the email is "smoking gun" evidence of intentional gender discrimination.

Imagine further the following scenarios when the plaintiff offers the email into evidence at trial. One: the defense attorney objects to the introduction of the email, the judge asks for the basis of the objection, and the defense attorney says "inadequate foundation". Two: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says "Judge, this is an email, there is no evidence that the supervisor was the one who actually wrote it. It was found on a company computer, anyone in the company had access to that computer, including the plaintiff herself, whose office was right next to his, and my client is often away from his desk during the day, and he does not log out of his computer. Plaintiff hasn't shown that someone else didn't send that email pretending to be my client, and everyone knows how easy it is to fake an email." Three: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says "Judge, my client will testify that on the day and time stated on the email he was at a sales meeting with the other supervisors and the president of the company. Five other people saw him there at that day and time and will testify that they did. During those meetings, no one is allowed to use their smart phone or to send or receive emails, on pain of being fired if the president sees them looking at their phones. The location of the meeting was on a different floor from where my client and the plaintiff work. He will testify that he did not send the email, and that when he leaves his office he does not log out, his computer stays on, and anyone can access it without a password and use his office email account. He also will testify that when he came back from the meeting, the plaintiff looked at him in a strange way, and said "I wouldn't look so smug if I were you. You might not be that way for very long."

With these scenarios in mind, what is the interplay between Rule 104(a) and 104(b) in determining whether the email may be admitted at trial and considered by the jury? In the first scenario, no explanation was given by the defense attorney for excluding the email other than the conclusory statement that the plaintiff had not laid a sufficient foundation. Here, the trial judge alone decides, under Rule 104(a), whether an adequate foundation has been established. If the foundation was deficient, the judge will require the plaintiff's lawyer to make a fuller showing, and allow or exclude the email accordingly. Rule 104(b) is not implicated.

In the second scenario, the defense attorney has made a conclusory legal argument that provides no facts showing that the supervisor did not author the email, but rather speculates that it *could have* been written by someone else. The argument invites the trial judge to require the plaintiff's lawyer to "prove a negative"—that no one but the supervisor was the author. But this is not the burden that the plaintiff must meet under Rule 104(a) to establish the admissibility of the email. Rather, all that plaintiff must do is to meet the obligation imposed by Rule 901(a), which is to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Certainty is not required. All that is needed is evidence sufficient to convince a reasonable juror that, more likely than not, the email is what the plaintiff claims it is—an email her supervisor drafted. And, under the hypothetical facts of the second scenario, the defense counsel is wrong in saying the plaintiff has offered no evidence that the email came from the supervisor. She has shown that the email came from the supervisor's email address, on the company email server, on a day when the supervisor was at the office, discussing a topic about which the supervisor had knowledge, and is signed with his name. Certainly this would be an example of authentication under Rule 901(b)(4), where the "appearance, contents, substance . . .

or other distinctive characteristics of the item, taken together with all the circumstances" tend to show that the supervisor authored the email.

The second scenario also raises only Rule 104(a) issues for the trial judge alone to determine admissibility. The facts, under which admissibility must be judged, are undisputed. If the trial judge concludes (as she should under these facts) that a reasonable juror *could* find from the foundation presented that it is more likely than not that the supervisor wrote the email, it is admissible. Defense counsel's speculation about what "could" have happened is reserved for argument to the jury about how much weight (if any) to give to the email. Absent from scenario two is evidence that the supervisor in fact did not author the email, to contradict the undisputed facts introduced by the plaintiff regarding the distinctive characteristics of the email that associate it with the supervisor.

Scenario three does introduce facts contradicting the evidence the plaintiff introduced about the distinctive characteristics of the email tying it to the supervisor. The defense attorney has proffered that he will introduce evidence (the supervisor, the five witnesses who corroborate that he was with them at the time the email was sent, the policy prohibiting use of cell phones during meetings with the company president, the meeting's location on a different floor of the building). Now the trial judge is presented with competing evidence that the supervisor did, and did not, author the email. If the plaintiff's evidence is accepted over that of the defendant, then it is more likely than not that the supervisor is the author, and the email is relevant to show his discriminatory intent. But, if the defendant's version of the facts is accepted over those offered by the plaintiff, then the supervisor did not author the email, and it is irrelevant to prove his state of mind. The relevance of the email turns on whether the plaintiff's version or the defendant's version is accepted, and this falls squarely within the scope of Rule 104(b). The relevance of the email depends on the existence of a disputed fact—authorship of the email. Who decides between the competing versions? If the case is tried before a jury, it is the jury, not the judge, who must resolve the dispute.[7] The judge's role under Rule 104(a) is to evaluate whether a reasonable jury *could* find (more likely than not) either that the supervisor did, or did not, author the email. If either version is plausible, then the judge conditionally admits the email, but at the time it is introduced instructs the jury that if they find that the plaintiff has shown that the supervisor more likely than not authored the email, they may consider it as evidence and give it the weight that they feel it is entitled to. Contrastingly, if they find that the defendant has persuaded them that, more likely than not, he did not author the email, they must disregard it entirely, and give it no weight in their deliberations. The final decision about whether the email has been admitted (and can be considered by the jury) or excluded (and disregarded by the jury) must await the jury's deliberation on the merits of the case. The judge makes a preliminary assessment of whether the evidence is one-sided or two, and if the latter, submits it to the jury for

[7] Fed. R. Evid. 104(b) (1972) Advisory Note ("If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.").

their decision. The issue of conditional relevance generated by disputed facts regarding the authenticity (and hence, relevance) of evidence is especially prevalent with digital evidence.

It is important for judges to distinguish between which of the scenarios listed above is presented to them when ruling on admissibility of digital evidence. For scenario one situations, the judge alone decides whether the proponent has laid a proper foundation to authenticate the digital evidence. Most often, the judge will consider whether one or more of the illustrations of how to authenticate found at Fed. R. Evid. 901(b)[8] or 902[9] has been shown.

For scenario two situations, the judge alone makes the decision whether to admit or exclude. In doing so, he must be careful not to let unparticularized and conclusory argument by the party objecting to the introduction of the digital evidence about what "might" or "could have happened" lead him to impose on the proponent of the evidence a burden of proof greater than that ordinarily required by Rule 104(a)—a showing that the evidence more likely than not is what it purports to be. It is a mistake for a judge to require the party introducing digital evidence to prove that no one other than the purported maker could have created the evidence if the introducing party has shown that, more likely than not, it was created by a particular person, unless there is evidence (not argument) that some other person could have done so.[10] Finally, for scenario three situations, where the judge is faced with competing facts plausibly showing that the digital evidence was, and was not, created by the person claimed by the proponent, then she should allow the evidence to be admitted "conditionally" under Rule 104(b), and instruct the jury that if they find that the evidence that the person claimed to have created the evidence did not do so is more believable than the evidence that he did, they must disregard it and give it no weight in their deliberations.

Careful attention to the interplay between Rule 104(a) and 104(b), as well as consideration of the abundant authentication tools identified in Rules 901(b) and 902, will go a

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[8] For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person's voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence describing a process or system of showing that it produces an accurate result).

[9] Fed. R. Evid. 902 provides examples of self-authentication, where no extrinsic evidence or testimony is needed to authenticate. The following self-authentication rules may be helpful for digital evidence; 902(5) (A book, pamphlet, or other publication purporting to be issued by a public authority. Most public authorities have web sites and post publications relating to their fields of jurisdiction.); 902(6) (Printed material purporting to be a newspaper or periodical. Most newspapers and periodicals have "on line editions", and this rule potentially is available to self-authenticate.); 902(11) and (12) (certified copy of domestic and foreign records of regularly conducted activities); proposed Rule 902(13) (certified copy of machine-generated information); and proposed Rule 902(14) (certified copy of computer generated or stored information).

[10] Grimm, et al, *Authentication of Social Media Evidence*, 36 American Journal of Trial Advocacy 433, 459 (2013) ("A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it 'might' have been created.").

long way towards removing the mystery about authenticating digital evidence, even when the technology at play is unfamiliar to the judge. In the end, technical expertise is not needed. Rather, an awareness of the fundamental evidence rules governing admissibility and authentication of any evidence, whether digital or not, is all that is needed. And this Manual aims to provide illustrations to make the effort even easier.

III. Relevant Factors for Authenticating Digital Evidence

What follows are general guidelines and lists of relevant factors for authenticating the basic forms of digital evidence that have developed over the last 20 years. The lists of relevant factors do not purport to be exclusive. There is no attempt to weigh the factors, or to take a cumulative approach, as the importance of any factor will be case-dependent. And there is no intent to imply that all of the factors listed must be met before the proffered digital evidence can be found authentic.

In evaluating all the factors below, it is important to remember that the threshold for the court's determination of authenticity under Rule 901 is not high: "the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." [11] The possibility of alteration "does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more that it can be the rationale for excluding paper documents."[12]

Generally speaking, it will be a rare case in which an item of digital evidence *cannot* be authenticated. The question is whether the proponent is willing and able to expend the resources necessary to do so.[13] The factors set forth below are intended to direct litigants to ways in which resources can be usefully spent on authenticating digital evidence --- and on ways to avoid such costs in certain situations.

[11] United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

[12] *Id.* at 40.

[13] *See* Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age,* 108 Nw. U. L.Rev. 1137, 1157 (2014) ("Although much is made of [the authentication] hurdle in the Information Age, it is * * * an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.")

A. Emails

The authentication questions for email most commonly focus on whether the email was sent or received by the person whom the party claims sent or received it. There are a number of factors that will assist the proponent in establishing authenticity for either or both of these purposes. Among them are:

1. A witness with personal knowledge may testify to authenticity.[14] Possibilities include:

● The author of the email in question testifies to its authenticity.[15]

● A witness testifies that s/he saw the email in question being authored/received by the by the person who the proponent claims authored/received it.[16]

2. Business Records. The custodian of records of a regularly conducted activity testifies to a foundation, or certifies, in accordance with Fed. R. Evid. 902(11) or (12), that an email satisfies the criteria of Fed. R. Evid. 803(6). It should be noted, however, that emails --- even of a business, do not automatically qualify as business records.[17]

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[14] See Fed. R.Evid. 901(b)(1).

[15] See, e.g., Anderson v. United States, 2014 U.S. Dist. LEXIS 166799, at *13 (N.D. Ga. Dec, 2, 2014) (defendant-witness acknowledged that the documents in question contained emails he sent to an undercover agent, the emails were sent from his email address, and the document contained the entirety of his email exchange with the undercover agent; this was a sufficient showing of authenticity). See also Citizens Bank & Trust v. LPS Nat'l Flood, LLC, 2014 U.S. Dist. LEXIS 134933, at *12 (N.D. Ala. Sept. 25, 2014) (witness's personal knowledge of email contents and her affidavit authenticating emails as the ones she sent sufficient for admissibility).

[16] United States v. Fluker, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)).

[17] See, e.g., United States v. Cone, 714 F.3d 197, 220 (4th Cir. 2013):

> While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then ergo all those e-mails are business records falling within the ambit of Rule 803(6)(B). "An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." Morisseau v. DLA Piper, 532 F. Supp. 2d 595, 621 n. 163 (S.D.N.Y. 2008).

It is probably fair to state that emails and social media postings will often be prepared too casually and irregularly to be admissible as business records. But this is not inevitably so, and again if the electronic communication does fit the admissibility requirements it is just as admissible as a hardcopy record.

3. Jury comparison with other authenticated emails.[18] The authenticity of an email can be determined by the trier of fact by comparing the email in question with emails already authenticated and in evidence. [19]

4. Production in discovery. If a document request is sufficiently descriptive, production in response to that request may serve in itself to authenticate the email, as the act of production may be a concession that the document is what the party asked for --- and thus is what the party says it is. The act of production can constitute a statement of a party-opponent and consequently admissible evidence of authenticity. See Fed.R.Evid. 801(d)(2).[20] Authentication has also been found when an adversary produces in discovery a third party's email received by the producing party in the ordinary course of business, and the email is offered against the adversary.[21]

5. Circumstantial Evidence.[22]

Applying Rule 901(b)(4) --- covering authentication on the basis of "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item" --- requires consideration of the "totality of circumstantial evidence."[23] While any one factor *may* be insufficient to determine admissibility, when weighed together, authenticity may be established. "This rule is one of the most frequently used to authenticate e-mail and other electronic records."[24]

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[18] Fed.R.Evid. 901(b)(3).

[19] United States v. Safavian, 435 F. Supp. 2d 36, 40 (D.D.C. 2006)("Those emails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that evidence may be authenticated by the trier of fact with 'specimens which have been authenticated'—in this case those emails that have been independently authenticated.").

[20] See, e.g., AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc., 2014 U.S. Dist. LEXIS 174535 (D. Conn. Dec. 18, 2014) (collecting cases holding that production of emails in discovery constitutes a concession of authenticity); Nola Fine Art, Inc. v. Ducks Unlimited, Inc., 2015 U.S. Dist. LEXIS 17450 (E.D. La. Feb. 12, 2015) ("[Defendant] produced the email to plaintiffs in discovery and therefore cannot seriously dispute the email's authenticity").

[21] Broadspring, Inc. v. Congoo, LLC, 2014 U.S. Dist. LEXIS 177838 (S.D.N.Y. Dec. 29, 2014) (third party emails sent to a party in the ordinary course of business and produced by the party in litigation are sufficiently authenticated by the act of production when offered by an opponent, but hearsay and other admissibility objections as to the third parties' statements must separately be satisfied).

[22] Fed.R.Evid. 901(b)(4).

[23] United States v. Henry, 164 F.3d 1304, 1305 (10th Cir. 1999).

[24] Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 546 (D. Md. 2007).

Set forth below are factors that can, alone or in conjunction (depending on the case), establish authenticity. Different circumstantial factors may be relevant depend on whether the authenticity dispute is over whether a person sent or received the email.

a. Authenticating Authorship Circumstantially

The inclusion of some or all of the following in an email can be sufficient to authenticate the email as having been sent by a particular person:

- the purported author's known email address;[25]
- the author's electronic signature;
- the author's name;[26]
- the author's nickname; [27]
- the author's screen name;
- the author's initials;
- the author's moniker;[28]
- the author's customary use of emoji or emoticons;
- the author's use of the same email address elsewhere;
- a writing style similar or identical to the purported author's manner of writing;
- reference to facts only the purported author or a small subset of individuals including

[25] See. e.g, United States v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000) (an email identified as originating from the defendant's email address and that automatically included the defendant's address when the reply function was selected was considered sufficiently authenticated).

[26] See, e.g., United States v. Fluker, 698 F.3d 988, 999–1000 (7th Cir. 2012) (emails sent from a "More Than Enough, LLC" (MTE) email address were sufficiently authenticated when the purported author was an MTE board member and "[i]t would be reasonable for one to assume that an MTE Board member would possess an email address bearing the MTE acronym."); *Safavian*, 435 F. Supp. 2d at 40 (email messages held properly authenticated when containing distinctive characteristics, including email addresses and name of the person connected to the address).

[27] United States v. Brinson, 772 F.3d 1314 (10th Cir. 2014) (use of fake name commonly used by defendant).

[28] See United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998) (chatroom log where user "Stavron" identified himself as the defendant and shared his email address was used to authenticate subsequent emails from that email address).

the purported author would know;[29]

● reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of the author or items of importance to the author (e.g., car, pet); the author's personal information, such as a cell phone number, social security number, etc.[30]

Factors outside the content of the email itself can establish authenticity of authorship circumstantially. For example:

● a witness testifies that the author told him to expect an email prior to its arrival;[31]

●the purported author acts in accordance with, and in response to, an email exchange with the witness;

● the author orally repeats the contents soon after the email is sent;

● the author discusses the contents of the email with a third party;

● the author leaves a voicemail with substantially the same content.

Forensic information may be used to support a circumstantial showing that the email was sent by the purported author. Forensic sources include:

● an email's hash values;[32]

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[29] See United States v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000) (messages that referred to facts only the defendant was familiar with were ruled admissible).

[30] Commonwealth v. Amaral, 78 Mass. App. Ct. 671, 674–675, 941 N.E.2d 1143, 1147 (2011) ("In other e-mails, Jeremy provided his telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same") (citing Mass. G. Evid. § 901(b)(6)).

[31] State v. Ruiz, 2014 Mich. App. LEXIS 855 (Mich. Ct. App. May 15, 2014) (interpreting MRE 901) (witness testified to knowing the defendant authored an email because the defendant told him to expect an email relating to arson—the contents of the email subsequently received).

[32] A hash value is "[a] unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set. The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion. 'Hashing' is used to guarantee the authenticity of an original data set and can be used as a digital equivalent of the Bates stamp

● testimony from a forensic witness that an email issued from a particular device at a particular time.[33]

b. Authenticating Receipt Circumstantially

The following factors can be probative in authenticating an email as having been received by a particular person:

●a reply to the email was received by the sender from the email address of the purported recipient;

●the subsequent conduct of the recipient reflects his or her knowledge of the contents of the sent email;

●subsequent communications from the recipient reflects his or her knowledge of the contents of the sent email;

●the email was received and accessed on a device in the possession and control of the alleged recipient.

Finally, while it is true that an email may be sent by anyone who, with a password, gains access to another's email account, similar questions (of possible hacking) could be raised with traditional documents. Therefore, there is no need for separate rules of authenticity for emails. And importantly, the mere fact that hacking, etc., is possible is not enough to exclude an email or any other form of digital evidence. If the mere possibility of electronic alteration were enough to exclude the evidence, then no digital evidence could ever be authenticated.[34]

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used in paper document production." Federal Judicial Center, Managing Discovery of Electronic Information: A Pocket Guide for Judges, Federal Judicial Center, 2007 at 24. See also Lorraine v. Markel American Ins. Co, 241 F.R.D. 534, 547 (D. Md. 2007) (noting that "[h]ash values can be inserted into original electronic documents when they are created to provide them with distinctive characteristics that will permit their authentication under Rule 901(b)(4).").

[33] *Lorraine,* 241 F.R.D. 534 at 547–48 (because an electronic message's metadata (including an email's metadata) can reveal when, where, and by whom the message was authored, the court found it could be used to successfully authenticate a document under 901(b)(4)).

[34] See, e.g., Interest of F.P., 878 A.2d 91 (Pa. Super. 2005) (just as an email can be faked, a "signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa. R.E. 901 and Pennsylvania case law.").

B. Text Messages

Text messages are not different in kind from email and so the rules and guidelines on authentication are similar. Here are some of the relevant factors for authenticating text messages:[35]

1. A witness with personal knowledge may testify to authenticity. Possibilities include:

● The author of the text in question testifies to its authenticity.

● A witness testifies that s/he saw the text in question being authored/received by the person who the proponent claims authored/received it.[36]

2. Jury comparison with other authenticated texts.

3. Production in discovery.

4. Establishing that an electronic system of recordation records accurately. This process of illustration, authorized by Fed.R.Evid. 901(b)(9), can be useful if the objection to authenticity is that the original text has been altered in some way. For example, in *United States v. Kilpatrick*, 2012 U.S. Dist. LEXIS 110166 (E.D. Mich. Aug. 7, 2012), the government sought to authenticate text messages sent from two SkyTel pages, each belonging to one of the defendants respectively. A SkyTel records-custodian verified that the text messages the government offered had not been and could not be edited in any way because when the messages are sent from the devices belonging to the defendants, they are automatically saved on SkyTel's server with no capacity for editing. The court ruled that this showing was sufficient, under Fed. R. Evid. 901(b)(9), to establish authenticity over a claim that the messages had been altered.

It should be noted that the showing as to the process or system in *Kilpatrick* will be able to be made by a certificate of the foundation witness --- substituting for live testimony --- under an amendment to the Evidence Rules that is scheduled to take effect on December 1, 2017.[37]

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[35] The case law cited under the various factors discussed in the section on emails should be equally useful as supportive citations for the similar (or identical) factors supporting authentication of texts.

[36] United States v. Barnes, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating: "[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence").

[37] The proposed amendments would add two new subdivisions to Rule 902, which provides for various forms of self-authentication. The proposals read as follows:

5. Circumstantial evidence.

a. Authenticating Authorship Circumstantially

The inclusion of some or all of the following in a text can be sufficient to authenticate the text as having been sent by a particular person:

- the purported author's ownership of the phone or other device from which the text was sent;[38]
- the author's possession of the phone;
- the author's known phone number;
- the author's name;
- the author's nickname;[39]
- the author's initials;
- the author's moniker;
- the author's name as stored on the recipient's phone;

Rule 902. Evidence That Is Self-Authenticating
The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
* * *

> **(13)** ***Certified Records Generated by an Electronic Process or System*****.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).
>
> **(14)** ***Certified Data Copied from an Electronic Device, Storage Medium, or File*****.** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).
>
> It is the proposed Rule 902(13) that would allow proof by certification in a case like *Kilpatrick.*

[38] United States v. Mebrtatu, 543 F. App'x 137, 140–141 (3d Cir. 2013) (phone was in the purported sender's possession; phone contains texts sent to and signed with the purported author's first name, including texts from her boyfriend professing love and other texts whose content links them to her; texts sufficiently authenticated as hers).

[39] United States v. Kilpatrick, 2012 U.S. Dist. LEXIS 110166, at *11 (E.D. Mich. Aug. 7, 2012)(the court outlined a number of distinctive characteristics that established the authenticity of the pager and cellphone text messages at issue; among these factors were the defendants' use of their names (Kilpatrick) and nicknames ("Zeke" or "Zizwe") to sign the messages they sent).

● the author's customary use of emoji or emoticons;

● the author's use of the same phone number on other occasions;

● a writing style similar or identical to the purported author's manner of writing;

● reference to facts only the purported author or a small subset of individuals including the purported author would know;

● reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of author or items of importance to author (e.g., car, pet); author's personal information, such as contact information, social security number, etc.; receipt of messages addressed to the author by name or reference.[40]

Factors outside the content of the text itself can establish authenticity of authorship circumstantially. For example:

● a witness testifies that the author told him to expect a text message prior to its arrival;

● the purported author acts in accordance with a text exchange;

● the purported author orally repeats the contents soon after the text message is sent or discusses the contents with a third party.

b. Authenticating Receipt Circumstantially

The following factors can be probative in authenticating a text as having been received by a particular person:

[40] United States v. Benford, 2015 U.S. Dist. LEXIS 17046, at *16–*17 (W.D. Okla. Feb. 12, 2015) (in establishing that text messages from a device were authored by the defendant, the prosecution pointed to evidence that contact information for the defendant's brother and girlfriend were saved on the phone and that incoming messages addressed the defendant by name); United States v. Ellis, 2013 U.S. Dist. LEXIS 73031, at *3–*4 (E.D. Mich. May 23, 2013) (the defendant's possession of a cellphone that received messages addressed to him by name or moniker was, among other circumstantial evidence (such as his possession of the device), sufficient to establish that he was the author of outgoing text messages from the same phone).

● a reply to the text message was received by the sender from the purported recipient's phone number;

●the subsequent conduct of the recipient reflects his or her knowledge of the sent message's contents;

●subsequent communications from the recipient reflect his or her knowledge of the contents of the sent text message;

●the text message was received and accessed on a device in the possession and control of the alleged recipient.

C. Chatroom and Other Social Media Conversations

By definition, chatroom postings and other social media communications are made by third parties, not the owner of the site. Further, chatroom participants usually use screen names (pseudonyms) rather than their real names. Thus the authenticity challenge is to provide enough information for a juror to believe that the chatroom entry or other social media communication is made by a particular person.

Simply to show that a posting appears on a particular user's webpage is insufficient to authenticate the post as one written by the account holder. Third party posts, too, must be authenticated by more than the names of the purported authors reflected on the posts. Evidence sufficient to attribute a social media or chat room posting to a particular individual may include, for example:

- testimony from a witness who identifies the social media account as that of the alleged author, on the basis that the witness on other occasions communicated with the account holder;

- testimony from a participant in the conversation based on firsthand knowledge that the transcript fairly and accurately captures the conversation;[41]

- evidence that the purported author used the same screen name on other occasions;

- evidence that the purported author acted in accordance with the posting (*e.g.*, when a meeting with that person was arranged in a chat room conversation, he or she attended);

- evidence that the purported author identified himself or herself as the individual using the screen name;

- an admission that the computer account containing the chat is that of the purported author;[42]

- use in the conversation of the customary signature, nickname, or emoticon associated with the purported author;

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[41] See, e.g., United States v. Lebowitz, 676 F.3d 1000 (11th Cir. 2012) (internet chat authenticated by credible testimony of one participant); United States v. Lundy, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); United States v. Barlow, 568 F.3d 215, 220 (5th Cir. 2009) ("English, as the other participant in the year-long 'relationship,' had direct knowledge of the chats. Her testimony could sufficiently authenticate the chat log presented at trial").

[42] United States v. Manley, 787 F.3d 937, 942 (8th Cir. 2014) ("the government presented testimony of a law enforcement officer who helped to execute the search warrant, and the officer testified that the defendant admitted adopting the username 'mem659' for his computer account. The username for his computer account was the same one used in some of the chats.").

● disclosure in the conversation of particularized information that is either unique to the purported author or known only to a small group including the purported author;

● evidence that the purported author had in his or her possession information given to the person using the screen name;

● evidence from the hard drive of the purported author's computer reflecting that a user of the computer used the screen name in question;

● evidence that the chat appears on the computer or other device of the account owner and purported author;

● evidence that the purported author elsewhere discussed the same subject matter;

D. Internet, Websites, etc.

Websites present authenticity issues because they are dynamic. If the issue is what is on the website at the time the evidence is being proffered, then there are no authenticity issues because the court and the parties can simply access the site and see what the website says.[43] But proving up historic information on the website raises the issue of whether the information was actually posted as the proponent says it was.[44]

1. Rule 901 authentication standards as applied to dynamic website information.

In applying Rule 901 authentication standards to website evidence, there are three questions that must be answered:

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

A sufficient showing of authenticity of dynamic website information is usually found if a a witness testifies—or certifies in compliance with a statute or rule—that:

- the witness typed in the Internet address reflected on the exhibit on the date and at the time stated;
- the witness logged onto the website and reviewed its contents; and
- the exhibit fairly and accurately reflects what the witness perceived.[45]

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[43] Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U.L.Rev. 1137, 1157 (2014) ("It is hard to imagine many good faith disputes about whether proffered evidence really is a page from Google Maps or WebMD. Malfeasance would be foolish. The opposing party can simply go to the website to verify its authenticity, and if fraud is detected, the consequences for the offering party are dire."). See also Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC, 2015 U.S. Dist. LEXIS 115610, at*21-22 (S.D.N.Y. Aug. 31, 2015) (confirming that authenticity of existing website information could be determined by conducting a "basic Internet search.").

[44] See, e.g., Adobe Sys. v. Christenson, 2011 U.S. Dist. LEXIS 16977, at *29 (D. Nev. Feb. 7, 2011) ("[a]lthough Defendants can probably determine, with little difficulty, whether a current Google search for the search terms 'software surplus' provides links on the first page [of a website], this would not prove that such a search would have resulted in such a link at a prior point in time.").

[45] See, e.g., Estate of Konell v. Allied Prop. & Cas. Ins. Co., 2014 U.S. Dist. LEXIS 10183 (D. Or. Jan. 28, 2014) ("To authenticate a printout of a web page, the proponent must offer evidence that: (1) the printout accurately

The exhibit should bear the Internet address and the date and time the webpage was accessed and the contents downloaded.[46]

When evaluating the proffer, the court may consider the following factors as circumstantial indications that the information was posted by the owner of the site, under Rule 901(b)(4):

● distinctive website design, logos, photos, or other images associated with the website or its owner;[47]

● the contents of the webpage are of a type ordinarily posted on that website or websites of similar people or entities;

● the owner of the website has elsewhere published the same contents, in whole or in part;

● the contents of the webpage have been republished elsewhere and attributed to the website; and

● the length of time the contents were posted on the website.

Other possible means of authenticating website postings are as follows:

● testimony of a witness who created or is in charge of maintaining the website. That witness may testify on the basis of personal knowledge that the printout of a webpage came from the site.[48]

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reflects the computer image of the web page as of a specified date; (2) the website where the posting appears is owned or controlled by a particular person or entity; and (3) the authorship of the web posting is reasonably attributable to that person or entity"); *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 2009 U.S. Dist. LEXIS 17530 (M.D.N.C. Mar. 6, 2009) ("[defendant] could authenticate its printouts of various websites by calling witnesses who could testify that they viewed and printed the information, or supervised others in doing so, and that the printouts were accurate representations of what was displayed on the listed website on the listed day and time"); *Rivera v. Inc. Village of Farmingdale*, 29 F. Supp. 3d 121 (E.D.N.Y. 2013) (internet postings offered to show community bias in Fair Housing Act case; testimony that witness "personally downloaded all of the postings and confirmed the identities of the key posters ... [suffices to show] a 'reasonable likelihood' that they were actually posted on the internet by members of an online community comprised of the Village's own residents").

[46] See, e.g., Foreword Magazine, Inc. v. OverDrive Inc., 2011 U.S. Dist. LEXIS 125373, at *8–*11 (W.D. Mich. Oct. 31, 2011) (admitting screenshots from websites, accompanied only by the sworn affidavit of an attorney, given "other indicia of reliability (such as the Internet domain address and the date of printout)").

[47] See, e.g., Metcalf v. Blue Cross Blue Shield of Mich., 2013 U.S. Dist. LEXIS 109641 (D. Or. Aug. 5, 2013). (authenticity of website information of an organization's purported website was established by logos or headers matching those of the organization).

● a printout obtained from the Internet Archive's "wayback machine." The Internet Archive documents and stores all websites and the "wayback machine" can retrieve website information from any particular time.[49] Some courts require a witness from the Internet archive to testify to establish that the "wayback machine" employs a process that produces accurate results under Rule 901(b)(9).[50] Other courts, as discussed infra, take judicial notice of the reliability of the "wayback machine."

The opponent of the evidence is free to challenge authenticity of dynamic website data by adducing facts showing that the exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the ostensible owner of the site. There may be legitimate questions concerning the ownership of the site or attribution of statements contained on the site to the ostensible owner.

2. Self-Authenticating Website Data

Under Fed. R. Evid. 902, three types of webpage exhibits are self-authenticating --- meaning that a presentation of the item itself is sufficient to withstand an authenticity objection from the opponent.

a. Government Websites

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[48] St. Luke's Cataract & Laser Inst., P.A. v. Sanderson, 2006 U.S. Dist. LEXIS 28873 (M.D. Fla. May 12, 2006) (web master's testimony can authenticate a printout).

[49] Another example of a website that allows users to access archival copies of webpages is www.cachedpages.org, which allows users to employ one interface to search three different archival services—the Wayback Machine, Google Cache, and Coral Cache.

[50] See, e.g., Telewizja Polska USA, Inc. v. Echostar Satellite Corp., No. 02 C 3293, 2004 WL 2367740, at 6* (N.D. Ill. Oct. 15, 2004) (approving the use of the Internet Archive's "wayback machine" to authenticate websites as they appeared on various dates relevant to the litigation). Compare Open Text S.A. v. Box, Inc., 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (court was unwilling to accept a screenshot from the wayback machine into evidence without testimony from a representative of the Internet Archive confirming its authenticity).

Under a proposed amendment to the Federal Rules of Evidence, the reliability of the wayback machine process could be established by a certificate of the Internet Archive official, rather than in-court testimony). See Proposed Rule 902(13) (allowing proof of authenticity of electronic information produced by a process leading to an accurate result to be established by the certificate of a knowledgeable witness). That proposed amendment is scheduled to become effective on December 1, 2017.

Under Rule 902(5) data on governmental websites are self-authenticating.[51] As discussed below, courts regularly take judicial notice of these websites.

b. Newspaper & Periodical Websites

Under Rule 902(6) (*Newspapers and Periodicals*), "[p]rinted material purporting to be a newspaper or periodical" is self-authenticating. This includes online newspaper and periodicals, because Rule 101(b)(6) provides that any reference in the Rules to printed material also includes comparable information in electronic form. Thus all newspaper and periodical material is self-authenticating whether or not it ever appeared in hard copy.[52]

c. Websites Certified as Business Records

Rules 902(11) and (12) render self-authenticating business (organizational) records that are certified as satisfying Rule 803(6) by "the custodian or another qualified person." Exhibits extracted from websites that are maintained by, for, and in the ordinary course of, a business or other regularly conducted activity can satisfy this rule.[53]

3. Authenticating the date of information posted on a website.

In some cases, a party may need to show not only that a posting was made on a website, but also the date on which the information was generated --- this can be a distinct question from establishing what the website looked like at a particular time, which can be shown by the methods discussed above. Assume, for example, that a video is posted on YouTube on January 1, 2016. If the proponent wants to prove that it was posted on that day, this can be done by a person with knowledge, circumstantial evidence, etc. It is a different question if the proponent needs to show that the information itself was *generated* on a certain day. That will not be shown by proving it was posted on a certain date. For example, in *Sublime v. Sublime Remembered*, 2013 U.S. Dist. LEXIS 103813 (C.D. Cal. July 22, 2013), the plaintiffs brought suit against the defendant for violating a court order prohibiting defendant from performing songs belonging to the plaintiffs. As evidence, the plaintiffs sought to admit a YouTube video of the defendant

[51] See, e.g., Williams v. Long, 585 F. Supp.2d 679, 686–88 & n. 4 (D. Md. 2008) (collecting cases indicating that postings on government websites are self-authenticating).

[52] See, e.g., White v. City of Birmingham, 2015 U.S. Dist. LEXIS 39187 (N.D. Ala. Mar. 27, 2015) (noting sua sponte that news articles from Huntsville Times website (AL.com) "could be found self-authenticating at trial").

[53] See, e.g., United States v. Hassan, 742 F.3d 104, 132–134 (4th Cir. 2014) (Facebook posts, including YouTube videos were self-authenticating under Rule 902(11) where accompanied by certificates from Facebook and Google custodians "verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities"); Randazza v. Cox, 2014 U.S. Dist. LEXIS 49762 (D. Nev. April 10, 2014) (videos posted to YouTube "are self-authenticating as a certified domestic record of a regular conducted activity if their proponent satisfies the requirements of the business-records hearsay exception.").

performing the prohibited music. The court ruled that the video was not properly authenticated without evidence that it was recorded *after* the court order was issued. The mere fact that it was *posted* after the court order was issued was not enough to establish that the video was what the proponent said it was --- performance of the music after the court order was entered.

Establishing that a video (or any other kind of information posted on a website) was *prepared* on --- or before or after --- a certain date thus presents a separate question of authenticity. But it is a question that can be addressed through the same factors discussed above: for example, by a person with personal knowledge, a forensic expert, and/or circumstantial evidence. Illustrative is *United States v. Bloomfield*, 591 Fed.Appx. 847, 848-49 (11th Cir. 2014), in which the defendant was convicted of felon-firearm possession. The government offered a YouTube video which showed the defendant discharging an AR-15 rifle in front of Fowler Firearms. The date that the video was made was obviously critical. If it was made before the defendant was a convicted felon, then it depicted no crime. The government was not required, necessarily, to prove that the video was taken on a specific day, but it was required to establish that the video was taken after the defendant was convicted of a felony. And the date that the video was posted on YouTube was not the relevant date. The court found the date was properly authenticated in the following passage:

> ● Fowler Firearms's manager testified that Broomfield was a Fowler Firearms member, that on January 21, 2011, Broomfield purchased two boxes of PMC .223 ammunition, and that he had not purchased that ammunition at any other time. Dezendorf stated that the only firearm Fowler Firearms rented to customers at the time that used PMC .223 ammunition was the AR–15 rifle.
>
> ● An employee who had worked at Fowler Firearms for ten years testified that he could discern the approximate date the video was taken. He explained that the video showed side deflectors and lights on the gun range, which Fowler Firearms had installed in late 2010 or early 2011. He also testified that Fowler Firearms paints its floors and walls at the beginning of the season, and the freshly-painted floor and walls seen in the video indicated that the footage was filmed close to the start of 2011.
>
> ● A witness who operated a maintenance business that provided repair and maintenance to Fowler Firearms testified that he installed the lighted baffles shown in the video, in late September or early October of 2010.

All this was more than enough to indicate that the video was taken around the beginning of 2011 --- post-dating the defendant's felony status --- and so depicted the crime of felon-firearm possession.

E. Social Media Postings

"Social media" is defined as "forms of electronic communications (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content."[54] Parties have increasingly sought to use social media evidence to their advantage at trial. A common example would be a picture or entry posted on a person's Facebook page, that could be relevant to contradict that person's testimony at trial. If the entry is challenged for authenticity, the proponent must present a prima facie case that the evidence is what the party says it is—e.g., that it is in fact a posting on the person's Facebook page. If the goal is to prove that the page or a post is that of a particular person, authenticity standards are not automatically satisfied by the fact that the post or the page is in that person's name, or that the person is pictured on the post.[55] That is because someone can create a Facebook or other social media page in someone else's name. Moreover, one person may also gain access to another's account.

What more must be done to establish authenticity of a social media page? Most courts have found that it is enough for the proponent to show that the pages and accounts can be tracked through internet protocol addresses associated with the person who purportedly made the post.[56]

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[54] Definition of Social Media, Merriam-Webster, http://www.merriam-webster.com/dictionary/social%20media# (last visited January 16, 2016).

[55] See, e.g., United States v. Vayner, 769 F.3d 125, 132 (2d Cir. 2014), where the court held that a page on the Russian version of Facebook was not sufficiently authenticated simply by the fact that it bore the name and picture of the purported "owner" Zhyltsou:

> It is uncontroverted that information about Zhyltsou appeared on the VK page: his name, photograph, and some details about his life consistent with Timku's testimony about him. But there was no evidence that Zhyltsou himself had created the page or was responsible for its contents. Had the government sought to introduce, for instance, a flyer found on the street that contained Zhyltsou's Skype address and was purportedly written or authorized by him, the district court surely would have required some evidence that the flyer did, in fact, emanate from Zhyltsou. Otherwise, how could the statements in the flyer be attributed to him?

Essentially the court in *Vayner* held that a Facebook page is not self-authenticating. Compare United States v. Encarnacion-LaFontaine, 2016 WL 611925 (2d Cir. Feb. 16, 2016)(threatening Facebook posts were properly authenticated where "the Government introduced evidence that (1) the Facebook accounts used to send the messages were accessed from IP addresses connected to computers near Encarnacion's apartment; (2) patterns of access to the accounts show that they were controlled by the same person; (3) in addition to the Goris threats, the accounts were used to send messages to other individuals connected to Encarnacion; (4) Encarnacion had a motive to make the threats, and (5) a limited number of people, including Encarnacion, had information that was contained in the messages.").

[56] United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) (the trial court did not abuse its discretion in admitting Facebook pages purportedly maintained by two of the defendants; the trial court properly determined that the prosecution had satisfied its burden under Rule 901(a) "by tracking the Facebook pages and Facebook accounts to Hassan's and Yaghi's email addresses via internet protocol addresses"); United States v. Brinson, 772 F.3d 1314 (10th Cir. 2014) (Facebook account linked to the defendant's email).

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Other factors that can be relied upon to support authentication of social media postings include the following:[57]

● testimony from the purported creator of the social network profile and related postings;

● testimony from persons who saw the purported creator establish or post to the page;

● testimony of a witness that she often communicated with the alleged creator of the page through that account;

● expert testimony concerning the results of a search of the social media account holder's computer hard drive;[58]

● testimony about the contextual clues and distinctive aspects in the messages themselves tending to reveal the identity of the purported author;

● testimony regarding the account holder's exclusive access to the originating computer and social media account;

● information from the social media network that links the page or post to the purported author;

● testimony directly from the social networking website that connects the establishment of the profile to the person who allegedly created it and also connects the posting sought to be introduced to the person who initiated it;

● expert testimony regarding how social network accounts are accessed and what methods are used to prevent unauthorized access;

● production pursuant to a document request;

● whether the purported author knows the password to the account, and how many others know it as well;

● that the page or post contains some of the factors previously discussed as circumstantial evidence of authenticity of texts, emails, etc., including:

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[57] See generally Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013); Richard Raysman and Peter Brown, Authentication of Social Media Evidence, New York Law Journal, November 11, 2011, p. 3.

[58] Honorable Paul W. Grimm, Authentication of Social Media Evidence, 36 AM. J. TRIAL ADVOC. 433, 468 (2013) ("A computer forensic expert can frequently authenticate the maker of social media content. Obviously, you will need to retain the proper expert and ensure that he or she has enough time and information to make the identification. Advance planning is essential, and be mindful of the potentially substantial cost.").

- ¾ nonpublic details of the purported author's life;
- ¾ other items known uniquely to the purported author or a small group including him or her;
- ¾ references or links to, or contact information about, loved ones, relatives, co-workers, others close to the purported author;
- ¾ photos and videos likely to be accessed by the purported author;
- ¾ biographical information, nicknames, not generally accessible;
- ¾ the structure or style of comments that are in the style of the purported author;
- ¾ that the purported author acts in accordance with the contents of the page or post.

Finally, a social media post meeting the foundational requirements of a business record under Fed. R. Evid. 803(6) may be self-authenticating under 902(11). While this may not be enough to authenticate the *identity* of the person posting, it will be enough to establish that the records were not altered in any way after they were posted.[59]

[59] See, e.g., United States v. Hassan, 742 F.3d 104, 134 (4th Cir. 2014):

> The government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities. According to those certifications, Facebook and Google create and retain such pages and videos when (or soon after) their users post them through use of the Facebook or Google servers.

III. Judicial Notice of Digital Evidence

This Best Practices Manual has discussed the many ways that new forms of digital evidence might be authenticated. Almost all of these methods require expenditure of resources. Courts and parties have begun to realize that some of this new digital evidence has reached the point of being an undisputed means of proving a fact. In these circumstances, judicial notice may be used to alleviate the expenditure of resources toward authentication.

Under Fed. R. Evid. 201(b) a court may judicially notice a fact if it is not subject to reasonable dispute. An example of a court taking judicial notice of a fact obtained through an electronic process is found in *United States v. Brooks,* 715 F.3d 1069, 1078 (8th Cir. 2013). The defendant in a bank robbery prosecution challenged the admissibility of GPS data that was obtained from a GPS tracker that the teller placed in the envelope of stolen money. The trial court took judicial notice of the accuracy and reliability of GPS technology. The court of appeals found no error:

> We cannot conclude that the district court abused its discretion in taking judicial notice of the accuracy and reliability of GPS technology. Commercial GPS units are widely available, and most modern cell phones have GPS tracking capabilities. Courts routinely rely on GPS technology to supervise individuals on probation or supervised release, and, in assessing the Fourth Amendment constraints associated with GPS tracking, courts generally have assumed the technology's accuracy.

Another common example of judicial notice of digital information is that courts take judicial notice of distances, locations, and the physical contours of an area by reference to Google Maps.[60]

What follows are some examples of judicial notice of digital information.

1. Government Websites. Judicial notice may be taken of postings on government websites,[61] including:

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[60] See, e.g., United States v. Burroughs, 810 F.3d 833, 835, n.1 (D.C.Cir. 2016) ("We grant the government's motion to take judicial notice of a Google Map. It is a 'source whose accuracy cannot be reasonably questioned,' at least for the purpose of identifying the area where Burroughs was arrested and the general layout of the block."); McCormack v. Hiedeman, 694 F.3d 1004, 1008 (9th Cir. 2012) (relying on Google Maps to determine the distance between two cities; the court held that Google Maps was a website whose accuracy could not reasonably be questioned under Fed. R. Evid. 201(b)(2).). See also Cline v. City of Mansfield, 745 F. Supp. 2d 773, 800 n.23 (N.D. Ohio 2010) (the court took judicial notice that the sun set at 7:47 pm on a particular date according to www.timeanddate.com).

[61] See, e.g., United States v. Head, 2013 U.S. Dist. LEXIS 151805, at *7 n.2 (E.D. Cal. Oct. 22, 2013) ("The court may take judicial notice of information posted on government websites as it can be 'accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'"); Puerto Rico v. Shell Oil Co. (In re MTBE Prods. Liab. Litig.), 2013 U.S. Dist. LEXIS 181837, at *16 (S.D.N.Y. 2013) ("Courts routinely take judicial

- Federal, state, and local court websites.[62]

- Federal, state, and local agency, department and other entities' websites.[63]

- Foreign government websites.[64]

- International organization websites.[65]

2. Non-Government Websites. Generally, courts are reluctant to take judicial notice of non-governmental websites because the Internet "is an open source" permitting anyone to "purchas[e] an internet address and create a website" and so the information recorded is subject to dispute.[66] A few websites, however, as discussed above, have become a part of daily life — their accuracy is both objectively verifiable and actually verified millions of times a day. Other websites are the online versions of sources that courts have taken judicial notice of for years, and the courts find little reason to distinguish a reputable web equivalent from a reputable hard copy edition.

Examples of Information Found Authentic on Non-Governmental Websites Through Judicial Notice.

- Internet maps (*e.g.*, Google Maps, MapQuest).

- Calendar information.[67]

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notice of data on government websites because it is presumed authentic and reliable").

[62] See, e.g., Feingold v. Graff, 516 F. App'x 223, 226 (3d Cir. 2013).

[63] See, e.g., Lawrence v. Fed. Home Loan Mortg. Corp., 2015 U.S. Dist. LEXIS 40012 (W.D. Tex. Mar. 30, 2015) (federal government's agreement with national bank as posted on government website); Flores v. City of Baldwin Park, 2015 U.S. Dist. LEXIS 22149 (C.D. Cal. Feb. 23, 2015) (municipal police department website).

[64] See, e.g., United States v. Broxmeyer, 699 F.3d 265, 296 (2d Cir. 2012) (websites of governments of Vietnam and Brazil).

[65] See, e.g., Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1367 (2013) (World Bank website).

[66] United States v. Kane, 2013 U.S. Dist. LEXIS 154248 (D. Nev. Oct. 28, 2013).

[67] See, e.g., Tyler v. United States, 2012 U.S. Dist. LEXIS 184007, at *9–*10 n.6 (N.D. Ga. Dec. 6, 2012); Local 282, Int'l Bhd. of Teamsters v. Pile Found. Constr. Co., 2011 U.S. Dist. LEXIS 86644, at *17–*18 n.5 (E.D.N.Y. Aug. 5, 2011).

- Newspaper and periodical articles.[68]

- Online versions of textbooks, dictionaries, rules, charters.[69]

Most non-Governmental websites, even if familiar, are of debatable authenticity and therefore not appropriately the object of judicial notice. Wikipedia is a prime example. Courts have declined requests to take judicial notice of the contents of Wikipedia entries,[70] except for the fact that the contents appear on the site as of a certain date of access.[71]

3. Wayback Machine. Archived versions of websites as displayed on the "wayback machine" (www.archive.org) are frequently the subject of judicial notice,[72] but this is not always the case.[73] Note that it is only the contents of the archived pages that may warrant judicial notice—the dates assigned to archived pages may not apply to images linked to them, and more generally, links on archived pages may direct to the live web if the object of the old link is no longer available.

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[68] See, e.g., Ford v. Artiga, 2013 U.S. Dist. LEXIS 106805, at *19 n.5 (E.D. Cal. July 30, 2013); HB v. Monroe Woodbury Cent. Sch. Dist., 2012 U.S. Dist. LEXIS 141252 (S.D.N.Y. Sept. 27, 2012).

[69] See, e.g., United States v. Mosley, 672 F.3d 586, 591 (8th Cir. 2012) (PHYSICIANS' DESK REFERENCE); Shuler v. Garrett, 2014 U.S. App. LEXIS 2772, at *7 (6th Cir. Feb. 14, 2014) (OXFORD ENGLISH DICTIONARY); Dealer Computer Servs. v. Monarch Ford, 2013 U.S. Dist. LEXIS 11237, at *11 & n.3 (E.D. Cal. Jan. 25, 2013) (American Arbitration Association rules); Morgan Stanley Smith Barney LLC v. Monaco, 2014 U.S. Dist. LEXIS 149419 (D. Colo. Aug. 26, 2014) (FINRA rules); Famous Music Corp. v. 716 Elmwood, Inc., 2007 U.S. Dist. LEXIS 96789, at *12–*13 n.7 (W.D.N.Y. Dec. 28, 2007) (Articles of Association of ASCAP).

[70] See, e.g., Blanks v. Cate, 2013 U.S. Dist. LEXIS 11233, at *8 n.4 (E.D. Cal Jan. 28, 2013) (refusing to take judicial notice of a Wikipedia entry "as such information is not sufficiently reliable"); Stein v. Bennett, 2013 U.S. Dist. LEXIS 126667, at *20-21 n.10 (M.D. Ala. Sept. 5, 2013) ("Wikipedia is not a source that warrants judicial notice"); Gonzales v. Unum Life Ins. Co. of Am., 861 F. Supp. 2d 1099, 1104 n.4 (S.D. Cal. 2012) ("The Court declines Plaintiff's request to take judicial notice of the Wikipedia definition of Parkinson's Disease because the internet is not typically a reliable source of information").

[71] See, e.g., McCrary v. Elations Co., LLC, 2014 U.S. Dist. LEXIS 8443, at *4-5 n.3 (C.D. Cal. Jan. 13, 2014) ("While the court may take judicial notice of the fact that the internet, Wikipedia, and journal articles are available to the public, it may not take judicial notice of the truth of the matters asserted therein").

[72] See, e.g., Under a Foot Plant Co. v. Exterior Design, Inc., 2015 U.S. Dist. LEXIS 38190 (D. Md. Mar. 25, 2015) ("District courts have routinely taken judicial notice of content from The Internet Archive").

[73] See, e.g., Open Text S.A. v. Box, Inc., 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (proffered Wayback Machine printouts not authenticated absent certification from representative of InternetArchive.org).

APPENDIX

Federal Rules of Evidence Most Commonly Used to Establish Authenticity of Digital Evidence

Rule 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

* * *

(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

* * *

(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

*** * ***

(11) ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a

criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Proposed Additions to Rule 902, Projected Effective Date December 1, 2017:

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) ***Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

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FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Fed. R. Evid. 801(d)
Date: April 1, 2016

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses --- the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions at the previous two meetings, and the presentations at the Symposium, have served to narrow the Committee's focus on any possible amendment that would expand admissibility of prior witness statements. Here is a synopsis of the Committee's prior determinations:

● While there is a good argument that prior inconsistent statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Most importantly there is a good reason to limit the admissibility of some prior witness statements, as discussed below. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

● The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule

801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

Accordingly, this memo will focus on possible amendments to Rule 801(d)(1)(A), in light of the arguments and concerns raised at the Symposium and in Committee discussions. The memo is divided into five parts:

Part One will provide general background on the relationship between prior witness statements and the hearsay rule --- material that has been provided in previous memos to the Committee.

Part Two will discuss the background of Rule 801(d)(1)(A) and Congress's limitation on the Advisory Committee's proposal that would have allowed all prior inconsistent statements to be admissible for their truth.

Part Three will discuss state law deviations from Federal Rule 801(d)(1)(A), with a special focus on the Wisconsin practice that was discussed at the Symposium.

Part Four discusses and addresses the concerns about greater substantive admissibility of prior inconsistent statements that were raised at the Symposium:

- How do you know the inconsistent statement was ever made?

- How do you cross-examine a witness who denies making the statement?

- In criminal cases, how do you handle the situation in which defense counsel impeaches with a prior inconsistent statement for the purpose of showing that neither the prior statement nor the in-court testimony is true?

- In civil cases, how do you prevent parties from filing affidavits with inconsistent statements solely to avoid summary judgment?

Part Five will provide two drafting alternatives for expanding substantive admissibility of prior inconsistent statements, along with proposed Committee Notes. The two alternatives are:

- Returning to the Advisory Committee's original proposal which provided for substantive admissibility of all prior inconsistent statements;

- Addressing concerns about whether the statement was ever made by providing substantive admissibility only for statements that have been recorded or acknowledged by the declarant.

I. Should Prior Statements of Testifying Witnesses Be Treated as Hearsay?

A. Arguments in Favor of Admitting Prior Statements of Witnesses as Substantive Evidence

Federal Rule of Evidence 801(c) defines hearsay as a statement that "the declarant does not make while testifying at the current trial or hearing."[1] Thus, a prior statement of a testifying witness, when offered for its truth, is hearsay. So when the witness says, "I told my cousin that I saw the defendant texting while driving and then he ran over the plaintiff," that is not admissible to prove the facts asserted in the statement to the cousin.[2]

Many scholars have argued that prior statements of testifying witnesses should not be classified as hearsay. The leading proponent for placing prior statements of testifying witnesses outside the hearsay rule was probably Professor Edmund Morgan. Morgan's basic argument is that the rule against hearsay stems from a concern that the out-of-court declarant's credibility cannot be assessed by the traditional methods of oath, cross-examination, and view of demeanor.[3] But when the declarant *is* the witness at trial, she *will* be under oath and subject to cross-examination and review of demeanor. Morgan makes this point in his famous article, *Hearsay Dangers and the Application of the Hearsay Concept*:

> When the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. . . . The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: "The declarant as a witness is now under oath and now purports to remember and narrate accurately. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part."[4]

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1. *Id*. 801(c)(1).

2. Of course, the witness could also testify to what he saw at the time of the accident, and that would not be hearsay. Under the Federal Rule, though, the witness's prior statement about the event is treated no differently than any other declarant's statement about the event. If it is offered for truth, it is hearsay.

One might ask why a party would want to admit a witness's prior statement about an event when the witness can simply testify about the event itself. The answer is that in many cases the in-court testimony of the event has a different evidentiary significance than the statement made earlier and closer in time to the event. Moreover, if the witness has now changed his story about the event, the prior (inconsistent) statement obviously has a different effect than the in-court testimony.

3. *See generally* Edmund Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

4. *Id*. at 192–94.

Morgan thus concedes, of course, that at the time the witness made the prior statement she was not subjected to cross-examination, oath, or a review of demeanor. But he argues that the existence of these protections at the time of trial should suffice. See also *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976) ("We agree with Judge Learned Hand's observation that when the jury decides the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court.").

But what if the witness denies having made any statement at all? That should not be a problem according to Morgan because the witness "will usually swear that he tried to tell the truth in anything that he may have said."[5] Thus, cross-examination on that averment will be sufficient to regulate any credibility questions as of the time the statement was made. If, on the other hand, the witness concedes that he made the statement but now swears that it was not true, the jury, viewing the testimony of the person who made both statements, is in a good position to assess which story represents the truth in light of all the facts. Morgan concludes:

> In any of these situations Proponent is not asking Trier to rely upon the credibility of anyone who is not present and subject to all the conditions imposed upon a witness. Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. Consequently there is no real reason for classifying the evidence as hearsay.[6]

Two further points can be made in support of exempting prior statements of witnesses from the hearsay rule. First, the prior statement is by definition closer in time to the event described and so is less likely to be impaired by faulty memory or a litigation motive.[7] Second, treating all prior statements of testifying witnesses as outside the hearsay rule would dispense with the need to give confusing limiting instructions as to those statements that would be admissible anyway for credibility purposes—for example, an instruction that "the prior inconsistent statement may not be considered as a proof of any fact, but only for its bearing on the credibility of the witness."[8] Indeed the interest in avoiding difficult-to-follow instructions

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5. *Id*
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6. *Id.*

7. *See Federal Rules of Evidence: Hearing on H.R. 5463 Before the S. Comm. on the Judiciary*, 93d Cong. 65 (1974) (statement of the Standing Comm. on Rules of Practice and Procedure and the Advisory Comm. on Rules of Evidence of the Judicial Conf. of the United States) ("The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play.").

8. *See* Morgan, *supra* note 3, at 193 ("Furthermore, it must be remembered that the trier of fact is often permitted to hear these prior statements to impeach or rehabilitate the declarant-witness. In such event, of course, the trier will be told that he must not treat the statement as evidence of the truth of the matter stated. But to what practical effect? . . . Do the judges deceive themselves or do they realize that they are indulging in a pious fraud?"); *see also* Steven DeBraccio, *That's (Not) What She Said: The Case for Expanding Admission of Prior Inconsistent Statements in New York Criminal Trials*, 78 ALB. L. REV. 269, 297 (2014) ("[I]t would be more

was the animating reason behind the 2014 amendment to Rule 801(d)(1)(B) that eliminated the distinction between substantive and rehabilitative uses for prior consistent statements.

B. Arguments in Favor of Treating Prior Statements of Witnesses as Hearsay

The classic argument for treating prior statements of witnesses as hearsay was set forth by Justice Stone of the Minnesota Supreme Court in *State v. Saporen*.[9] He contended that delayed cross-examination of a statement at trial is simply not the same as cross-examination at the time the statement is made:

> The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.[10]

The *Saporen* court's view of cross-examination at trial as "[striking] while the iron is hot" is surely overstated.[11] It is not as if an adversary's witness is speaking extemporaneously and off-the-cuff during direct testimony. Trial testimony is usually prepared in advance and elicited in a formal question-and-answer format. For the cross-examiner of a witness at trial, the iron is not truly hot. Put another way, the asserted gap in effectiveness between cross-examination about a prior statement and cross-examination of trial testimony is surely not as wide as the *Saporen* court suggests.

That said, there is certainly dispute in the profession about the comparative effectiveness of delayed cross-examination and cross-examination of trial testimony. At the Symposium, Professor Saltzburg made an argument that delayed cross-examination is particularly ineffective when the witness denies ever having made a statement. The question of effectiveness of cross-examination when a prior inconsistent statement is admitted will be addressed below.

Besides the alleged infirmity of delayed cross-examination, there are two other arguments that have been put forth in favor of treating prior statements of witnesses as hearsay. The first argument is that if prior inconsistent statements are substantively admissible, it would mean in criminal cases that a defendant could be convicted solely on the basis of prior inconsistent statements, rather than any in-court testimony. But that is a question of sufficiency of evidence, not admissibility. Professor Broun, in a previous memorandum to the Committee, found little or

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beneficial to our trial process to simply allow the jurors to consider the evidence as truth and avoid the never-ending discussion on the usefulness of limiting instructions.").

9. 285 N.W. 898 (Minn. 1939).

10. *Id.* at 901.

11. *Id.*

no evidence that prior inconsistent statements have been found sufficient to convict when they have been found substantively admissible.

The second argument in favor of excluding prior witness statements as hearsay focuses on prior *consistent* statements. If all prior statements could be admitted for their truth, there would be an incentive for parties to have their witnesses generate consistent statements before trial. Then the witness could be asked on direct examination about all the previous statements that he made—to his grandmother, to the church congregation, to the bus driver on the way to testify, et cetera. The focus would then be shifted, problematically, to the prior statements as opposed to the in-court testimony.[12] This concern about generating consistent statements --- along with the fact that the rule on consistent statements was recently amended --- has led the Committee to focus on inconsistent statements and Rule 801(d)(1)(A).

There is a third argument against admitting prior witness statements in criminal cases that can be dismissed: admitting a prior statement of a witness against a criminal defendant violates his right to confrontation. The Supreme Court has rejected that argument in at least three cases, finding that an opportunity to cross-examine the witness about his prior statement satisfies the Confrontation Clause.[13]

II. Prior Inconsistent Statements

A. The History of Federal Rule 801(d)(1)(A)

The common-law approach to prior inconsistent statements was that they were hearsay and were only admissible to impeach the declarant-witness. The original Advisory Committee thought that the common-law rule, distinguishing between impeachment and substantive use of prior inconsistent statements, was "troublesome."[14] It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements,

12. *See* State v. Saporen, 285 N.W. 898, 901 (Minn. 1939) (noting that the "practical reason" for treating prior witness statements as hearsay is that it would create temptation and opportunity to manufacture evidence).

13. *See* Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."); United States v. Owens, 484 U.S. 554 (1988) (finding no confrontation violation where witness was subject to cross-examination about his prior statement of identification, even though he had no memory about why he made the identification); California v. Green, 399 U.S. 149 (1970) (rejecting confrontation claim where the defendant had an opportunity to cross-examine a prosecution witness about the witness's prior statement).

14 Advisory Committee Note to Rule 801(d)(1)(A).

"[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter." And the Committee thought that it had "never been satisfactorily explained why cross-examination cannot be subsequently conducted with success." Moreover, "[t]he trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Finally, "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation."

For all these reasons, the Advisory Committee's proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee's Note to the proposal makes this clear: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence."

Congress, however, cut back on the Advisory Committee proposal. In the form ultimately adopted, Rule 801(d)(1)(A) states that only those prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" are admissible as substantive evidence. The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, "there can be no dispute as to whether the prior statement was made"; and 2) the requirements of oath and formality of proceeding "provide firm additional assurances of the reliability of the prior statement."

There are problems with the rationales for Congress's tightening of the hearsay exception for prior inconsistent statements. The first Congressional concern --- as to whether the statement was ever made --- is not a hearsay concern. Whether the statement was made (as distinguished from whether it is true) is a question ordinarily addressed by in-court regulators --- the in-court witness to the statement testifies and is cross-examined, or other admissible evidence is presented that the statement was or was not made, and this becomes a jury question.[15] Second, the requirements of oath and formality surely do add reliable circumstances, and thus these requirements do respond to a hearsay concern. But as the Advisory Committee noted, the oath "receives much less emphasis than cross-examination as a truth-telling device."

The end result of this Congressional intervention is to render the hearsay exception for prior inconsistent statements relatively useless. It goes without saying that the vast majority of prior inconsistent statements are not made under oath at a formal proceeding. Essentially the only function for Rule 801(d)(1)(A) is to protect the proponent (usually the government) from having its substantive case sapped by turncoat witnesses --- a matter discussed at the Hearsay Symposium. It can be argued that Congress's rationales for adding the oath and formality requirements are not strong enough to justify gutting the exception proposed by the Advisory

[15] Of course the inconsistent statement could be proven up through hearsay subject to an exception, such as a business or public record. The point is that concerns about whether the statement was ever made are not a reason, under the hearsay rule, to exclude the statement itself.

Committee. This is especially so because the limitation comes with significant negative consequences, including the following:

● excluding testimony as hearsay even though the declarant can be cross-examined;

● requiring a difficult-to-follow jury instruction, i.e., that the statement can be used only to impeach the witness but not for its truth;

● raising the possibility that parties will seek to evade the rule by calling witnesses to "impeach" them with prior inconsistent statements, with the hope that the jury will use the statements as proof of the matter asserted --- and thereby raising a problem for the courts in having to determine the motivation of the proponent for calling the witness (motivation that would be irrelevant if the prior statement were substantively admissible);[16] and

● raising the possibility that prior inconsistent statements not admissible for truth under Rule 801(d)(1)(A) will be found admissible for truth under the residual exception anyway.[17]

One further consequence of the Congressional limitation in criminal cases was discussed at the Hearsay Symposium: prosecutors have an incentive to bring "wobblers" into the grand jury in order to lock in their prior statement as substantive evidence if they renege at trial. On the one hand, this could be looked at as an inconvenient and cumbersome result --- having to call witnesses to the grand jury that would otherwise not be called. On the other hand, it could be looked at as a good if unintended consequence of the Congressional limitation. The limitation ends up providing more evidence to the grand jury, and also more disclosure of information to the defendant in advance of trial.

[16] *See, e.g., United States v. Ince*, 21 F.3d 576, 579 (4th Cir. 1994) (government's impeachment of its witness with a prior inconsistent statement was improper where "the only apparent purpose" for the impeachment "was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence). *Compare United States v. Kane*, 944 F.2d 1406 (7th Cir. 1991)(impeachment with a prior inconsistent statement was improper where the prosecution had no reason to think that the witness would be hostile or would create the need to impeach her). *See also People v. Fitzpatrick*, 40 N.Y.2d 44, 49-50, 386 N.Y.S.2d 28 (1976) (noting the concern that "the prosecution might misuse impeachment techniques to get before a jury material which could not otherwise be put in evidence because of its extrajudicial nature"; also noting that "a number of authorities have pointed out that the potential for prejudice in the out-of-court statements may be exaggerated in cases where the person making the statement is in court and available for cross-examination").

[17] *See, e.g., United States v. Valdez-Soto*, 31 F.3d 1467, 1470 (9th Cir. 1994) (finding a prior inconsistent statement not under oath to be properly admitted as substantive evidence under the residual exception, noting that "the degree of reliability necessary for admission is greatly reduced where, as here, the declarant is testifying and is available for cross-examination, thereby satisfying the central concern of the hearsay rule.").

III. State Variations on Rule 801(d)(1)(B)

In deciding whether to expand the substantive admissibility of prior inconsistent statements, there are reference points provided in the state rules of evidence. It is particularly notable that a large number of states have rejected the congressional limitation on substantive admissibility of prior inconsistent statements. The state deviation is far greater than that with respect to most of the other Federal Rules of Evidence.

A. Rejection of Congressional Limitation in Rule 801(d)(1)(B)

Many of the states did not adopt the congressional limitation on substantive admissibility of prior inconsistent statements. In the following states, prior inconsistent statements are admissible for their truth:

Alaska[18]
Arizona[19]
California[20]
Colorado[21]
Delaware[22]
Georgia[23]
Montana[24]
Nevada[25]
Rhode Island[26]
South Carolina[27]
Wisconsin[28]

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18. ALASKA R. EVID. 801(d)(1)(A).

19. ARIZ. R. EVID. 801(d)(1)(a).

20. CAL. EV. CODE § 1235.

21. COLO. R. EVID. 801(d)(1)(A).

22. DEL. R. EVID. 801(d)(1)(A).

23. GA. R. EVID. 801(d)(1)(A).

24. MONT. R. EVID. 801(d)(1)(A).

25. 4 NEV. STAT. § 51.035(2)(A).

26. R.I. R. EVID. 801(d)(1)(A).

27. S.C. R. EVID. 801(d)(1)(A).

28. WIS. R. EVID. 801(d)(1)(A).

At the Symposium, Professor Dan Blinka reported on Wisconsin's experience with its rule providing for substantive admissibility of all prior inconsistent statements. He noted that the rule has only rarely been the subject of appellate decisions, and that practitioners have had no problem adjusting to and applying the rule.[29]

B. Variations Short of Outright Rejection of the Congressional Limitation

Other states provide less onerous alternatives to the congressional restriction on substantive admissibility of prior inconsistent statements. For example, Arkansas requires prior oath at a formal proceeding for civil cases only.[30] And Connecticut addresses the concern about whether the statement was ever made with a narrower limitation. The exception covers:

> [a] prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape, or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.[31]

Requirements (B) and (C) in the Connecticut rule are surplusage because they are covered by other rules (authentication by Rule 901 and personal knowledge by Rule 602). But the Connecticut version does suggest a compromise approach that might be employed—which would expand substantive admissibility so long as there is assurance that the prior inconsistent statement was actually made. Again, whether it was made is not a hearsay problem; but a provision requiring that the statement be recorded, signed, et cetera should do much to satisfy those whose concern is about witnesses (such as police officers) cooking up prior inconsistent statements of other witnesses.

Hawaii similarly expands the exception beyond the congressional limitation, while still addressing concerns that the statement was never made. Besides statements under oath at a prior proceeding, Hawaii provides substantive admissibility for prior inconsistent statements when they are "reduced to writing and signed or otherwise adopted or approved by the declarant" and

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29 An example of the operation of the Wisconsin rule is seen in the Netflix documentary "Making a Murderer." Brandon Dassey confessed to police officers that he took part in a murder. He challenged his confession before the jury on the ground that the officers essentially tricked and browbeat him into making it. The confession was critical to the prosecution as there was no forensic evidence or eyewitness testimony tying Dassey to the murder. The government called Brandon's cousin Kayla. Previously she had stated that Brandon confessed to her. At trial she repudiated that statement, saying that Brandon had never confessed to her. Under the Wisconsin rule, her prior statement about Brandon's confession was admitted as substantive evidence, and that was critical to the trial court's denial of a directed verdict.

30. ARK. R. EVID. 801(d)(1)(i).

31. CONN. CODE EVID. R. 8-5.

also when they are "recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement."[32]

Illinois, similar to Connecticut, addresses the concern that the statement was never made. Prior inconsistent statements are admissible substantively if properly recorded, but Illinois also includes as a ground for admissibility that "the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition."[33] Illinois thus adds an interesting addition—the statement does not need to be recorded if the declarant, when testifying, acknowledges making the prior statement. That is a completely justifiable proposition because there should be no doubt about the prior statement if the declarant actually acknowledges making it. (The draft of the amendment at the end of this memo contains such a provision).

Louisiana does not permit substantive use of prior inconsistent statements in a civil case.[34] Prior inconsistent statements are admissible substantively in a criminal case, "provided that the proponent has first fairly directed the witness'[s] attention to the statement and the witness has been given the opportunity to admit the fact and where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement."

Maryland has a provision similar to Connecticut, allowing substantive use of a prior inconsistent statement if there is assurance that it was actually made. Such statements are admissible if they have been "reduced to writing and . . . signed by the declarant" or "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement."[35]

New Jersey provides for substantive admissibility of all prior inconsistent statements of a witness called by an opposing party (somewhat like a party-opponent statement). However, if the witness is called by the proponent --- and so the inconsistent statement is offered against the opponent --- safeguards must be met. The proponent must show that the statement "(A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition."[36] The New Jersey structure recognizes a risk that the prior statement was never made, but allocates that risk to the party-opponent when that party calls a witness who has made a prior inconsistent statement that the adversary can use.

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32. HAWAII R. EVID. 802.1(1)(B)–(C).

33. ILL. R. EVID. 801(d)(1)(A).

34. LA. CODE EVID. 801(d)(1)(A).

35. MD. R. EVID. 5-802.1.

36. N.J. R. EVID. 803(a)(1).

North Dakota applies the congressional limitation in Rule 801(d)(1)(A) to criminal cases only.[37]

Pennsylvania, like Connecticut, expands beyond the congressional limitation but requires a showing that the prior inconsistent statement was actually made:

> (1) *Prior Inconsistent Statement of Declarant-Witness*. A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:
>
> (A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;
>
> (B) is a writing signed and adopted by the declarant; or
>
> (C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.[38]

Utah rejects the congressional limitation and also treats prior statements as not hearsay when the witness denies or has forgotten the statement. So there appears to be no concern at all in Utah about whether the prior inconsistent statement was ever made:

> (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:
>
> (A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten . . . .[39]

Wyoming applies the congressional limitation only in criminal cases.[40]

Reporter's Note concerning state law variations:

Assuming the Committee wishes to address the concern over whether a prior witness statement was ever made, it would appear from the state experience that substantive admissibility could be conditioned on the following:

- the statement was signed or adopted by the witness at the time it was made;
- the statement was electronically recorded or transcribed; or

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37. N.D. R. EVID. 801(d)(1)(A).

38. PA. R. EVID. 803.1.

39. UTAH R. EVID. 801(d).

40. WYO. R. EVID. 801(d)(1)(A).

● the witness acknowledges making the statement when testifying at trial.

The New Jersey version, which dispenses with these requirements when the witness is called by the party-opponent, is interesting but could end up getting pretty complicated. First, the party-opponent might call an adverse witness, as it is permitted to do under Rule 607; denying such a party any protection that the rule would otherwise provide on an "assume the risk" rationale might deter a party from calling a witness that they have the right to call under Rule 607. Moreover, it may be difficult to determine whether all or part of an inconsistent statement is actually adverse to the position of the party who called the witness. All in all, it is probably better to require the protections of the rule regardless of who calls the witness --- again assuming that any protection as to whether the statement was made is necessary in the first place.

IV. The Expressed Concerns About Expanding Substantive Admissibility of Prior Inconsistent Statements

A. Concerns About Whether the Prior Statement Was Ever Made

The classic hypothetical for this concern arises when the government calls a police officer who testifies (over the defendant's denial) that the defendant previously made a statement inconsistent with his in-court testimony denying guilt. As discussed above, concern over whether the statement was made was the principal reason for the limitation on substantive admissibility imposed by Congress.

There are several arguments that can be made in response to the concern about false testimony about a prior inconsistent statement:

● The most important response, as discussed above, is that the possibility of lying about a prior statement does not present a hearsay problem at all. If a witness lies and testifies that a prior inconsistent statement was made, that lie is made in court, under oath and subject to cross-examination, with a view of demeanor. It simply is misplaced to treat manufacture of in-court testimony as a hearsay problem or as a limit on a hearsay statement.

● Second, the risk that a witness might be making up a statement is not limited to prior inconsistent statements. It could apply to any oral statement admissible under a hearsay exception or as not hearsay. For example, a witness might testify that he heard a victim make an excited utterance, or a dying declaration. There is of course a risk that the witness might be making up the statement. But the system leaves that risk to be regulated by cross-examination of the witness testifying under oath. We do not respond to the concern by requiring excited utterances or statements to doctors or any other statement

admissible under a hearsay exception to be made under oath at a formal proceeding. We don't even impose such a requirement for a prior *consistent* statement, even though it may well be that the witness is lying about having made it. What's so different about the making (or not making) of prior inconsistent statements that requires regulation about whether the statement was ever made?

● Third, this Advisory Committee is on record for the proposition that the risk of a witness lying about a statement having been made is not to be regulated by the hearsay rule but rather by the rigors of cross-examination. The 2010 amendment to Rule 804(b)(3) specifically addressed the question whether a court, in evaluating the reliability statement under the declaration against interest exception, should consider if the in-court witness was lying about whether the statement was ever made. The Committee Note to the 2010 amendment clearly rejected the risk of lying in court as a hearsay concern:

> In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. *To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.*

● Fourth, it is notable that there is no requirement of oath at a formal proceeding for prior inconsistent statements that are admissible solely for impeachment. But why are we not concerned about *those* prior inconsistent statements being made up? The impact of a prior inconsistent statement, even if offered only for impeachment, can be devastating. It is surely possible that the statement will be (mis)used by the jury for its truth. It doesn't appear to make sense to have an abiding concern about made-up statements in one context but not the other, when the only difference is that one is given substantive effect. Put another way, the extra added substantive effect of a prior inconsistent statement under Rule 801(d)(1)(A) is an insufficient reason to provide draconian procedural requirements when the same risk of fabrication applies to impeachment-only inconsistent statements.

●Finally, even if the concern over fabricating inconsistent statements is one that should be addressed in a hearsay rule, there are (as demonstrated by some of the states) less onerous ways to regulate the problem of fabrication. Examples include conditioning substantive admissibility on recording or acknowledgment by the witness who made the statement. These possibilities are further explored in the section on drafting alternatives.

B. Concerns About the Difficulty of Cross-Examination When the Witness Denies Making the Inconsistent Statement

Professor Saltzburg argued that the premise of a hearsay exception for prior inconsistent statements --- the ability to cross-examine the person who made the statement --- is faulty when

the witness simply denies making the statement. How do you cross-examine the witness about the prior statement if the witness denies making it?

Professor Saltzburg is surely right that there are special challenges in cross-examining a witness who denies the assertion that is sought to be tested. Yet this challenge may not be enough in itself to justify the existing limitations on substantive admissibility found in Rule 801(d)(1)(A). There are a number of reasons why the challenge of cross-examining a denying witness may not be a sufficient reason to reject an expansion of substantive admissibility of prior inconsistent statements:

- A witness who denies making a prior statement is not really different from a witness who denies seeing an event. Assume a witness is called to testify to an event and simply denies knowing anything about it. The party wants to elicit information about the event, and maybe even knows that the witness was at the event. In these situations the witness is called, testimony is given, and cross-examination about the denial proceeds, without any concern about the challenges of that cross-examination. It is unclear why there should be limitations on admissibility simply because the witness denies a prior statement rather than a prior event.

- It seems a questionable policy to preclude substantive admissibility of a prior inconsistent statement simply because the witness denies making it. That gives the witness veto power over admissibility.

- A prior inconsistent statement is admissible for impeachment even though the witness denies making it. The challenges of cross-examination are exactly the same. Why should substantive admissibility be any different?

- Most importantly, the challenges of cross-examining a denial, even if substantial, speaks more to an *alternative* to the existing rule rather than to retaining that rule. Thus, if the rule were to provide that a prior inconsistent statement is substantively admissible so long as it is recorded, then the problem of the denying witness is essentially solved. At that point, a witness who denies making a recording statement is testifying so implausibly that the cross-examination of the witness's motives and recall should be pretty straightforward and effective. And at any rate, a rule should not be rejected simply because there is a possibility that a witness will lie on the stand or provide an implausible denial of the record evidence.

C. The Concern About Proving a Prior Inconsistent Statement to Show That Neither the Statement Nor the Testimony is True.

At the Symposium, A.J. Kramer observed that sometimes a cross-examiner raises a prior inconsistent statement not to show that it is true, but to show that *nothing* the witness has said is

true. A.J.'s example was of drugs found in a car, and the government wants to place the defendant in the car. A witness testifies that the defendant was in the back seat of the car. He has made a prior inconsistent statement that the defendant was in the front passenger seat and another statement that the defendant was driving. The point of introducing the inconsistencies would be to show that the witness is all over the place (literally) with his story and in fact he is lying about the defendant being in the car at all. But A.J.'s concern is that if the prior inconsistent statements are admissible as proof of a fact, then defense counsel, when offering the statements, will have proved as a fact that the defendant was (somewhere) in the car.

It would of course be a bad state of affairs if an amendment to Rule 801(d)(1)(A) would mean that a party, who was only seeking to use the inconsistent statement for impeachment, could end up proving the adversary's case with substantive evidence. The fundamental issue is, how to allow a party to use a prior inconsistent *only* for impeachment if that is their election, even though it could be used substantively under an expanded rule.

One factor tempering the concern about unintended substantive use is that when the cross-examiner is trying to prove that the witness had never told the truth, the prior statement on direct has already been made and is admissible as substantive evidence. Thus, in the car hypothetical, it is the direct testimony that has put the defendant in the car as a matter of substantive evidence. So the cross-examiner's attack really *does* go to impeachment and has no real substantive impact.

More broadly nothing in the hearsay rule or Rule 801(d)(1)(A) *requires* a proponent to offer the inconsistent statement for its truth --- even if to do so is permitted by the Rule, that doesn't mean that the proponent can't control the use of the statement by offering it for a limited purpose. Conceptually, the situation is analogous to a party who is offering an out-of-court statement for its effect on the listener, or for context, rather than for the truth. The party controls the use of the evidence by articulating the purpose. So it would seem that a proponent could avoid a substantive evidence trap in the car hypothetical by making it clear to the court and the jury that the inconsistent statement is offered not to prove that the defendant was in the car but rather to prove that the witness is lying about the defendant being in the car. It seems unlikely that a trial court would find that a defense counsel who was simply trying to show that a witness was lying should be held to have proven the truth of an adverse fact.

That said, it might be prudent in any amendment to mention and provide guidance on the possible use of inconsistent statements solely for impeachment. There are of course two possibilities --- adding to text and adding to Committee Note. Adding to the Committee Note would seem preferable because nothing in the text of the rule needs to be changed to make the point that a party does not *have to* offer a statement for its truth --- if the statement is not offered for its truth, it doesn't satisfy the definition of hearsay in Rule 801(c), and so Rule 801(d)(1)(A) never comes into play. Moreover, it would be difficult to add a condition to the rule that would be anything more than restating the condition of the hearsay rule itself. Something like "is inconsistent . . . and the proponent offers the statement for the truth of the matter asserted" would not seem helpful.

Assuming the clarification is better placed in a committee note, the passage from the note might look something like this:

> While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that *neither* is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

D. The Concern In Civil Cases That Parties Will Avoid Summary Judgment By Filing an Affidavit With an Inconsistent Statement

At the Symposium the concern was expressed that if prior inconsistent statements are given substantive effect, a party could avoid summary judgment simply by filing an affidavit with an inconsistent statement. The example provided was as follows: a party has made a concession in a deposition that essentially ends its case. The opponent then moves for summary judgment on the basis of the statement. The party, in opposition to the motion, files an affidavit that contradicts the deposition. If that affidavit must be given substantive effect due to an expansion of substantive admissibility under Rule 801(d)(1)(A), then the thinking is that the court would have to deny the motion. In contrast, if it were admissible only for impeachment then it would have no effect, because the court considers only substantive evidence on summary judgment.

If the scenario presented above were an inevitable outcome from an amendment to Rule 801(d)(1)(A), then the amendment would probably need to be rejected, or limited to criminal cases, or subject to an exception that would prohibit the practice. That is to say, it is a bad result to propose an amendment that would provide undeserving parties a shady means to escape summary judgment.

But on closer inspection it appears that the risk of misuse of substantive admissibility of prior inconsistent statements on summary judgment is far less likely than it sounds. That is for two reasons:

- First, as Daniel Collins observed at the last meeting, the scenario painted at the Symposium can occur *today* --- no amendment is necessary for a party to file an affidavit averring to an inconsistent statement as a means of forestalling summary judgment. This is because an affidavit containing a statement is an assertion that the affiant will testify at trial to that statement, i.e., it will be presented in admissible form at trial. Fed.R.Civ.P. 56(c). So if, for example, a party makes a statement at the deposition that he didn't read

the prospectus, but then files an affidavit saying that he did, he is averring that he will testify at trial that he did. That will be substantive evidence at trial, regardless of Rule 801(d)(1)(A). The same would hold true if the statement presented to forestall summary judgment is in an affidavit of a non-party that contradicts a statement the non-party previously made. The non-party's averment of an inconsistent statement must be treated as substantive evidence because it will be provided in an admissible form at trial, i.e., as in-court testimony.

Thus, the only risk that could possibly be added by an expansion to Rule 801(d)(1)(A) is quite narrow: Assume that a statement by a non-party would terminate the case; but instead of the non-party filing an affidavit with an inconsistent statement, the party files an affidavit that he *heard* the non-party make an inconsistent statement. In that case, under the existing Rule 801(d)(1)(A), the non-party's inconsistent statement would be admissible only for impeachment (and so cannot be considered on summary judgment) because it is not presented in a form that would be admissible substantively at trial (i.e., the party's testimony about the inconsistent statement would be hearsay). Under a rule providing for greater substantive admissibility of prior inconsistent statements, it would have to be considered by the court in opposition to summary judgment.

The narrowness of the problem of expanded substantive use of prior inconsistent statements on summary judgment is borne out by Ken Broun's research of summary judgment in states that provide a hearsay exception for all prior inconsistent statements. (Ken's memo on the subject is included in the agenda book after this memo.) Ken concludes that the problem of prior inconsistent statements on summary judgment in these states rarely arises in reported cases, and when it does, it is exclusively the situation in which a party files an affidavit averring to a statement made by a *non-party* that is inconsistent with the statement that the non-party made at a deposition.[41]

● Even if expanded substantive admissibility of prior inconsistent statements might lead a party in bad faith to think about forestalling summary judgment by creating such a statement, it wouldn't work. There is already substantial case law in place to prevent parties from submitting "sham affidavits." Case law in every circuit establishes a "sham affidavit" rule. See Edward Brunet, John Parry, & Martin Redish, *Summary Judgment: Federal Law and Practice* § 8:10 (citing cases from every circuit providing authority of district courts to strike sham affidavits). A sham affidavit "is an affidavit that is inadmissible because it contradicts the affiant's previous testimony . . . unless the earlier testimony was ambiguous, confusing, or the result of a memory lapse." *Pourghoraishi v. Flying J., Inc.*, 449 F.3d 751, 759 (7th Cir. 2006). Thus if a party submits an affidavit solely to contradict a previous statement, it will be rejected on summary judgment. *See also Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1237 (11th Cir. 2010) ("[a] court may determine that an affidavit is a sham when it contradicts previous deposition testimony and the party submitting the affidavit does not give any

[41] It should be noted that nothing in the cases cited by Professor Broun indicate that the parties were acting inappropriately, i.e., generating unreliable statements solely in order to forestall summary judgment.

valid explanation for the contradiction"); *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001) (affirming summary judgment for employer in a Title VII sex discrimination case, finding the trial court properly rejected the plaintiff's affidavit that directly conflicted with her own prior deposition testimony); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3d Cir. 1988) (trial court properly disregarded the plaintiff's affidavit "submitted only after [she] faced almost certain defeat in summary judgment," finding that the affidavit "flatly contradicted no less than eight of her prior sworn statements"); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 198 (4th Cir. 1997) (affirming summary judgment in an employment discrimination case and finding that the trial court properly disregarded the affidavit of the nonmovant that "contradicts his prior deposition testimony"); *Dotson v. Delta Consol. Industries, Inc.*, 251 F.3d 780, 781(8th Cir. 2001) (affirming summary judgment in a Title VII race discrimination case and rejecting nonmovant's argument that his affidavit created an issue of fact with his earlier conflicting deposition "because we have held many times that a party may not create a question of material fact, and then forestall summary judgment, by submitting an affidavit contradicting his own sworn statements in a deposition"); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1138 (9th Cir. 2000) ("[G]enerally, a nonmoving party may not create an issue of fact for summary judgment purposes by means of an affidavit contradicting that party's prior deposition testimony.").

Thus, the concern that expansion of substantive admissibility of prior inconsistent statements would create a crisis for summary judgment cases is belied both by the narrowness of the problem and, more importantly, by existing law that would prohibit a party from manufacturing an inconsistent statement in an effort to forestall summary judgment.

V. Drafting Alternatives

If the Committee decides that substantive admissibility of prior inconsistent statements should be expanded, then there are basically two ways to do it. Model One simply deletes the current Congressional limitation. Model Two treats the concern about whether the statement was ever made, by borrowing recording and other requirements from existing state provisions.

A. Model One: Lifting the Congressional Limitation on Prior Inconsistent Statements:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

*** * ***

(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:

(A) is inconsistent with the declarant's testimony ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition~~;

(B) is consistent with the declarant's testimony and is offered:

(i) 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; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

* * *

Possible Committee Note

The amendment provides that the rule against hearsay does not bar the substantive use of an inconsistent statement of a testifying witness. It restores the original proposal of the Advisory Committee, eliminating the Congressional limitations on substantive admissibility of inconsistent statements of testifying witnesses. The Committee has determined that the practice in states that follow the original Advisory Committee approach has shown that approach to be workable, and that allowing these statements to be admitted substantively is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement.

While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

B. Narrowing the Limitation on Prior Inconsistent Statements to Address Concerns About Whether the Statement was Ever Made:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

*** * ***

(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:

(A) is inconsistent with the declarant's testimony and was:

(i) given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(ii) written or adopted by the declarant;

(iii) acknowledged by the declarant while under oath; or

(iv) recorded verbatim stenographically or electronically when made; or

(B) is consistent with the declarant's testimony and is offered:

(i) 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; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

Possible Committee Note

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily narrow. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made. But as shown in the practice of some states, there are less onerous alternatives that can assure that what is introduced is exactly what the witness said. These safeguards are set forth by the amendment.

While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

Reporter's Note

It would be possible to craft language that would delete the Congressional provision and yet cover it by describing all the conditions in which there would be sufficient assurance that the statement was made. But the Congressional language has been in place for 40 years and there is case law on it. The better approach seems to be to retain the language and then provide other grounds that provide assurance that the statement was made. That process is similar to the one

chosen in the 2014 amendment to Rule 801(d)(1)(B): the original language was retained and new grounds for admissibility were added.

Memorandum

To: Advisory Committee on Evidence Rules

From: Ken Broun, Consultant

Re: Effect of a broader rule admitting prior inconsistent statements on rulings on summary judgment

Date: January 4, 2016

The Committee is considering the possibility of amending rule 801(d)(1)(A) to eliminate the requirement that the statement "was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." One of the issues raised in the Committee's preliminary discussion of the possible amendment was the effect that such a change might have in motions for summary judgment.

States with rules broader than Fed. R.Evid. (801(d)(1)(A).

There are at least ten states with rules that admit all prior inconsistent statements of a witness who testifies and is subject to cross-examination about the statement as nonhearsay. See Alaska R. Evid. 801(d)(1)(A); Ariz. R. Evid. 801(d0(1)(A); Cal. Evid. Code §1235; Del. R. Evid. 801(d)(1)(A); Kan. Stat. Ann. §60-460(9); Mont. R. Evid. 801(d)(1)(A);N.M. R. Evid. 801(d)(1)(A); Nev. St. Ann. §51.0351(2); Wis. Stat. Ann. 908.01(4)(a)(1); Utah R. Evid. 801(d)(1)(A).

Illinois has a broader rule applicable only in criminal cases. Ill. Stat. ch. 725 §5/115-10.1.

Cases in which a broader rule for substantive admissibility has made a difference in summary judgment decisions.

In a survey of cases from all of the jurisdictions listed above, I could find only one situation in which the broader substantive admissibility has made a difference in summary judgment decisions. There are several California cases and at least two Wisconsin cases where the broader rule has prevented summary judgment in instances in which it might have been granted under the existing federal rule. In all of these cases, the defendant moved for summary judgment, relying on a witness's statement. The plaintiff resisted that motion, relying on evidence that the witness had made a statement inconsistent with the statement offered by defendant. The courts consistently held that the plaintiff's reliance on the inconsistent statement (in all instances made in circumstances that would not have permitted substantive use of the statements under Fed.R.Evid. 801(d)(1)(A)) was sufficient to defeat summary judgment.

The California cases are the best examples. Typical of those cases is *Donovan v. L.A. Ski and Sun Tours,* 2002 WL 387258 (Cal. App. 2002). In *Donovan,* plaintiff claimed intentional interference with contract. Defendant moved for summary judgment and

submitted a declaration (the California equivalent of an affidavit under federal practice) in which a third party stated that plaintiff had failed to meet his contractual obligations to the third party and for that reason he had entered into a contract with defendant. Plaintiff submitted a declaration in which he related a prior conversation in which the same third party had told him that defendant had been trying to convince him to breach the contract with plaintiff and had offered him more money. The court held that summary judgment should have been denied. If the third party were called as a witness at trial, his prior inconsistent statement would be sufficient to support the plaintiff's case. Since plaintiff would be able to defeat a motion for a nonsuit, summary judgment was improperly granted.

Another case is *Colarossi v. Coty US Inc.,* 97 Cal. App. 4th 1142 (Cal. App. 2002). *Colarossi* was a wrongful termination action. Defendant moved for summary judgment relying on the depositions of two employees who gave reasons for plaintiff's termination. In response, plaintiff filed a declaration in which the employees had made statements inconsistent with defendant's declaration with regard defendant's motive for firing. Defendant argued that the statements were not admissible for substantive purposes under California law because the employees were not given an opportunity to explain or deny the inconsistent statements offered by plaintiff. The Court of Appeals rejected defendant's argument and held that the trial court erred in granting summary judgment. In so ruling, the court stated (97 Cal. App. at 1151):

> If this case goes to trial, Colarossi's attorney will surely have to ask these questions in order to get Murdocco's and Bassett's prior inconsistent statements admitted into evidence. However, we cannot any good reason why counsel would have to ask these questions at the discovery stage of this case.

Another case reaching the same result is *Abraham v. Pacific Union Real Estate Group, Ltd.,* 2004 WL 1047392 (Cal. App. 2004). In *Abraham*, plaintiff sued a real estate agent for her participation in a scheme to evict plaintiff from a rent-controlled apartment. Defendant moved for summary judgment, relying on a deposition given by the owner of the apartment stating that no one had helped her prepare the key document. In response, plaintiff relied on a letter from the owner in which she stated that the real estate agent had helped her prepare the document. The court held that summary judgment should have been denied because the letter would have been admissible as a prior inconsistent statement. Any argument with regard to the letter went to weight, rather than admissibility.

In *Gottlieb v. Culp, Inc.*, 2002 WL 10064 (Cal. App. 2002) the court also held that statements contradicting defendant's affidavit would defeat defendant's motion for summary judgment. The court stated:

> These foundational requirements supply the indicia of trustworthiness for the prior inconsistent statement hearsay exception. The witness who made the prior inconsistent statement is in court and may be examined and cross-examined about the in-court testimony and the prior inconsistent statement. The trier of fact can observe the witness's demeanor as he either denies

> making the prior inconsistent statement, attempts to explain it away, or claims to have no recollection of it. . . . . In other words, these are requirements for the introduction into evidence of the prior inconsistent statement at a trial or hearing. Consequently, the fact those requirements have not yet been met in this case did not render the evidence inadmissible in the limited context of the summary judgment motion. In the context of that motion, Gottlieb essentially made a prima facie showing for the use of the prior inconsistent statement exception so that the court could properly consider it. Whether or not Gottlieb's testimony about Sharf's prior inconsistent statement is credible is a matter for the trier of fact to resolve at trial, not for the trial court to resolve in ruling upon the summary judgment motion.

See also Theus v. Univ. of So. Calif., 2003 WL 22840054 (Cal. App. 2003). In *Theus,* defendant moved for summary judgment, relying on a declaration in which a supervisor stated that race was not a factor in plaintiff's dismissal and that plaintiff was fired for poor job performance. Plaintiff responded with a declaration with a declaration containing statements of the same supervisor inconsistent with the defendant's declaration. The court found that the plaintiff's statement was sufficient to defeat summary judgment.

The Wisconsin cases are similar. *Koehler v. Haechler,* 133 N.W.2d 730, 733(Wis. 1965) ("where a party moving for summary judgment relies upon a particular assert in the affidavit of a prospective witness as establishing his right to summary judgment, proof of a prior statement by the prospective witness, inconsistent in a material respect, is ordinarily sufficient to entitle the opposing party to trial, and defeat the motion for summary judgment"); Holiday v. Henkel, 532 N.W.2d 145 (Wis. App. 1995) (party opposing summary judgment may rely on prior inconsistent statement from a witness to establish a genuine issue of material fact).

Other possible uses of broader rule in summary judgment

I could find no other instances in which a broader substantive use of prior inconsistent statements played a role in the granting summary judgment. It is difficult to imagine a case in which the existence of a prior inconsistent statement would entitle a party to summary judgment. There would always be two conflicting statements and therefore an issue of credibility, which should preclude summary judgment. *See 10A Fed.Prac. & Proc. Civ. §2726(3d. ed.).* Instances in which a prior inconsistent statement is used to deny a motion for summary judgment would be similar to the California and Wisconsin cases cited above. It should be noted that the results in the California and Wisconsin cases could occur under the present federal rule provided the opposing affidavit set forth a statement qualifying under current Fed. R. Evid. 801(d)(1)(A).

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Daniel J. Capra Phone: 212-636-6855

Philip Reed Professor of Law e-mail: dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Suggested Changes to Rule 803(2)
Date: April 1, 2016

Rule 803(2), the excited utterance exception to the hearsay rule, has been on the hotseat lately. First there was Judge Posner's proposal to eliminate the exception entirely, on the ground that its underlying premise --- that a person cannot lie if under the influence of a startling event --- is unsupported by empirical data and in fact is nothing more than folk psychology. At its Spring 2014 meeting, the Committee decided not to proceed at that time with a proposal to eliminate the exception. But in the interim, there have been three new suggestions about amending Rule 803(2) to deal with various perceived problems. This memo sets forth the three separate suggestions for change, and provides background and discussion of those suggestions.

No action on any of these suggestions is anticipated for the Spring 2016 meeting. If the Committee is interested in pursuing any of these suggestions for change, a formal proposal will be prepared for the next meeting.

What follows is a discussion of each proposal for change to Rule 803(2), which currently provides a hearsay exception for the following:

> **(2)** ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

It should be said that several of the suggestions for change to Rule 803(2) raise questions about similar changes to other exceptions --- especially the exceptions for present sense impressions and state of mind statement. So any proposed amendment might need to take into account these other exceptions.

I. Preventing Admissibility of "Re-Excited" Statements, and Shifting to Rule 804

Roger Park, an Evidence professor from Hastings Law School, requests two changes to Rule 803(2):

> First, the phrase "stress of excitement" should be changed to "continuous stress of excitement." This change aims at eliminating the re-excitement cases, where the excited declarant's statement is admitted despite the fact that the declarant had a period of calm reflection before becoming re-excited when reminded of the event. Second, unavailability should be required.

Reporter's Comment:

These changes, if meritorious, are certainly easy to implement textually. The first suggestion is simply to add the word "continuous" before "stress" in the rule. The second is simply to move the exception over to become Rule 804(b)(7). The merits of these two proposals will be discussed in turn.

"Continuous Stress of Excitement"

Park is troubled by cases in which the declarant has suffered a trauma, but the statement that is offered is not made while under the influence of that trauma. Rather, the statement that is offered is sparked by a second event; the declarant is upset by that second event and then talks about the original trauma. He relies on the cases found by Jone Tran in *Crying Wolf or an Excited Utterance? Allowing Reexcited Statements to Qualify Under the Excited Utterance Exception*, 52 Clev. St. L. Rev. 527 (2004-2005).

The case most frequently discussed as raising the re-excitement problem --- and the only federal case cited in the Tran article --- is *United States v. Napier*, 518 F.2d 316, 317-18 (9th Cir. 1975). In *Napier* a woman was severely assaulted --- she suffered a brain injury in a vicious attack. She was hospitalized for several weeks. A week after the victim was released from the hospital, her sister showed her a newspaper article. The newspaper article contained a photograph of Napier. When the victim saw the photograph, she became very upset and pointed to the photo, yelling, "He killed me!"

The Ninth Circuit recognized that the statement was not made while under the influence of the assault --- far too much time had passed. But the court held that the statement was made while under the influence of a second startling event --- seeing her perpetrator in the newspaper --- and the statement about the assault was related to the second startling event.

The question for the Committee is whether the *Napier* result --- reached 40 years ago, and apparently the only "re-excitement" case under federal law --- warrants a change to Rule 803(2). It seems pretty clear that there is no big problem in federal practice that justifies an amendment. The Tran article does talk about a handful of state cases involving reexcitement, but state court application of state counterparts of a federal rule have never been thought to justify amendment when there is no problem to address in the federal courts.

There is also the question of whether the *Napier* result is even problematic in the first place. Is there anything wrong about a flexible interpretation of the term "startling event"? Is there anything outrageous in the conclusion that being shown a picture indicating that one's perpetrator is walking around free would be something that would legitimately startle an average person, and then lead them to talk about the initial assault? If startlement really does still the reflective capacity, why wouldn't the victim's statement in *Napier* be about as reliable as a statement made about the assault itself, immediately after the assault? One could argue that the difference would be that the *Napier* victim's statement was more memory-dependent, and that is true. But the FJC report on excited utterances, included in this agenda book, cites several studies concluding that "[e]motionally arousing stimulus or events are more likely to be encoded into memory, and memories of emotional events may be more vivid and enduring than memories about more neutral stimuli or events."[1] So the fall-off does not seem so drastic that inadmissibility should follow.

It is notable what *Napier* does *not* allow --- it would not cover a statement where a declarant simply recounts an old trauma, and gets upset during the telling. It does not cover a statement where it is simply the memory itself that is startling. If it did, that would surely be overbroad, because most people become emotional when thinking and talking about old traumas. But that is not enough for admissibility under Rule 803(2) --- the declarant must be speaking under the influence of some *external* startling event. *See United States v. Marrowbone,* 211 F.3d 452 (8th Cir. 2000) (the fact that the declarant became upset while describing a prior sexual assault was not enough to qualify the statement as an excited utterance, where the declarant was noticeably calm for a long period before starting to make the statement). Thus, the *Napier* rule seems more like a reasoned application of the terms "startling event" and "relatedness" than anything that undermines the basic underpinnings of the excited utterance exception.

Finally, the fix proposed by Park does not even solve the so-called re-excitement "problem." Adding "continuous" before "stress of excitement" wouldn't disqualify the statement in *Napier.* The victim in that case *was* making her statement while "under the continuous stress of excitement that it [the startling event] caused." That is because the relevant startling event was the view of the newspaper. In order to address the *Napier* facts, there would have to be some redefinition of the term "startling event." Something like the following would be necessary:

[1] *Reliability of PSI and EU Hearsay Evidence,* Federal Judicial Center, at 14.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused --- but not if the statement describes an earlier even that was also startling.

That language at least addresses the *Napier* problem of two startling events. But all in all, it seems to be a matter that is not worth addressing. It is an infrequent issue, and there is a strong argument that it has been properly resolved under the existing rule.

Unavailability

A Rule 803 exception is premised on guarantees of reliability that render its statements actually better than in-court testimony from the declarant --- that is why availability of that declarant is irrelevant. The classic example is a business record. The record entry is considered better evidence than testimony long after the event, in which the person who made the entry is quite unlikely to remember the particulars of the regularly conducted event. In contrast, a Rule 804 exception is premised on guarantees of reliability that are not as strong, and that do not overcome the preference for live testimony. Yet admissibility is granted because live testimony cannot be provided.

So the question for the Committee posed by Park's suggestion is whether the reliability guarantees established by Rule 803(2) are such that excited utterances are actually better evidence of a startling event than later in-court testimony about that event. For example, is the 911 report of a domestic assault better evidence than the victim's testimony about it later at trial? Many people, many lawyers, would answer that question, yes. The 911 call is made closer in time so there is no memory problem. It is likely to be made spontaneously, and so could be thought to compare favorably to formal answers to a lawyer's questions at trial. And as shown at the Hearsay Symposium, many continue to believe that the stress of excitement stills the reflective capacity --- and that Judge Posner's reliance on social science evidence is misplaced because none of those studies can replicate the circumstances of the basic excited utterance that is most often offered in federal courts --- i..e., a 911 call.

On the other hand, there has been such an extended attack on the excited utterance exception that it does seem plausible to think about whether the drumbeat for change should be

addressed by limiting the use of the exception to where it is absolutely necessary --- and that would be the result of moving the exception to Rule 804.[2]

In determining whether the excited utterance exception should be moved to Rule 804, the Committee has been provided with a very helpful account of the studies that have been conducted on excitement and reliability. That detailed report, prepared by the FJC, is included in this agenda book. It seems to be a fair conclusion from that study that the data is not as clear on the unreliability of the excited utterance exception as Judge Posner would have it --- which is to say that the case for moving the exception to Rule 804 is not free from doubt.

Another issue to consider in determining whether the excited utterance exception should move to Rule 804 is whether the exception should have some company on the journey. There are other Rule 803 exceptions that have been criticized as providing insufficient guarantees of reliability. If the judgment is made that Rule 803(2) is to move over, the Committee will need to consider how these other exceptions can be distinguished in terms of reliability guarantees--- and if they cannot be distinguished, they should move as well. The prime candidates for transport are present sense impressions (as emphasized by Judge Posner) and state of mind statements, covered by Rule 803(3). State of mind statements could arguably be less reliable than excited utterances, because they are not in response to any external stimuli --- they are just interior musings about one's own feelings, and are certainly subject to bad motivation. *See, e.g., United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984) (exculpatory statement of state of mind made under untrustworthy circumstances --- after the defendant was arrested and professed his innocence --- was admissible under Rule 803(3): "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that rule are read to mean what they say, its truth or falsity is for the jury to determine.").

So even if the proposal to move excited utterances to Rule 804 might have some merit, it should probably be done only as part of a larger project of considering similar treatment of other exceptions.

[2] As will be seem below, Professor Alan Williams, who proposes reliability-based amendments to the excited utterance exception, also advocates moving the exception to Rule 804.

II. Trustworthiness Burden-Shifting

Professor Liesa Richter suggests that the way to deal with concerns about the excited utterance exception is to add a safety valve provision akin to that found in Rules 803(6)-(8) --- allowing the judge to exclude a statement fitting under the exception if the opponent can show "that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Her proposal would look like this:

> **(2)** ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused, if the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The way it would work would be that the proponent has the initial burden of showing that the statement fits the reliability requirements of the exception; then the burden shifts to the opponent to show that there is something in the particular circumstances to indicate that the statement is in fact unreliable even though it meets the trustworthiness criteria of the exception.

This burden-shifting proposal could be thought to have the following points of merit:

● It's a familiar standard, borrowed from other rules, and so the mode of analysis under those rules could be relied upon in applying the language in Rule 803(2).

● If the assumption is correct that the typical 911 call *is* reliable, but there are concerns in some cases that a startling event might not be effective in stifling the ability to lie, then the language can be used to exclude statements in those cases, leaving the exception to cover a "heartland" of reliable excited utterances. For example, self-serving statements might be excluded even though made under the influence of a startling event --- e.g., a driver pops out of a car after an accident, very upset, and says "It wasn't my fault!" cf. *United States v. Peak*, 856 F.2d 825 (7th Cir. 1988) (an exculpatory statement by the defendant was held admissible under Rule 803(3) despite the contention that the defendant had an opportunity to fabricate a then-existing state of mind; the court has no authority under current law to exclude such a statement on grounds of lack of trustworthiness).

● It tries to preserve the basic categorical approach to hearsay exceptions but also tries to allow for some flexibility when the exception is overinclusive. (Though whether it is

really possible to retain a categorical approach while allowing flexibility is a puzzler of rulemaking).

_____

It should be noted that Professor Richter has suggested this burden-shifting approach for Rule 803(16) as well --- as discussed in the memo on Rule 803(16) in this agenda book. The suggestion is made in that memo that the burden-shifting device is problematic as applied to Rule 803(16) because it works in two steps --- the first step being that the proponent has earned a presumption that the statement is reliable because it fits within the exception, and the second step being that the opponent can overcome that presumption by showing untrustworthiness under the circumstances. But that two step approach is not a good fit for Rule 803(16) because establishing admissibility under the exception does *not* justify a presumption of reliability. That critique is not as applicable to Rule 803(2), because there is at least a colorable argument (despite all the recent attacks) that statements fitting within the exception have some indicia of reliability.

If the Committee is interested in considering the addition of trustworthiness burden-shifting language to Rule 803(2), it will need to consider three further questions in implementing the change:

1. *Should the same change be implemented with other hearsay exceptions?* Again, hearsay exceptions like present sense impressions, state of mind, and dying declarations, all raise questions of overinclusiveness (that is, while many covered statements are reliable, some are not). And perhaps a trustworthiness safety valve would be useful in those exceptions as well. But of course, the more safety valves employed, the less categorical the exceptions, and as was found at the Hearsay Symposium, there is some virtue in having categorical rules.

2. *Should Rule 803(2) be moved to Rule 804 even with the addition of trustworthiness language?* One might argue that if Rule 803(2) needs a "reliability fix" it might be accomplished either by moving it to Rule 804 or by adding trustworthiness burden-shifting. But some might argue that the exception is so weak that it needs both remedies to fix it. That basically depends on how you feel about the exception. As shown in the FJC report, there are arguments on both sides about the trustworthiness of the exception.

3. *Is the trustworthiness language from Rules 803(6) and (8) a proper fit for Rule 803(2) or any other exception?* The proposal is to allow the opponent to show that "the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness." But that language is not a perfect fit for Rule 803(2). The reference to "source of information" was drafted to cover a recurring problem with business and public records --- where the recordkeeper relies on an outside source of information. It is often referred to as the "business duty" problem or the "Johnson v. Lutz" problem, after an old New York case in which the court expressed the concern that the recordkeeper might be recording unreliable information from an outside source.

But with respect to excited utterances, there is not usually a "source of information" problem, at least not one that needs any special language. If the excited declarant is relying on hearsay, then the statement will be inadmissible not because of Rule 803(2) but because of Rule 805 --- the rule that excludes multiple hearsay unless each transmission satisfies the hearsay rule. Likewise, if the excited declarant *has no* source of information, the hearsay statement will be excluded not under Rule 803(2), but because the declarant is speaking in the absence of personal knowledge. *See, e.g., Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995) (excited utterance in a 911 call was not admissible where the declarant lacked personal knowledge of the underlying event). So the reference to "source of information" seems inapt, or superfluous, as applied to Rule 803(2).

Nor does the reference to "method or circumstances of preparation" seem a good fit for Rule 803(2). Business and public records are "prepared" and there is a "method" employed in that preparation. Excited utterances are unplanned-for responses to external stimuli. It is odd to think of a "method" behind such statements, and odder still to think that they are in any way "prepared."

If the Committee decides that the trustworthiness burden-shifting remedy is useful, but that it needs to be adjusted to fit Rule 803(2), that adjustment might look something like this:

(2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused, <u>unless the opponent shows that the statement is untrustworthy under the circumstances.</u>

This is broader language that might accommodate arguments about excited utterances that appear to be untrustworthy in individual cases. It is residual-type language, but unlike the residual exception, here it is the opponent who has the burden of showing *un*trustworthiness. And it could be applied to other exceptions, such as Rules 803(1) and (3) and, for that matter, dying declarations.[3]

State Use of Untrustworthiness Safety Valves

Research has uncovered two states that have included untrustworthiness safety-valve language in some of their hearsay exceptions. Florida has a trustworthiness safety for present sense impressions and state of mind statements (but not excited utterances). The safety valve provides that a present sense impression is admissible "except when such statement is made under circumstances that indicate its lack of trustworthiness." This appears to put the burden of showing untrustworthiness on the opponent, but any amendment to the Federal Rules should make that more clear --- as is the case with Rule 803(6). The safety valve for the Florida state of mind exception provides that the exception "does not make admissible" a statement "made under circumstances that indicate its lack of trustworthiness." In addition, Ohio has an untrustworthiness safety valve for present sense impressions.

Professor Liesa Richter was kind enough to look at the Florida and Ohio cases involving present sense impressionss. Her report on these rules--- together with my short report on the Florida state of mind exception --- is attached at the end of this memo. These reports are intended to provide background on how trustworthiness burden-shifting might work for excited utterances as well as more generally.

III. Adding a Corroborating Circumstances Requirement

Allen Williams wrote an article entitled "Abolishing the Excited Utterance Exception to the Rule Against Hearsay" in 63 U. Kan. L. Rev. 717 (2015). The title is a misnomer. He doesn't advocate abolishing the exception --- rather he is addressing Judge Posner's proposal to abolish it, and he responds with a suggestion for amending the exception. His critique of the existing exception covers the basic attacks: people can lie even though startled; and startled people don't

[3] In the memorandum on hearsay exceptions as guidelines, also included in this book, one of the drafting options is to add such an untrustworthiness clause to *all* of the Rule 803 and 804 exceptions.

perceive things accurately. He proposes two fixes to the excited utterance exception. First, he suggests moving it to Rule 804 --- a proposal that is already addressed above. Second, he proposes borrowing the corroborating circumstances requirement from Rule 804(b)(3). So the rule would look something like this (whether in Rule 803 or 804):

> **(2)** ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused, <u>if it is supported by corroborating circumstances that clearly indicate its trustworthiness</u>.

One important difference between this proposal and the Richter proposal discussed above is that it places an extra admissibility requirement on the *proponent.* A decision on where the burden is to be placed is obviously dependent on one's view of the strength of the exception itself. If one believes that statements made under the influence of startling events are presumptively reliable, it makes sense to shift the burden to the opponent to show untrustworthiness in the individual case. If one believes that most excited utterances are questionable and need to be shored up by an additional guarantee of reliability, then the extra admissibility requirement makes better sense.

One consequence to be considered in the allocation is that if the burden is on the proponent, then it will have to be met (and evaluated by the court) *in every case*. If the burden is on the opponent, then it only arises in those cases in which the opponent can actually show some untrustworthiness concerns. So placing the burden on the opponent regulates marginal cases of reliability at a lesser cost.

The corroborating circumstances proposal has the obvious benefit of applying language that has already been interpreted in a body of case law --- and unlike the business records language discussed above, the corroborating circumstances language does seem to be a good fit for excited utterances and other exceptions. The reliability-based concerns about declarations against interest --- specifically suspect motivation --- are the same basic concerns that exist with excited utterances.

If the Committee is interested in considering the addition of corroborating circumstances language to Rule 803(2), it will need to consider three further questions in implementing the change:

1. *Apply it to other exceptions?* This is the same issue that is applicable to the other suggestions for change, discussed above.

2. *Move the exception to Rule 804*? As above, the question is whether adding a corroborating circumstances requirement is enough to justify retention of the exception in Rule 803 (assuming of course that any change is required at all), or whether concerns still remain that require "demotion" to Rule 804.

3. *Whether to define corroborating circumstances?* The Advisory Committee has refused to define the term "corroborating circumstances" in Rule 804(b)(3). When the rule was amended in 2010, the Committee initially drafted a Note that set forth a number of relevant factors, but ultimately decided that case law had already applied the concept sufficiently and that a list of factors was not appropriately placed in a Committee Note. The Committee had determined in its deliberations that the term "corroborating circumstances" was broad enough to cover the possibility of corroborating *evidence* as well as circumstantial guarantees of reliability. If the corroborating circumstances language were added to Rule 803(2), the Committee may wish to revisit the question of defining "corroborating circumstances" anew.

Florida Present Sense Impression Hearsay Exception

By Professor Liesa Richter

Florida Evidence Rule 90.803(1)

Florida Evidence Rule 90.803(1)

The present sense impression is the first hearsay exception in Florida Evidence Rule 90.803 that provides hearsay exceptions for statements regardless of declarant availability. Rule 90.803(1) reads:

> **(1) Spontaneous statement.--**A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.[4]

Florida Rule 90.803(1) was enacted in 1979 and is referred to as the "spontaneous statements" exception.[5] This exception was included in the Florida Evidence Code as part of an effort to eliminate the amorphous and dangerous *res gestae* doctrine and to bring structure and consistency to the hearsay previously admitted pursuant to that common law doctrine. [6] Like Federal Rule of Evidence 803(1), the Florida spontaneous statements exception depends upon contemporaneous observation and speech by the declarant.[7] The drafters of the Florida Evidence Code recognized the close relationship between their version of the present sense impression exception and the excited utterance exception, both requiring "spontaneous" statements.[8]

The Trustworthiness Exception in Florida Evidence Rule 90.803(1)

Unlike FRE 803(1), Florida Evidence Rule 90.803(1) contains an exception to the admissibility of present sense impressions when "circumstances indicate" a "lack of trustworthiness."[9] The only Florida Supreme Court case to discuss this exception is Deparvine

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[4] Fla. Stat. Ann. § 90.803(1).

[5] Deparvine v. State, 995 So. 2d 351, 369 (Fla. 2008).

[6] *See Florida Law Revision Council Note (1976),* Fla. Stat. Ann. § 90.803 (West)

("The phrase "res gestae" has long been not only entirely useless, but even positively harmful."). Florida recognized the present sense impression exception prior to enactment of its Evidence Code. *See* Tampa Electric Co. v. Getrost, 10 So. 2d 83 (1942) (admitting hearsay statement of lineman that he had called the office and had been told the electricity was off).

[7] *See Florida Law Revision Council Note (1976),* Fla. Stat. Ann. § 90.803 (West)("The circumstantial guarantee of subsection (1) is that when a spontaneous statement of narration is made simultaneously with perception, the substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misinterpretation.").

[8] *See Id.* ("The key element in both [the present sense impression and excited utterance exceptions] is spontaneity."). For a time, Florida cases appeared to require a "startling" or "unusual" event for both the present sense impression and excited utterance exceptions. *See e.g.* Hutchinson, 882 So. 2d 943, 951 (Fla. 2004). The Florida Supreme Court rejected that view and clarified that the Florida present sense impression does *not* demand a "startling" or other triggering event in Deparvine v. State, 995 So. 2d 351, 369 (Fla. 2008).

[9] Fla. Stat. Ann. § 90.803(1).

v. State.[10] In that case, the court affirmed the admission of hearsay statements made by a victim in a capital murder case pursuant to Florida Evidence Rule 90.803(1). In Deparvine, the trial court admitted the victim's statement to her mother during a routine telephone conversation shortly before her death that she was driving her car and "following Rick and the guy that bought the truck."[11] The defendant argued that the victim's statement did not fit the Florida spontaneous statements exception because there was no unusual or startling triggering event that prompted the victim to make the statement. The Florida Supreme Court affirmed the admission of the hearsay statement pursuant to Florida's present sense impression, abrogating prior cases suggesting that Florida Rule 90.803(1) requires a "startling" or "unusual" triggering event.[12]

In discussing the requirements of Florida Evidence Rule 90.803(1), the court explored the history and intended interpretation of the Florida present sense impression exception.[13] The court noted that the "only" difference between the federal and Florida present sense impression hearsay exceptions "is the added provision in the Florida rule that evidence is not admissible, even though it meets the other requirements of section 90.803(1), when the 'statement is made under circumstances that indicate its lack of trustworthiness.'"[14] According to the Florida Supreme Court:

> This provision enables the judge to bar the admission of statements that lack sufficient reliability. The drafters were particularly concerned with statements by unidentified bystanders. The court should weigh any corroborating evidence together with all other factors in making this determination.[15]

After describing this distinction between the Florida present sense impression and Federal Rule 803(1), the Florida Supreme Court offered no further analysis of the trustworthiness exception and failed to address which party bears the burden of demonstrating a lack of trustworthiness under the Florida exception.[16] The court found that the victim's statement described her "then location and status as she perceived it." The court found that the statement fit the §90.803(1) requirements and did not address any concerns about trustworthiness. In Deparvine, the Florida Supreme Court noted the "relative infrequence" of present sense impression cases.[17]

Very few Florida appellate courts have addressed the trustworthiness exception in §90.803(1) directly, although several Florida cases have discussed concerns about the "reliability" of particular hearsay statements offered under §90.803(1) more generally. Notwithstanding the unique trustworthiness exception in the Florida present sense impression,

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[10] Deparvine v. State, 995 So. 2d 351 (Fla. 2008).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 368. It is worth noting that the Florida Evidence Code also includes a trustworthiness exception within the Rule 90.803 hearsay exceptions for state of mind, business and public records, and in the exceptions for child victim and elderly/disabled adult victim statements.

[15] *Id.* (quoting Charles W. Erhardt, *Florida Evidence* § 803.1, p. 843 (2007 ed.)).

[16] *Id.* The court instead devoted its attention to the question of whether Florida §90.803(1) required an "unusual" or "exciting" triggering event for the spontaneous statement. The court ultimately concluded that the Florida present sense impression mirrored the federal rule, adopting the Thayerian perspective requiring no such "triggering" event. *Id.*

[17] *Id.* at 369-70.

the Florida cases appear to reach results in applying §90.803(1) that are largely consistent with the results reached under existing Federal Rule of Evidence 803(1).

Florida Appellate Applications of Florida Evidence Rule 90.803(1)

The appellate court in **Wal-Mart Stores, Inc. v. Jenkins** relied upon the trustworthiness exception in §90.803(1) in reversing judgment for the plaintiff in a slip and fall case. The trial court allowed the plaintiff to testify that she overheard an unidentified bystander state shortly after her fall that "this should have been mopped up 15 minutes ago" using §90.803(1).[18] Plaintiff relied upon this hearsay statement to demonstrate the defendant's constructive notice of a dangerous condition and the jury found for the plaintiff. In a three-paragraph opinion, Florida's Fifth District Court of Appeals reversed, finding that the bystander hearsay statement should have been excluded pursuant to the trustworthiness exception in §90.803(1). The court stated: "The fact that the statement at issue here was made by an unidentified bystander raises the question of reliability."[19] Although the court specifically referenced, the trustworthiness exception, it also noted problems with establishing the declarant's personal knowledge.[20] Indeed, it seems that this statement also would be excluded under FRE 803(1) based upon personal knowledge and timing concerns in the absence of a trustworthiness exception.

Likewise, in **Overton v. State**, the appellate court referenced the trustworthiness exception in §90.803(1) in affirming defendant's armed robbery conviction. [21] On appeal, the defendant argued that the trial court erred in excluding his own hearsay statements made to officers at the time of his arrest. The trial court excluded statements defendant made to a deputy that he was "the wrong guy" and that the "right guy" was "getting away" as they arrested defendant.[22]

According to the appellate court, "the trial court was correct in sustaining the state's objection on the ground that the statement was 'self-serving.' Although the statement was made at the time of Overton's apprehension and may be considered as part of the res gestae, if it is so self-serving and made under circumstances that indicate its lack of trustworthiness, then it should be excluded. *See* Section 90.803(1), Florida Statutes (1981)."[23] There is inadequate information in Overton to evaluate the admissibility of this statement under FRE 803(1). Depending upon the defendant/declarant's ability to perceive "the right guy getting away," as well as the time lapse between the robbery and the statements, the self-serving statement could theoretically qualify as a present sense impression under FRE 803(1) in the absence of a trustworthiness exception.

In contrast to Overton, a Florida appellate court reversed the murder conviction of a teenager based upon the exclusion of the defendant's self-exculpatory statements in **Alexander**

[18] 739 So. 2d 171, 172 (Fla. Dist. Ct. App. 1999).
[19] *Id.*
[20] *Id.* ("There was no evidence to establish that the phantom declarant was even in the store 15 minutes before the fall in order to "perceive the event," nor was there evidence that the declarant actually observed the substance on the floor at any time prior to the fall.")
[21] 429 So. 2d 722, 723 (Fla. Dist. Ct. App. 1983).
[22] *Id.*
[23] *Id.*

v. State.[24] Immediately after firing a single shot that killed the victim, the defendant made statements to witnesses indicating surprise and that the shooting was an accident. The trial court excluded these statements as inadmissible hearsay and the appellate court reversed, finding them to be "admissible under the res gestae rule now codified in sections 90.803(1), (2), and (3)."[25] The court noted that the defendant's statements were "made almost simultaneously with the act of shooting, a period of time too short to support a finding of fabrication that would destroy the apparent trustworthiness of this evidence." The court rejected the State's argument that the self-serving nature of the statements defeated their admissibility: "The mere fact that statements are self-serving is not, in and of itself, a sufficient evidentiary basis for their exclusion from evidence. No legal principle excludes statements or conduct of a party solely on the ground that such statements or conduct is self-serving." The court further found that Florida has "followed a liberal rule concerning the admittance of res gestae statements."[26] The court found nothing to suggest that the defendant's statements were lacking in apparent trustworthiness and reversed his conviction. Based upon the declarant/defendant's personal knowledge of the shooting and instantaneous description of it, these statements could also be admissible under existing FRE 803(1) or 803(2). Although a trustworthiness exception could permit a challenge, the Florida court declined to use its trustworthiness exception to block admission of this hearsay evidence.

In **Preston v. State**, the court reversed defendant's conviction for sexual battery based upon the admission of hearsay statements by the alleged victim.[27] At trial, the court admitted hearsay statements made by the testifying victim to her boyfriend and a police officer recounting the alleged battery at least one hour after the incident. Florida's Second District Court of Appeal reversed, finding the victim's statements inadmissible under either the present sense impression or excited utterance exception. In so doing, the court noted the problematic time lapse between the alleged incident and the victim's hearsay statement. Although Florida commentators have cited Preston as a case implicating the §90.803(1) trustworthiness exception, the court did not directly reference that provision. The court did, however, identify motivational problems with the statement calling its reliability into question: "Finally, from the time the prosecutrix left the restaurant lounge with appellant for several hours of drinking and 'partying,' as described by several witnesses, she had a possible reason to contrive a story or misrepresent to her boyfriend. While any one of these factors, taken individually, may not be sufficient to render otherwise 'spontaneous' or 'excited' statements inadmissible, we think these factors, taken together, preclude admission of the statements under sections 90.803(1) and (2)."[28] Although this hearsay statement could potentially qualify for admission under FRE 803(2), it would be inadmissible under existing FRE 803(1) given the time lapse between the alleged incident and the victim's description of it even in the absence of a trustworthiness exception.[29]

In **J.M. v. State**, the defendant appealed his conviction for cocaine possession and delivery based upon the erroneous admission of a hearsay statement through Florida's present

[24] 627 So. 2d 35, 43-44 (Fla. Dist. Ct. App. 1993).
[25] *Id.*
[26] *Id.* (citing cases).
[27] 470 So. 2d 836, 837 (Fla. Dist. Ct. App. 1985).
[28] *Id.* at 837.
[29] Because the victim testified at trial, the admission of her hearsay statement would not have violated defendant's Sixth Amendment rights under Crawford.

sense impression exception.[30] At trial, a police officer testified that he observed the defendant meet with a man in a wheelchair outside an apartment building and exchange a small item for money. The officer testified that he approached the man in the wheelchair as soon as the defendant departed and asked if he had any drugs. According to the officer, the man said he had some somewhere and began looking around in his wheelchair as if trying to help find the drugs. The officer spotted the drugs in the seat of the wheelchair during this process. When the officer confiscated the drugs, the man told him that he "just bought the cocaine from a black man wearing a white tank-top and dreadlocks," thus identifying the defendant. The trial court admitted the hearsay statement as a spontaneous statement under §90.803(1).[31] The appellate court reversed the conviction, finding that the hearsay identification was not an admissible present sense impression. The appellate court did not expressly rely on the trustworthiness exception in §90.803(1), but did highlight the circumstances surrounding the statement demonstrating that the declarant had an opportunity for reflection that undermined the reliability of the statement. "These events enabled McAllister to engage in the very type of reflective thought that is inconsistent with aspects of reliability upon which the spontaneous statement exception is founded."[32]

Conclusion on Florida's Present Sense Impression Exception

Although Florida's version of the present sense impression contains a trustworthiness exception, it appears that the Florida law surrounding the exception is under-developed and that the trustworthiness exception is infrequently utilized, at least at the appellate level. Further, it appears that the application of the present sense impression exception in Florida largely mirrors its application under FRE 803(1) notwithstanding the added trustworthiness exception. In rare cases like Overton where the hearsay statement appears to meet the stated requirements of a present sense impression, the trustworthiness exception does provide opponents with an additional mechanism for excluding the evidence.

[30] 665 So. 2d 1135 (Fla. Dist. Ct. App. 1996).

[31] *Id.*

[32] *Id.* ("McAllister's statement of identification does not fall within the definition of a spontaneous statement. In this regard, the trial evidence established that, by the time McAllister made the statement implicating the defendant, he had been approached by a uniformed police officer who questioned him; he had admitted to committing a crime; and he had moved about in his wheelchair as if to assist the officer in recovering the cocaine."). J.M. v. State was decided in 1996 prior to the Crawford decision, which also would exclude this testimonial hearsay where the declarant did not testify at trial.

Reporter's Comment on the Florida State of Mind Exception

As stated above, Florida also has an untrustworthiness clause in its state of mind exception, §90.803(3). But it doesn't appear to have been applied in any rigorous way, at least in the reported decisions. At most it is given lip-service by a passing reference that there was nothing that indicated that a proffered state of mind statement was untrustworthy. *See, e.g.*, *Huggins v. State*, 889 So.2d 743, 757 (Fla. 2004) (statement of victim that she intended to go to a grocery store, offered to show that she wanted to go to the store and not to go anywhere with the defendant, was properly admitted under the state of mind exception: "First, the State introduced Larson's statement of intent to prove her subsequent conduct of going to Publix. Second, there is no indication from the record that Larson's statement was made under circumstances that indicate its lack of trustworthiness. Third, although case law provides that a victim's state of mind is inadmissible unless probative of a material issue, this case falls within an exception to that rule because the State also introduced the statement to inferentially rebut the defense argument that Larson may have voluntarily accompanied her killer from Publix to another location."); *Jenkins v. State*, 422 So.2d 1007 (Fla. App. 1982) (in an assault case in which the defendant claimed self-defense, the victim's statement that he was going to attack the defendant should have been admitted under the state of mind exception; the statement by the witness that sometimes the victim kidded around "does not indicate a lack of trustworthiness so as to invoke" the exception).

The Ohio Present Sense Impression

By Professor Liesa Richter

The Ohio Rules of Evidence became effective on July 1, 1980.[33] Although the Ohio Evidence Rules were patterned after the Federal Rules of Evidence, there are some significant differences between the Ohio and Federal Rules.[34] The Ohio present sense impression hearsay exception, for example, differs from Federal Rule of Evidence 803(1). Ohio Evidence Rule 803(1) reads:

> **(1) Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter ***unless circumstances indicate lack of trustworthiness***.[35]

As noted by the Ohio Evidence Advisory Committee, "the rule is identical to Federal Evidence Rule 803(1) except for the additional provision that the trial court may exclude such statements if the circumstances under which the statement was made indicate a lack of trustworthiness."[36] According to the Ohio Evidence Advisory Committee, the Ohio exception vested the trial judge with discretion to exclude untrustworthy present sense impressions in an effort to "narrow" the availability of the exception.[37]

The Advisory Committee notes to the Ohio present sense impression suggest that the trustworthiness exception was aimed at ensuring "verification" of present sense impressions. According to Committee notes, trustworthiness requires that "the statement was made at a time and under circumstances in which the person to whom the statement was made would be in a position to verify the statement."[38] In keeping with this verification concern, the Committee notes explain that the trustworthiness exception "would justify exclusion if, for example, the statement were made by a declarant concerning a perceived event to another by way of a C.B. radio transmission."[39] Notwithstanding the focus on verification, the Committee notes explain that circumstances other than verification may also detract from trustworthiness and justify exclusion of an otherwise admissible present sense impression.[40] Nothing in the Ohio Evidence Advisory Committee notes discusses which party bears the burden of demonstrating trustworthiness or a lack thereof.

Notwithstanding the Ohio Evidence Advisory Committee's stated intention to narrow availability of the present sense impression exception, the Ohio cases do not consistently require

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[33] 1 Baldwin's Oh. Prac. Evid. Introduction (3d ed.2015).

[34] *Id.*

[35] Ohio Evid. R. 803(1)(emphasizing language not contained in FRE 803(1)).

[36] Staff Notes of Ohio Evidence Advisory Committee (1980).

[37] *Id.* The drafters of Ohio Evidence Rule 803(1) may have taken a more restrictive view of the present sense impression because no Ohio case had directly recognized the exception prior to enactment of the rules. *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

or discuss verification of present sense impressions.[41] Although many Ohio cases pay lip service to the importance of trustworthiness, few Ohio cases exclude present sense impressions based upon a lack of trustworthiness. The Ohio cases do not address which party bears the burden with respect to the trustworthiness exception. Finally, present sense impressions appear to enjoy similar admissibility under Ohio Evidence Rule 803(1) as they do under its federal counterpart.

The Ohio Trustworthiness Exception: Cases Requiring Verification

Some Ohio appellate cases directly reference the trustworthiness exception in Ohio Evidence Rule 803(1) and appear to require verification or the potential for verification of present sense impressions.[42] Although these cases reference the trustworthiness clause, few actually exclude present sense impressions on this basis.

In **State v. Smith**, the Ohio appellate court did uphold the exclusion of a present sense impression on trustworthiness grounds. [43] Defendant Smith was accused of murdering his co-worker at a restaurant while they were on duty alone late at night. In order to suggest that the victim's boyfriend was the perpetrator, the defendant attempted to solicit testimony from a witness who overheard the victim cursing and yelling during a phone conversation a few days prior to the murder. The witness would have testified that the victim told her that she was talking on the phone with her boyfriend after ending the call, but the trial court sustained the State's hearsay objection to the evidence. On appeal, the Ohio appellate court rejected defendant's argument that the victim's statement identifying her boyfriend as the caller was a present sense impression. In so doing, the appellate court discussed the trustworthiness exception and the concern of inadequate verification:

> The record is unclear as to the amount of time that elapsed between the call and the statement. Therefore, we cannot properly determine if the victim made the statement immediately after the phone call as required by Evid.R. 803(1). More importantly, based upon the record, Ms. Foltz was not in a position to verify that it was Mr. Schroeder on the phone. Therefore, there is nothing to substantiate the trustworthiness of the victim's statement. It is well within the trial court's discretion to exclude statements under this hearsay exception due to lack of trustworthiness.[44]

The Smith court, therefore, appeared to adopt a strict view of the trustworthiness limitation in the present sense impression and emphasized actual verification.

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[41] 2 Baldwin's Oh. Prac. Evid. Rule 803 (3d ed. 2015)("As the cases make clear, however, trustworthiness, not verification, is required.").

[42] There is no Ohio Supreme Court case analyzing the Ohio present sense impression and its trustworthiness clause.

[43] State v. Smith, 2000 WL 1675052, at *7 (Ohio Ct. App. Nov. 8, 2000).

[44] *Id.*

In **State v. Gordon**, the Ohio appellate court again emphasized trustworthiness and verification in affirming admission of a present sense impression.[45] In that case, a witness testified over defendant's objection that another man entered a house and told him "[t]hat Terrell out there still kicking that man." In affirming the admission of the statement, the Ohio appellate court noted that the declarant had just perceived the attack and described it immediately. Importantly, the court also emphasized the witness's verification of the present sense impression:

> Lastly, the declarant made the statement to Hopkins who was able to verify the statement as seen by Hopkins' testimony that he "went to the porch" and saw "Terrell kicking the man two more times." As such, the declarant's statement does not lack trustworthiness.[46]

In **State v. Lester**, the Ohio appellate court again addressed verification and the trustworthiness exception in upholding the admission of a present sense impression.[47] In that case, defendant Lester was involved in an altercation at a residence. The defendant left with a woman shortly thereafter. After some time had passed, occupants of the residence heard a car pull up in the driveway. One occupant of the residence looked out a small window in the front door, turned to the remaining occupants of the house, and stated "They're back."[48] Another occupant of the residence walked up to the door, looked out, and saw a man wearing a jacket like the defendant's. As he turned around to get children out of the room, shots were fired through the door and into the house. The trial court admitted the hearsay statement "They're back" at Lester's trial over his objection.[49]

The Ohio appellate court noted that present sense impressions could be excluded for a lack of trustworthiness, but affirmed the admission of the statement as a present sense impression, reasoning that:

> The statement clearly described the event Foster perceived outside the door and was made while or immediately after Foster perceived the event. Additionally, the circumstances indicated that Foster not only made the statement to people who were in a position to verify the statement, but that verification did in fact occur. Grant testified that immediately after Foster looked outside, he looked outside and saw a man wearing a jacket matching Lester's. The circumstances of this case, therefore, did not lack trustworthiness.

Thus, the Lester court appeared to rely upon the *potential for verification* at the time of the statement, as well as actual verification, in upholding the trustworthiness of this present sense impression.

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[45] State v. Gordon, 2001 WL 1142032 (Ohio Ct. App. 2001).

[46] *Id.*

[47] State v. Lester, 1994 WL 700084, at *1-2 (Ohio Ct. App. Dec. 14, 1994).

[48] *Id.*

[49] *Id.* Although the trial court may have erroneously admitted it as non-hearsay to show the "effect" on others in the room, the appellate court found that its admission was justified by the present sense impression exception.

In a case ripped from the Ohio Advisory Committee notes, the trial court in **Hamm v. McCarty** excluded testimony by a witness that he heard an unidentified declarant say over a C.B. radio that the defendant's car had run a red light at another intersection moments before hitting the plaintiff's car.[50] The appellate court affirmed the ruling, stating that there was inadequate information about the radio transmission for it to meet the requirements of the present sense impression or excited utterance exceptions. There was certainly no opportunity for any witness to verify the statement made by the C.B. radio operator. It appears that basic Rule 803(1) requirements could bar this statement even in the absence of a trustworthiness exception, however.

In **State v. Dixon**, the defendant argued that the trial court erred in admitting statements made by a confidential informant to police pursuant to the present sense impression exception.[51] The statements described the confidential informant's controlled drug buy from the defendant. The defendant argued that the statements made during the debriefing of the confidential informant were not trustworthy because the walk from the controlled buy to the rendezvous point was sufficient for the confidential informant to reflect on the event and fabricate his account. In rejecting the defendant's argument, the Ohio appellate court found that it took the confidential informant only a few minutes to reach the officers and that his statements were made "immediately" after the controlled buy. In addition, the court noted that an audio recording of the controlled buy itself coincided with the confidential informant's description: "Given the close temporal proximity of the debriefings to the buys and the recordings of the buys themselves, there is a high degree of trustworthiness to these statements."[52]

Ohio Cases Allowing Unverified Present Sense Impressions

In contrast to the emphasis on verification in some Ohio appellate opinions, other Ohio cases permit statements made without potential or actual verification to be admitted as present sense impressions, notwithstanding the trustworthiness clause.

In **State v. Wages**, the Ohio appellate court did not insist upon verification or the potential for verification in affirming the admission of a present sense impression.[53] Defendant Wages was convicted for the murder of his girlfriend's mother. The victim was found alone in her home, having been beaten to death. At trial, two witnesses testified over defendant's objection that they were on the telephone with the victim shortly before she was killed and that she stated hastily that she had to get off the telephone because the defendant had just pulled into her driveway. Although the defendant challenged the trustworthiness of this statement due to the lack of verification, the appellate court affirmed, explaining that:

[50] Hamm v. McCarty, 573 N.E.2d 722, 725 (Ohio Ct. App. 1988).

[51] State v. Dixon, 790 N.E.2d 349, 356 (Ohio Ct. App. 2003). Both the confidential informant and the officer testified at trial, eliminating any Sixth Amendment concerns.

[52] *Id.*

[53] State v. Wages, 623 N.E.2d 193, 198 (Ohio Ct. App. 1993).

> The statement made by the victim was made as she was perceiving the appellant driving up her driveway. The requirement of the circumstantial guarantee of trustworthiness is met by the very nature of the victim's comment, despite the appellant's contention that the victim's observation needed to be independently verified.

Thus, the court did not reject the trustworthiness of the victim's present sense impression even though it was not uttered to a witness able to verify its accuracy.[54]

One of the most troubling applications of the Ohio present sense impression that belies the intent to "narrow" availability of the exception is **State v. Essa**.[55] In that case, defendant was charged with the murder of his wife after she suddenly became ill and died while driving in her car alone. Toxicology reports later identified cyanide poisoning as the cause of her death. At trial, the prosecution called the victim's best friend, who testified over a defense objection that the victim called her from her car moments before her death and stated that she was feeling nauseous and that she thought it was from a "calcium" pill her husband had made her take before she left the house. Although the record did not indicate how long after taking the pill the victim spoke to her friend, the appellate court found the victim's statements about her illness and its likely source to be admissible under the present sense impression exception:

> The record reflects that Rosemarie indicated to McGregor that she was feeling nauseous and believed it was being caused by a calcium pill that appellant had told her to take *earlier in the day*. Rosemarie personally observed appellant give her the calcium pill, then personally experienced her own nausea setting in, all of which she recounted to McGregor as it was happening ... McGregor's testimony related to the feeling of sickness that Rosemarie was suffering at the time she made the statement. Further, the proximity in time between appellant's giving Rosemarie the calcium pill and Rosemarie's statement indicates its trustworthiness. Therefore, McGregor's testimony was admissible pursuant to the present-sense-impression exception to the hearsay rules of evidence.[56]

Allowing the victim's statement about her husband's conduct at some prior time in the day as a present sense impression appears inconsistent with the timing requirement in the Ohio and federal exceptions. Further, it is clear that the victim did not utter this statement in the presence of a witness capable of verifying the accuracy of the statement. Notwithstanding the trustworthiness exception in the Ohio present sense impression and drafting history suggesting an intent to narrow availability of the exception, State v. Essa suggests some liberal application of the present sense impression exception in Ohio in some cases.[57]

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[54] *Id.* Perhaps the court was less concerned about verification and the inherent trustworthiness of the victim's statement because forensic evidence in the case tied the defendant to the crime.

[55] State v. Essa, 955 N.E.2d 429, 448 (Ohio Ct. App. 2011).

[56] *Id.* (emphasis added).

[57] Although nothing in the Ohio appellate cases suggests a true split of authority concerning the present sense impression, several of the more liberal applications of the exception came out of the Eighth District Court of Appeals for Cuyahoga County. *See* State v. Wages, 623 N.E.2d 193 (Ohio Ct. App. 1993); State v. Essa, 955

In **State v. Jordan**, the appellate court upheld the admission of unverified statements of the defendant's six year-old grandson under the present sense impression exception.[58] In that case, the defendant ran a day care in her home. When a mother arrived to pick up her eight month-old baby, the defendant brought him out from a back room, laid him down on a couch and told the mother that the baby had been asleep for two hours. As the mother began dressing the baby to take him home, she realized that he was dead. The defendant's six year-old grandson said "Granny put tape over his mouth because he would not stop crying."[59] In upholding admission of this statement as a present sense impression, the court emphasized that it was made "in conjunction with the realization that the baby had stopped breathing" and was "both spontaneous and unsolicited."[60] The court also noted that the police discovered duct tape and tissue which were later tested and determined to contain samples of the baby's DNA.

It is questionable whether the statement admitted in State v. Jordan would be admissible in federal court given the lack of any information about the length of time between the child's observation of the duct tape on the baby and the statements to the mother. Further, the statement does not appear to satisfy the more stringent view of the present sense impression intended by the drafters of the Ohio Evidence Rules. The Jordan court noted that a "central question" surrounding the trustworthiness of present sense impressions is whether the declarant made the statement to a person in a position to verify the statement, but rejected a requirement of actual corroboration. There was no discussion of the child declarant's emotional state to support application of the excited utterance exception in this case either.

The court in **State v. Penland** found that a police officer's contemporaneous description over his shoulder-mounted radio of his pursuit of defendant and the defendant's possession of a firearm, was admissible at trial as a present sense impression.[61] The appellate court noted that: "each of the taped statements from that radio transmission described an event or condition perceived by the officer, either as he perceived it or immediately thereafter." The court emphasized the special trustworthiness of these statements: "The circumstances surrounding the officer's transmission of the statements, especially the perilous nature of the officer's pursuit of the appellant, supply sufficient indicia of the statements' trustworthiness."[62] These statements were deemed trustworthy pursuant to Ohio Evidence Rule 803(1) even though they were not made in the presence of another witness capable of verifying their accuracy.

N.E.2d 429, 448 (Ohio Ct. App. 2011); State v. Jordan, 1997 WL 711303 (Ohio Ct. App. Nov. 13, 1997); State v. Tate, 982 N.E.2d 94 (Ohio App. 2012)(finding that trial counsel's failure to object to admission of victim's *written* hearsay statement to police following domestic assault was not ineffective where written statement would have been admissible as a present sense impression)(reversing conviction on other grounds).

[58] State v. Jordan, 1997 WL 711303, at *6 (Ohio Ct. App. Nov. 13, 1997).
[59] *Id.*
[60] *Id.*
[61] State v. Penland, 724 N.E.2d 841, 846 (Ohio Ct. App. 1998). The officer testified at trial.
[62] *Id.*

Trustworthiness Challenges Apart from Verification

As noted in the Ohio Evidence Advisory Committee notes, factors other than a lack of verification can detract from the trustworthiness of a present sense impression. Some Ohio opinions explore challenges to trustworthiness unrelated to verification.

In **State v. McNeal**, the appellate court affirmed the admission of statements made to a 911 operator as present sense impressions.[63] In that case, a 911 caller stated that she was unable to drive down a road because "there's three kids beating up this one kid." The caller then clarified that one guy was kicking the victim, while the other two were just "standing around."[64] The caller went on to describe the assailant and his conduct. The transcript of the call was admitted at McNeal's murder trial, along with testimony from his two friends that they observed McNeal kick and kill the victim. Following his conviction, McNeal appealed and argued that the 911 caller's hearsay statements should not have been admitted as present sense impressions because they lacked trustworthiness. Specifically, McNeal argued that the caller gave varying descriptions of the attack, first suggesting that all three suspects were beating the victim and then changing to say that only one suspect was actually assaulting the victim. McNeal further argued that the caller's physical description of the attacker was not a description of the "event" admissible through Ohio Rule 803(1).

Viewing the transcript of the 911 call in its entirety and not considering particular statements in a "vacuum," the appellate court rejected these attacks on the trustworthiness of the 911 call. The court found that the caller did not contradict herself, but rather gave a general description of the events she was observing and then clarified the particular details. The court also found that the caller's physical description of the attacker was within the subject matter allowed under the present sense impression.

In **Cox v. Oliver Mach. Co.**, the plaintiff lost fingers while operating the defendant manufacturer's saw.[65] Eight days after the accident, a representative of the defendant came to inspect the saw. During the inspection, and while the saw was running, the plaintiff's fellow employee Fraley allegedly told the defendant's representative Crowley that a "bad switch" he had replaced six times was causing the saw to malfunction. The trial court found that the statement did not satisfy the present sense impression exception and excluded it. In affirming the exclusion, the appellate court referenced the trustworthiness exception in the present sense impression and found that the eight-day lapse of time between the accident and the statement undermined trustworthiness:

> Simply because Fraley's statement may be trustworthy as to the saw's operation during Crowley's visit, the same degree of trustworthiness does not attach to a miscycle which occurred eight days prior to the utterance. According to the rule, the statement is admissible "unless circumstances indicate lack of trustworthiness." Over a week passed between the accident and Fraley's statement. Such a period certainly is not within the

[63] State v. McNeal, 2002 WL 1376177 *5 (Ohio Ct. App. 2002).
[64] *Id.*
[65] Cox v. Oliver Mach. Co., 534 N.E.2d 855, 863 (Ohio Ct. App. 1987).

scope of the minimal lapse of time contemplated by the rules of evidence in order for a present sense impression to be admitted as an exception to the hearsay rule.

In Cox, it seems that Fraley did make a statement about the operation of the saw as he was observing the defendant's representative running it that might have qualified as a present sense impression under the Ohio or federal exception. It appears that he made it to the defendant's representative who could have "verified" it. That said, the addition of backward-looking commentary about the prior replacement of the bad switch and the plaintiff's accident eight days earlier did not fall within the exception, thus requiring exclusion of the entire statement. The court noted that the defendant failed to subpoena the declarant who allegedly had information crucial to its defense, suggesting motivational concerns about the defendant and the witness rather than the declarant. Exclusion of the backward-looking parts of this statement would be appropriate under Federal Rule of Evidence 803(1) even in the absence of a trustworthiness clause.

In **State v. Shaw**, the defendant was convicted of murder after shooting his girlfriend and another man through a window.[66] Although the girlfriend died from her gunshot wounds, the man survived to testify at the defendant's trial. At trial, the man explained that he thought that the victim received a text message just before the shooting because she suddenly looked at her phone and then got up and looked out the window. Over a defense objection, the man testified that the victim then said "I think Melvin [the defendant] is here." The man testified that he looked out the window and presumed that the man he saw outside was Melvin, whom he had never met before. On appeal, the court noted that the victim's identification was "the most damaging because it puts appellant at the scene of the crime moments before the shooting started." The defendant argued on appeal that the victim's statement was insufficiently trustworthy to be admitted as a present sense impression because it was made from her impression of a text message, rather than an identification of the defendant himself and also because the victim's cell phone records failed to show a text message at the time. The court rejected both of these challenges to the trustworthiness of the victim's identification, finding that it was based upon her observations after looking out the window. Further, the court noted that the victim's identification of the defendant moments before the shooting was not dependent on her actual receipt of a text message. Therefore, the court affirmed the admission of the victim's statement as a present sense impression.

In **State v. Lenoir**, a defendant was prosecuted for assault.[67] At trial, the court admitted a transcript of a 911 call from a female declarant describing defendant assaulting a woman outside the declarant's house. On appeal of his conviction, the defendant challenged the trustworthiness of the 911 tape, arguing that the declarant admitted that she couldn't see that well without her glasses and may have been repeating, in part, what another man was saying to her about the attack. On a plain error standard of review, the Ohio appellate court upheld admission of the 911 tape as a present sense impression, noting that the declarant was a trial witness and that the defects in her perception at the time of the 911 call went to the weight of her present sense impression and did not defeat its admissibility.

[66] State v. Shaw, 4 N.E.3d 406, 415 (Ohio Ct. App. 2013).
[67] State v. Lenoir, 2003 WL 21267227 (Ohio Ct. App. May 30, 2003).

Other Present Sense Impression Decisions

Consistent with Federal Rule of Evidence 803(1), the Ohio appellate courts also have declined to apply the Ohio present sense impression where the time lapse between the underlying event and description is too great.[68] The Ohio appellate courts do not uniformly take a strict approach to the timing requirement in Ohio Evidence Rule 803(1), however. In **State v. Travis**, the court upheld the admission of a victim's oral description of domestic violence to responding officers given after officers first interviewed the perpetrator, but "well within the first hour of the offense." [69]

Conclusion on the Ohio Present Sense Impression Exception

The drafting history of the Ohio present sense impression exception clearly signals an intent to apply the exception more narrowly than its federal counterpart. The drafting history suggests that statements otherwise satisfying the present sense impression exception should be excluded as untrustworthy when they are made without the potential for verification by another witness. Several Ohio appellate opinions pay strong lip service to the trustworthiness exception in the Ohio rule and emphasize the importance of verification. That said, other Ohio cases uphold more liberal applications of the present sense impression exception, ignoring trustworthiness concerns and the absence of verification. Notwithstanding cases like Smith, where FRE 803(1) would likely permit a participant in a phone conversation to reveal the name of the caller on the other end of the line, and cases like Essa, where federal courts would likely exclude hearsay statements about a husband's actions "earlier in the day," the Ohio present sense impression exception reaches results similar to those that would be reached under FRE 803(1) in most cases, notwithstanding the trustworthiness clause in the Ohio exception.

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[68] *See e.g.* Abraham v. Werner Enterprises, 2003 WL 21384854 (Ohio Ct. App. 2003)("Gawur's conversations with Barley took place the day after Abraham's accident and approximately one week later. In our view, they were too far removed from the scene of the accident to bear the high degree of trustworthiness critical to present sense impressions."); State v. May, 970 N.E.2d 1029, 1039 (Ohio Ct. App. 2011)(rejecting admissibility of eye-witness statements to arresting officer that the defendant was only on his "second beer" when the officer pulled up to the scene because "the declarants did not make the statements to the trooper about May's postaccident alcohol consumption as it was happening. Nor did they speak to the trooper about this immediately when he arrived at the scene. The trooper did not question the declarants until after he had interviewed May and taken May's written statement."); State v. Barnd, 619 N.E.2d 518, 522 (Ohio Ct. App. 1993)(affirming exclusion of victim screaming obscenities at defendant five to ten minutes after bar fight as insufficiently contemporaneous to qualify as present sense impressions). The statements in Barnd did not describe any events and do not appear to be hearsay. They appear to be non-hearsay utterances that the defendant was seeking to use to prove the victim's state of mind. The trial court's exclusion seems more appropriate on Rule 403 grounds, where prejudicial cursing by the victim *after* the defendant broke a glass on his head was not very probative of the victim's pre-fight state of mind.

[69] State v. Travis, 847 N.E.2d 1237 (Ohio Ct. App, 2006); *see also* State v. Tate, 982 N.E.2d 94 (Ohio App. 2012)(finding that trial counsel's failure to object to admission of victim's *written* hearsay statement to police following domestic assault was not ineffective where written statement would have been admissible as a present sense impression)(reversing conviction on other grounds).

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THE FEDERAL JUDICIAL CENTER
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MEMORANDUM—*for information*

Date: March 5, 2016
To: Advisory Committee on Rules of Evidence
From: Timothy Lau*
Re: Review of Scientific Literature on the Reliability of Present Sense Impressions and Excited Utterances

I. Executive Summary

A. Purpose of the Memorandum

In October 2015, the Advisory Committee on Rules of Evidence held a symposium on the subject of hearsay reform. One of the issues discussed was the reliability of present sense impression (PSI) and excited utterance (EU) hearsay evidence currently admissible under Federal Rules of Evidence 803(1) and 803(2), here referred to as the PSI and EU hearsay exceptions, respectively.

Following the symposium, a member of the committee suggested that the Federal Judicial Center conduct original, experimental research examining the reliability of PSI and EU hearsay evidence. The Center offered to prepare a summary of the scholarly literature as a preliminary step, and the committee accepted this proposal.

This memorandum is prepared in response to the modified request of the committee. Section II summarizes the existing research findings on the reliability of PSI and EU hearsay. The review is interdisciplinary, but draws especially from the neurological, behavioral, and social sciences. Section III discusses the issues that remain unresolved and the need for and feasibility of conducting new experimental studies.

This memorandum is informational and is intended to serve as a framework for further discussion. It provides a general overview of the vast topics of deception, perception, and memory implicated in the overarching question of PSI and EU hearsay reliability. The Center stands ready to supplement this memorandum with an expanded exploration of topics that interest the committee.

B. Summary of the Memorandum

The federal courts have identified two important facets of hearsay reliability: (1) the susceptibility to fabrication, coaching, or confabulation; and (2) the accuracy of underlying observation.

* I would like to thank Jessica Snowden, Jason Cantone, and Molly Jackson for their helpful comments and suggestions.

Fabrication and coaching both reflect intentional lying. The intentional falsification of a PSI or an EU can be analyzed in three stages. First, the event or condition that is the subject of the PSI or EU must be amenable to being lied about. This memorandum identifies three characteristics of such an event or condition.

Second, the declarant must, within the time period permitted by the applicable hearsay exception, make the decision to lie. The literature suggests that humans have a default response when presented with an opportunity to lie. This response hinges on the presence of a motivation to lie. Generally, when there is a motivation to lie, the default response would be to lie, and when there is no motivation to lie, the default response would be to tell the truth. Cognitive effort and time are necessary to overcome this response pattern. To that end, whether PSI and EU hearsay evidence are generally free from lies is a question of whether declarants, on the whole, can quickly perceive any advantage to lying.

Existing research is largely silent on whether PSI and EU declarants have or could easily detect a motivation to lie. To arrive at an answer, the committee may have to draw on the judicial experience. PSI and EU hearsay evidence often originate in circumstances that involve a high level of mental trauma and physical danger, such as domestic abuse situations. It would be both impractical and unethical to subject humans to an adequate simulation of these situations in order to examine their facility in identifying motivations to lie. Experiments necessarily rely on safe, but more artificial, scenarios, which may not provide an externally valid test of the circumstances in which PSI and EU hearsay evidence often arises.

Third, lies inserted into a PSI or an EU must be of sufficient quality for the hearsay to be moved into evidence. The literature suggests that it generally is more difficult to create a lie than to tell the truth. The constraints attendant to the generation of PSI and EU hearsay evidence—time pressure and the need for coherent narratives—render the task of lying even more cognitively taxing. However, simply because a task is difficult does not mean it is impossible. Existing research is not conclusive but does suggest that the difficulty of crafting good lies in PSI and EU scenarios may reduce the incidence of lying. The Center may be able to effectively test this hypothesis with experiments.

Confabulation is a false memory. Unlike intentional liars, confabulators are not aware of the falsity of their statements. Confabulations often result from brain damage or mental disease; while healthy persons also may confabulate, they generally do so during memory tests or lengthy and pressured questioning. Confabulations do not appear to present much threat to the PSI and EU hearsay exceptions, and the Center does not recommend conducting experiments about them, given the other areas of potential inquiry.

As mentioned earlier, the accuracy of observation underlying a type of hearsay statement is another measure of reliability. The research literature makes clear that attention tends to improve the accuracy of observation. To the extent that a PSI about an event or condition reflects attention to that event or condition, the PSI may be of heightened reliability. Experimental studies in this area do not appear necessary.

However, research also suggests that emotion may impair perception and other mental processes that may be important to accurate observation. To the extent that an EU is made "under the stress of excitement," it may be less reliable. However, it does not appear

that experiments in this area would be useful for the committee to assess the validity of the EU hearsay exception.

II. Review of Research Literature on the Reliability of PSI and EU Hearsay Evidence

A. Measures of Reliability

As the Supreme Court has noted, "[r]eliability is an amorphous, if not entirely subjective, concept."[1] Rather than define and apply a set standard of reliability, this memorandum focuses on two aspects of reliability derived from judicial language.

In a discussion about the EU hearsay exception, the Supreme Court stated that "circumstances that eliminate the possibility of fabrication, coaching, or confabulation" could "provide sufficient assurance that the statement [made in those circumstances] is trustworthy."[2] Accordingly, the susceptibility of a type of hearsay evidence to fabrication, coaching, or confabulation is one dimension of its reliability.

Also, the committee's own notes about the EU hearsay exception have specifically addressed the criticism of the exception "on the ground that excitement impairs accuracy of observation."[3] Implicit is the idea that the accuracy of observation underpinning a particular type of hearsay evidence constitutes another measure of reliability.

The remainder of this memorandum therefore reviews research on the susceptibility of both PSI and EU hearsay evidence to fabrication, coaching, or confabulation, as well as the probable accuracy of underlying observations.[4] To that end, this memorandum focuses only on statements that qualify as PSI and EU hearsay evidence within the language of the exceptions.[5]

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1. Crawford v. Washington, 541 U.S. 36, 63 (2004).

2. Idaho v. Wright, 497 U.S. 805, 820 (1990).

3. Fed. R. Evid. 803(2) advisory committee's note.

4. A search of the literature yields no research that directly and empirically tests the assumptions underlying the PSI or EU exceptions. *See*, *e.g.*, John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 Law & Contemp. Probs. 3, 5 (2002) ("to our knowledge, psychological research has never directly tested the hypothesis that stress inhibits the ability to lie"). The limited empirical research concerning hearsay evidence tends to focus on such matters as the evaluation of the evidence by mock jurors. *See*, *e.g.*, Gail S. Goodman et al., *Hearsay Versus Children's Testimony: Effects of Truthful and Deceptive Statements on Jurors' Decisions*, 30 Law & Hum. Behav. 363 (2006) (analyzing whether mock jurors perceived the credibility of a child's statement differently based on the format in which the statement was presented and whether they could discriminate between accurate and deceptive statements made by a child). This review is therefore based on research directed at questions outside of the hearsay realm which nonetheless speak to the PSI and EU hearsay exceptions.

5. Some statements may resemble PSI or EU hearsay evidence but do not actually fulfill the requirements set forth in the exceptions. Examples include a statement about a nonexistent "event or condition" or one about an actual "event or condition" but not based on the declarant's perception. This memorandum as-

B. Susceptibility of PSI and EU Hearsay Evidence to Fabrication, Coaching, and Confabulation

Fabrication, coaching, and confabulation are all potential sources of falsity, but they are separate phenomena. Fabrication and coaching involve intentional deception; that is, a declarant making a fabricated or coached statement intends the statement to be false. Confabulation, in contrast, is a false memory.[6] Confabulators do not know they are not being truthful.[7]

The susceptibility of PSI and EU hearsay evidence to such intentional and unintentional deception are separately discussed in the following sections.

1. Fabrication and Coaching

No research appears to have directly addressed the susceptibility of PSI or EU hearsay evidence to deliberate lies. However, research has examined lies prompted by questions, which this memorandum reviews to the extent applicable.

Walczyk et al. have proposed the Activation-Decision-Construction Model to explain deceptive responses to questions:

> The Activation-Decision-Construction Model describes answering questions deceptively . . . . The model analyzes the act into three components. First, a question heard or read activates the truth from long-term memory, usually automatically. Second, based on the activated truth and social context, a decision to lie may be made, usually to advance liars' interests. Truthful answering will then be actively inhibited, especially for well practiced truths that can proactively interfere with lying . . . . Third, a context-appropriate lie is constructed that must be coherent and plausible. When possible, memories of the truth are altered slightly for the sake of lie plausibility and to minimize the cognitive load of lie construction. Finally, a lie is shared.[8]

The intentional formation of a deceptive PSI or EU can be similarly analyzed as a three stage process. First, there must be an opportunity to lie. The PSI hearsay exception defines a PSI as "[a] statement describing or explaining an event or condition." The EU hearsay exception defines an EU as "[a] statement relating to a startling event or condi-

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sumes that courts can perfectly resolve the gatekeeping "preliminary questions of fact." Fed. R. Evid. 803(2) advisory committee's note.

6. Michael D. Kopelman, *Varieties of Confabulation and Delusion*, 15 Cognitive Neuropsychiatry 14, 25 (2010); Louis Nahum et al., *Forms of Confabulation: Dissociations and Associations*, 50 Neuropsychologia 2524 (2012); Jerrod Brown et al., *Confabulation: Connections between Brain Damage, Memory, and Testimony*, 3 J.L. Enforcement 1, 1 (2013), http://www.jghcs.info/index.php/l/article/view/295/260.

7. Brown et al., *supra* note 6, at 2.

8. Jeffrey J. Walczyk et al., *Advancing Lie Detection by Inducing Cognitive Load on Liars: A Review of Relevant Theories and Techniques Guided by Lessons from Polygraph-Based Approaches*, 4 Frontiers in Psychol. 14, at 4 (2013) (citation omitted).

tion." Neither a PSI nor an EU can be made in a vacuum. There must be some appropriate "event or condition" that the declarant can use to falsify hearsay evidence.

Second, the declarant must decide to lie. The PSI hearsay exception requires that a PSI be "made while or immediately after the declarant perceived [the event or condition]," and the EU hearsay exception requires that an EU be "made while the declarant was under the stress of excitement that [the startling event or condition] caused." Falsifying a PSI or an EU requires the declarant to be capable of quickly deciding to make use of the event or condition to advance an agenda.

Third, the declarant must construct a deception of a quality sufficient for the falsified PSI or EU to be moved into evidence. The duty of candor to the tribunal forbids attorneys from offering evidence they know to be false.[9] It is therefore insufficient that the declarant only have the opportunity to lie and makes the decision to do so; he or she must, within the time frame permitted by the applicable hearsay exception, contrive a falsehood of sufficient quality that attorneys cannot recognize the falsity after investigation.

This section reviews the research literature to the extent it addresses the feasibility of each of these three steps.

a. Opportunity to Falsify a PSI or an EU

No research to date appears to have tested the situational factors necessary for a declarant to successfully falsify PSI or EU hearsay evidence.

However, three probable prerequisites may be inferred: (1) there is at least one witness to whom a declarant could lie about an event or condition, but one who cannot refute the falsity; (2) the event or condition is such that a plausible lie about it can be incorporated into a PSI or an EU; and (3) the range of plausible lies permitted by the event or condition must be capacious enough to accommodate a lie that can benefit the declarant.

A discussion of these inferences is provided in section III.A.1.a.

b. Deciding to Falsify a PSI or an EU

Although there has been much psychological and neuroscientific research conducted since the enactment of the PSI and EU hearsay exceptions, there is to date no complete understanding about when people decide to lie.[10]

Humans have a default response when presented with an opportunity to lie.[11] Scholars have identified the existence of a motivation to lie as a key determinant of what this response may be.[12] Where there is no motivation to lie,[13] humans may be predisposed to tell

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9. *See*, *e.g.*, Model Rules of Prof'l Conduct r. 3.3 (Am. Bar Ass'n, Discusson Draft 1983).

10. Bruno Verschuere & Shaul Shalvi, *The Truth Comes Naturally! Does It?*, 33 J. Language & Soc. Psychol. 417, 421 (2015).

11. *Id.*

12. *Id.* at 420–21.

13. In one research paradigm, participants are instructed to lie but are not given any reward for lying. *See*, *e.g.*, Evelyne Debey, Bruno Verschuere & Geert Crombez, *Lying and Executive Control: An Experimental Investigation Using Ego Depletion and Goal Neglect*, 140 Acta Psychologica 133, 135–38 (2012). In

the truth.[14] In contrast, when lying may be profitable, scholars have hypothesized that the default reaction is to lie.[15]

The suppression of the default response—to lie when there is no motivation to lie or to be honest when there is a motivation to lie—requires cognitive effort.[16] During this deliberative process, the mind may weigh such factors as moral judgment and justification for lying.[17] The process requires time and demands attentional focus.[18] It is more impaired under situations of high cognitive load, such as conditions that promote attentional lapses or depletion of self-control,[19] or under fatigue, such as conditions of sleep deprivation or later times of day.[20]

Other factors, beyond the costs and benefits of lying particular to a situation, also play a role. Both moral judgment and the desire to maintain a favorable self-image may motivate people to avoid lying.[21] Lying appears to be more difficult when conducted in personal settings; for example, the decision to lie has been observed to take twice as much time when testing is conducted person-to-person instead of by computer.[22] Likewise, the

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another paradigm, participants are incentivized to lie by the promise of rewards which are tied to the contents of their statements. *See*, *e.g.*, Shaul Shalvi, Ori Eldar & Yoella Bereby-Meyer, *Honesty Requires Time (and Lack of Justifications)*, 23 Psychol. Sci. 1264, 1266 (2012). Comparison of the results from the two types of studies demonstrates the importance of the motivation to lie. Verschuere & Shalvi, *supra* note 10, at 421.

14. Evelyne Debey, Jan de Houwer & Bruno Verschuere, *Lying Relies on the Truth*, 132 Cognition 324, 331 (2014); Bruno Verschuere et al., *The Ease of Lying*, 20 Consciousness & Cognition 908, 909 (2011); Sean A. Spence et al., *Behavioural and Functional Anatomical Correlates of Deception in Humans*, 12 NeuroReport 2849, 2852 (2001); Evelyne Debey et al., *From Junior to Senior Pinocchio: A Cross-Sectional Lifespan Investigation of Deception*, 160 Acta Psychologica 58, 65 (2015).

15. Verschuere & Shalvi, *supra* note 10, at 421.

16. Debey, de Houwer & Verschuere, *supra* note 14, at 331; Shalvi, Eldar & Bereby-Meyer, *supra* note 13, at 1268; Ahmed A. Karim et al., *The Truth About Lying: Inhibition of the Anterior Prefrontal Cortex Improves Deceptive Behavior*, 20 Cerebral Cortex 205, 209–10 (2010); Debey, Verschuere & Crombez, *supra* note 13, at 140; Shawn E. Christ et al., *The Contributions of Prefrontal Cortex and Executive Control to Deception: Evidence from Activation Likelihood Estimate Meta-Analyses*, 19 Cerebral Cortex 1557, 1558 (2009).

17. Shalvi, Eldar & Bereby-Meyer, *supra* note 13, at 1266; Nobuhito Abe et al., *The Neural Basis of Dishonest Decisions that Serve to Harm or Help the Target*, 90 Brain & Cognition 41, 41 (2009).

18. Jeffrey J. Walczyk et al., *Cognitive Mechanisms Underlying Lying to Questions: Response Time as a Cue to Deception*, 17 Applied Cognitive Psychol. 755, 771 (2003) [hereinafter Walczyk et al., *Cognitive Mechanisms*]; Shalvi, Eldar & Bereby-Meyer, *supra* note 13, at 1268; Debey, Verschuere & Crombez, *supra* note 13, at 138–40.

19. *Id.* at 138, 140; Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 Organizational Behav. & Hum. Decision Processes 191, 199 (2011).

20. Christopher M. Barnes et al., *Lack of Sleep and Unethical Conduct*, 115 Organizational Behav. & Hum. Decision Processes 169, 177–78 (2011); Maryam Kouchaki & Isaac H. Smith, *The Morning Morality Effect: The Influence of Time of Day on Unethical Behavior*, 25 Psychol. Sci. 95, 100 (2014).

21. Karim et al., *supra* note 16, at 209–10; Urs Fischbacher & Franziska Heusi, *Lies in Disguise: An Experimental Study on Cheating*, 11 J. Eur. Econ. Ass'n 525, 526 (2013).

22. Jeffrey J. Walczyk et al., *Lying Person-to-Person about Life Events: A Cognitive Framework for Lie Detection*, 58 Pers. Psychol. 141, 159–60 (2005) [hereinafter Walczyk et al., *Lying Person-to-Person*].

level of lying in experiments is higher in a laboratory setting than when receiving a phone call at home.[23] The relationship between the liar and audience also plays a role; people may be less likely to lie to those with whom they are close.[24]

Training may play a role in influencing both the default response and any subsequent deliberation. For example, repetition may recondition a default response of truth-telling to one of lying.[25] Likewise, the decision to lie may be made easier and faster with practice.[26] On the other hand, lying may be made more difficult with habitual truth-telling.[27]

Scholars estimating the overall prevalence of lying have concluded that most people tell few lies, and those lies which are told are generally not serious, are made in the context of everyday social interactions, and involve little planning and little regret.[28] There also exist a portion of people who are instinctively and emotionally averse to lying.[29] Of all lies told, most are told by a minority of prolific liars, and scholars have found a correlation between lying frequency and psychopathic tendencies.[30]

c. Injecting Lies into a PSI and an EU

The construction of a lie is a mental step distinct from the decision to lie, and it requires additional time and cognitive resources.[31] Lies appear to be generated by consciously say-

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23. Johannes Abeler, Anke Becker & Armin Falk, *Representative Evidence on Lying Costs*, 113 J. Pub. Econ. 96, 103 (2014).

24. Madeline E. Smith et al., *Everyday Deception or A Few Prolific Liars? The Prevalence of Lies in Text Messaging*, 41 Computers in Hum. Behav. 220, 225 (2014); Bella M. DePaulo & Deborah A. Kashy, *Everyday Lies in Close and Casual Relationships*, 74 J. Personality & Soc. Psychol. 63, 75 (1998).

25. Verschuere et al., *supra* note 14, at 909–10.

26. B. Van Bockstaele et al., *Learning to Lie: Effects of Practice on the Cognitive Cost of Lying*, 3 Frontiers in Psychol. 526, at 5 (2012); Xiaoqing Hu, Hao Chen & Genyu Fu, *A Repeated Lie Becomes a Truth? The Effect of Intentional Control and Training on Deception*, 3 Frontiers in Psychol. 488, at 7 (2012).

27. Verschuere et al., *supra* note 14, at 909–10; Jeffrey J. Walczyk et al., *A Social-Cognitive Framework for Understanding Serious Lies: Activation-Decision-Construction-Action Theory*, 34 New Ideas in Psychol. 22, 32 (2014) [hereinafter Walczyk et al., *A Social-Cognitive Framework*].

28. Bella M. DePaulo et al., *Lying in Everyday Life*, 20 J. Psychol. & Soc. Behavior 979, 991–92 (1996); Kim B. Serota, Timothy R. Levine & Franklin J. Boster, *The Prevalence of Lying in America: Three Studies of Self-Reported Lies*, 36 Hum. Comm. Res. 2, 19–23 (2010).

29. A study conducted in Spain found that a significant portion of people, 40%, were lie-averse. Raúl López-Pérez & Eli Spiegelman, *Why do People Tell the Truth? Experimental Evidence for Pure Lie-Aversion*, 16 Experimental Econ. 233, 245 (2012). Although the 40% figure cannot be directly applied to the U.S. population given the divergence between Spanish and U.S. culture, research conducted in the United States has found that a small number of prolific liars account for a large proportion of all lies. Serota, Levine & Boster, *supra* note 28, at 21–22.

30. Serota, Levine & Boster, *supra* note 28, at 21–22; Rony Halevy, Shaul Shalvi & Bruno Verschuere, *Being Honest About Dishonesty: Correlating Self-Reports and Actual Lying*, 40 Hum. Comm. Res. 54, 69 (2014); Smith et al., *supra* note 24, at 224.

31. Walczyk et al., *Lying Person-to-Person, supra* note 22, at 145; Emma J. Williams et al., *Telling Lies: The Irrepressible Truth?*, 8 PLoS One e60713, at 12 (2013).

ing either the opposite of the truth or some alteration of the truth.[32] Accordingly, lies rely on the truth, and liars have to mentally suppress themselves from speaking the truth.[33]

The difficulty of formulating a lie increases when there is a greater need to think through a lie; that is, a more complex lie requires a greater cognitive effort.[34] To that end, lying by omitting information should be cognitively easier, because unlike more active forms of lying, it does not require the generation of deceptive content beyond the inhibition of truth-telling.[35] Research suggests that lying by omission may be the prevalent form of deception.[36]

Along similar lines, lies may generally be harder to generate when there are fewer constraints. For example, research finds that lying is more cognitively taxing and takes longer when multiple lies are plausible or when the lies are made in response to open-ended questions rather than yes/no questions.[37]

When a lie must fit within a narrative to advance an agenda, the liar needs to expend cognitive effort to keep the story straight.[38] Maintaining a plausible and consistent narrative should be more difficult under situations that increase cognitive load, such as when a narrative must be told in reverse chronological order.[39]

Lying in response to an expected opportunity may be easier because retrieval of rehearsed lies from memory takes less cognitive effort than the generation of spontaneous lies.[40] But even when a lie has been prepared in advance, lying may still be more difficult than telling the truth because truthful knowledge may be encoded in a larger portion of the brain.[41]

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32. Walczyk et al., *Cognitive Mechanisms*, *supra* note 18, at 765.

33. Debey, de Houwer & Verschuere, *supra* note 14, at 331; Christ et al., *supra* note 16, at 1558; Debey et al., *supra* note 14, at 65–66.

34. Walczyk et al., *A Social-Cognitive Framework*, *supra* note 27, at 33.

35. Timothy R. Levine et al., *Self-Construal, Self and Other Benefit, and the Generation of Deceptive Messages*, 31 J. Intercultural Comm. Res. 29, 32–34 (2002).

36. *Id.* at 32–34, 43.

37. Williams et al., *supra* note 31, at 12, 13; Walczyk et al., *Lying Person-to-Person, supra* note 22, at 160.

38. G. Ganis et al., *Neural Correlates of Different Types of Deception: An fMRI Investigation*, 13 Cerebral Cortex 830, 831, 835 (2003).

39. *See* Aldert Vrij et al., *Increasing Cognitive Load to Facilitate Lie Detection: The Benefit of Recalling an Event in Reverse Order*, 32 Law Hum. Behav. 253, 254–55, 259–60, 262 (2008) [hereinafter Vrij et al., *Increasing Cognitive Load*] (increasing cognitive load by requesting a narrative in reverse order increased cues and thus detection of deception by police officers).

40. Lara Warmelink et al., *The Effect of Question Expectedness and Experience on Lying about Intentions*, 141 Acta Psychologica 178, 182 (2012); Aldert Vrij et al., *Saccadic Eye Movement Rate as a Cue to Deceit*, 4 J. Applied Res. Memory & Cognition 15, 18 (2015) [hereinafter Vrij et al., *Saccadic Eye Movement Rate*]; Ganis et al., *supra* note 38, at 832, 835.

41. Ganis et al., *supra* note 38, at 834–35. *But see* Vrij et al., *Saccadic Eye Movement Rate*, *supra* note 40, at 15, 18 (saccadic eye movements, correlated with the search of long term memory, found to be higher in the telling of planned lies than in truth-telling, although the difference was not considered significant).

Furthermore, a successful liar must appear honest and credible, which motivates them to regulate their own behavior as well as to monitor the behavior of surrounding people.[42] This behavioral monitoring may constitute an additional cognitive burden.[43]

2. Confabulation[44]

Confabulation is the emergence of memories of events, experiences, or details which never took place.[45] No known research directly examines whether PSI or EU hearsay evidence is susceptible to confabulation. However, scholars have identified some mechanisms underlying the phenomenon. This memorandum uses the scheme proposed by Kopelman, which generally classifies confabulations as either "spontaneous" or "provoked."[46]

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42. Vrij et al., *Increasing Cognitive Load*, *supra* note 39, at 259; Kamila E. Sip et al., *When Pinocchio's Nose Does Not Grow: Belief Regarding Lie-Detectability Modulates Production of Deception*, 7 Frontiers in Hum. Neuroscience 16, at 9 (2013); Bella M. DePaulo et al., *Cues to Deception*, 129 Psychol. Bull. 74, 103 (2003).

43. Vrij et al., *Increasing Cognitive Load*, *supra* note 39, at 259; Sip et al., *supra* note 42, at 9 (2013).

44. This memorandum uses a narrow, technical understanding of the word *confabulation*. *See*, e.g., Dresser v. Colvin, No. 12-CV-253-CJP, 2013 WL 791158, at *7 (S.D. Ill. Mar. 4, 2013) ("The ALJ evidently did not understand that confabulation is a term of art in the practice of psychology. It means 'confusion of imagination with actual memories, or the formation of false memories, due to a psychological or neurological disorder.'") (citation omitted); Mohammed v. Obama, 704 F. Supp. 2d 1, 27 (D.D.C. 2009) ("A common consequence of coercive interrogation techniques is 'confabulation,' or the 'pathological production of false memories.'") (citation omitted). However, *confabulation* can also be more broadly interpreted to encompass unintentional deception. *See*, *e.g.*, Thorogood v. Sears, Roebuck & Co., 678 F.3d 546, 549 (7th Cir. 2012) ("Consumers whose preference for stainless steel was unrelated to an anxiety about rust stains (almost certainly the vast majority) would not be upset to discover that an inconspicuous portion of the drum [of a clothes dryer] had been made of a different kind of steel that anyway was coated with ceramic and hence was rust-proof. One would have to have a neurotic obsession with rust stains (or be a highly imaginative class action lawyer) to worry about Sears' drum. We said that, judging from the record and the argument of his lawyer, the concerns expressed by Thorogood [about the rust stains] were a confabulation.") (citation omitted). The Center can address a more expanded definition of *confabulation* in a supplement, should the committee be interested.

45. Nahum et al., *supra* note 6, at 2524. Confabulation shares similarities with and yet is often viewed as distinct from delusion, which pertains to the formation of false beliefs. Kopelman, *supra* note 6, at 25; Asaf Gilboa & Mieke Verfaellie, *Telling It Like It Isn't: The Cognitive Neuroscience of Confabulation*, 16 J. Int'l Neuropsychological Soc'y 961, 961–62 (2010).

46. Kopelman, *supra* note 6, at 15, 21–24. The literature is in disagreement as to how confabulations should be classified. *See* Gilboa & Verfaellie, *supra* note 45, at 961–63 (noting various perspectives in the literature); Esther Lorente-Rovira et al., *Confabulations (I): Concept, Classification, and Neuropathology*, 39 Actas Españolas de Psiquiatría 251, 253 (2011) (criticizing the Kopelman classification). The Kopelman classification is used in this memorandum out of convenience, not because of its superiority to competing schemes. The choice of the scheme does not materially affect the discussion about the susceptibility of PSI and EU hearsay evidence to confabulation.

Provoked confabulation, also known as intrusion, is a fleeting memory error that occurs when the memory is challenged.[47] It is most commonly observed when a person, in recalling a list of words, reports words that were not included in the list.[48] Although intrusions are more frequent among patients suffering from brain damage, healthy persons are not immune.[49] This type of confabulation is thought to occur when the mind is challenged to retrieve more information from memory than is actually available.[50]

Spontaneous confabulation is the persistent creation of false memories without the need for provocation.[51] In one case, a patient would get out of bed every day and dress in formal clothes, convinced he had been called to a meeting the night before.[52] It is a consequence of brain damage and is suffered by those with conditions such as Korsakoff's syndrome or amnesia, for example.[53]

Kopelman acknowledges other types of confabulation; of these, false confessions and recovery of false memories may be important to the discussion of evidentiary reliability.[54] False confessions could be intentional lies, such as those volunteered by persons who want to shield the true culprits.[55] However, there is a species of false confessions in which innocent persons under coercive, interrogative settings gradually accept guilt and develop false memories to support the belief of guilt.[56] A similar process occurs in the recovery of false memories.[57] Common to both types of confabulation are lengthy questioning and pressure to accept narratives advanced by the questioners.[58]

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47. Kopelman, *supra* note 6, at 15, 20.

48. Chris McVittie et al., *The Dog that Didn't Growl: The Interactional Negotiation of Momentary Confabulations*, 22 Memory 824, 825 (2014).

49. Sabine Borsutzky et al., *Confabulations in Alcoholic Korsakoff Patients*, 46 Neuropsychologia 3133, 3141 (2008); Nahum et al., *supra* note 6, at 2531.

50. Nahum et al., *supra* note 6, at 2531; Kopelman, *supra* note 6, at 15, 20–21.

51. Kopelman, *supra* note 6, at 15.

52. McVittie et al., *supra* note 48, at 826.

53. Kopelman, *supra* note 6, at 18, 21; Nahum et al., *supra* note 6, at 2524–25, 2531, 2532.

54. Kopelman, *supra* note 6, at 21–24. Kopelman recognizes three other categories of false memories: false recognition syndrome; confabulations in schizophrenic patients; and pseudologia fantastica. *Id.* The first two are products of brain damage or mental disease. *Id.* Patients who suffer from pseudologia fantastica generate fantasies and lies compulsively. *Id.* As explained in section III.A.2, it is unlikely that statements from victims of brain damage will often be introduced as PSI and EU hearsay evidence. The same reasoning leads to the conclusion that these three types of false memories are unlikely to threaten the reliability of PSI and EU hearsay evidence.

55. Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 Current Directions Psychol. Sci. 249, 249 (2008).

56. *Id.*; Kopelman, *supra* note 6, at 23–24; Gisli H. Gudjonsson et al., *The Role of Memory Distrust in Cases of Internalised False Confession*, 28 Applied Cognitive Psychol. 336, 337–38 (2014).

57. Gudjonsson et al., *supra* note 56, at 346.

58. *Id.*

C. Accuracy of Observation Underlying PSI and EU Hearsay Evidence

The fact that a declarant honestly makes a PSI or an EU is no guarantee that the resulting hearsay is reliable. An honest declarant still must accurately observe the event or condition to generate reliable evidence.[59]

This section addresses potential issues of accuracy of observation underlying PSI and EU hearsay evidence. The discussion about PSI hearsay will be limited to statements based on dispassionate observation of the event or condition. With regard to the accuracy of observation, a PSI about a "startling event or condition" made "under the stress of excitement" is essentially an EU.[60] In this section, such a PSI will be treated as an EU.

1. PSI

In general, research suggests that attention facilitates accurate perception.[61] For example, the accuracy and speed of the perception of objects is greatest within the area where one's attention is directed.[62] This enhancement effect of attention on perception is most pronounced when the difficulty of perception is highest.[63] Attention also results in a better ability to notice change.[64]

2. EU

a. "Startling Event or Condition" from a Scientific Point of View

It is important to note the divergence in the usages of *startling*, *excitement*, and *stress* in the context of the EU hearsay exception and in the scientific literature.

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59. As noted in section II.A, the committee has considered the "accuracy of observation" underpinning a particular statement as a measure of its reliability. Fed. R. Evid. 803(2) advisory committee's note.

60. As the committee has stated, "[i]n considerable measure [the PSI and EU exceptions] overlap." Fed. R. Evid. 803(2) advisory committee's note.

61. *Attention* as used in section III.B.1 refers to voluntary attention. Voluntary attention is the allocation of perceptual resources to the spatial location important to task goals. William Prinzmetal et al., *Voluntary and Involuntary Attention Have Different Consequences: The Effect of Perceptual Difficulty*, 62 Q.J. Experimental Psychol. 352, 352 (2009). It is distinct from "involuntary attention," which is the involuntary capture of attention by a stimulus unrelated to the goal-directed activity. *Id.* Voluntary attention is by definition the type of attention implicated within the PSI hearsay exception. This is because a PSI declarant has the task goal of "describing or explaining an event or condition," and his or her perceptual resources are directed to the event or condition.

62. William Prinzmetal, Christin McCool & Samuel Park, *Attention: Reaction Time and Accuracy Reveal Different Mechanisms*, 134 J. Experimental Psychol.: Gen. 73, 90 (2005).

63. Prinzmetal et al., *supra* note 61, at 364.

64. Graham Davies & Sarah Hine, *Change Blindness and Eyewitness Testimony*, 141 J. Psychol. 423, 431 (2007). *See also* Deborah Davis et al., *'Unconscious Transference' Can Be an Instance of 'Change Blindness*,' 22 Applied Cognitive Psychol. 605, 618–19 (2008) (diverted attention results in higher likelihood of failure to notice changes).

The startle reflex, as science now understands it, is a defensive reaction to an intense and abrupt sensory stimulus such as a sudden, loud noise.[65] The reflex includes an involuntary muscular contraction, such as the blinking of the eyes or the ducking of the head, presumably to facilitate flight or to protect the body from danger.[66] It also occurs at a speed too fast to be simulated, and, unlike surprise, cannot be entirely inhibited by anticipation.[67] The startle reflex may be accompanied by an emotional response, such as surprise, along with a disruption to cognitive processing and motor responses, but it can also be completed within fractions of a second without awareness that the reflex ever took place.[68]

The EU hearsay exception defines an EU as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." In associating "startling" with "stress of excitement," the exception seems to reflect an understanding, held by some scholars prior to and through the 1980s, that startle is itself an emotional response, such as an extreme form of surprise.[69] The exception does not appear to require that the "startling event or condition" be one that triggers a reflexive response, such as the startle reflex; instead, it seems to contemplate the event or condition to be one that leads to a strong emotional response, or, in the words of the exception, the "stress of excitement."[70]

Courts also have interpreted a startling event or condition as an event eliciting emotion rather than the startle reflex. For example, the Seventh Circuit has recently noted that, "in almost every imaginable scenario, seeing a person pointing a gun at the head of another is a startling situation."[71] The sight of a gun pointed at the head of another person may cause intense emotion, but it seems unlikely to trigger such reflexive muscular movement as flinching. Furthermore, the Supreme Court, in dicta, suggested that a startling event or condition "has a[n] . . . effect of focusing an individual's attention."[72] The committee's notes similarly indicated that a startling event or condition is more "likely to evoke comment."[73] That a startling event or condition focuses attention and evokes

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65. M. Koch, *The Neurobiology of Startle*, 59 Progress in Neurobiology 107, 108 (1999); Javier Rivera et al., *Startle and Surprise on the Flight Deck: Similarities, Differences, and Prevalence*, 58 Proc. Hum. Factors & Ergonomics Soc'y 1047, 1047 (2014); Sergio Agnoli, Laura Franchin & Marco Dondi, *Three Methodologies for Measuring the Acoustic Startle Response in Early Infancy*, 53 Developmental Psychobiology 323, 323 (2011).

66. Christian Grillon & Johanna Baas, *A Review of the Modulation of the Startle Reflex by Affective States and Its Application in Psychiatry*, 114 Clinical Neurophysiology 1557, 1557 (2003); Rivera et al., *supra* note 65, at 1047.

67. Paul Ekman, Wallace V. Friesen & Ronald C. Simons, *Is the Startle Reaction an Emotion?*, 49 J. Personality & Soc. Psychol. 1416, 1424 (1985).

68. Rivera et al., *supra* note 65, at 1047–48; Jenefer Robinson, *Startle*, 92 J. Phil. 53, 55 (1995).

69. Ekman, Friesen & Simons, *supra* note 67, at 1424–25.

70. The language of the EU hearsay exception also appears to contemplate a response from the "startling event or condition" that is longer in duration than the startle reflex.

71. United States v. Zuniga, 767 F.3d 712, 716 (7th Cir. 2014).

72. Michigan v. Bryant, 131 S. Ct. 1143, 1157 (2011).

73. Fed. R. Evid. 803(2) advisory committee's note.

comment suggests a judicial conception of "startling event or condition" not so much as one that actually causes a startle reflex, but as one that brings about a strong emotional response, such as surprise, anxiety, fear, and anger.[74]

The memorandum therefore interprets "startling event or condition" as an event or condition that elicits an emotional response. The EU hearsay exception does not discriminate between different emotions, such as surprise or fear, and the discussion here generalizes across the emotions to draw common conclusions.[75]

b. Effect of Emotion on the Accuracy of Observation

There currently is no complete understanding of how emotion affects mental processes, and emotion is itself a broad term that encapsulates many emotional states. However, it is generally accepted that emotion may impair some cognitive processes while facilitating others.[76] To that end, emotion may degrade some types of perception and cognitive processing that would be important for accurate observation. For example, anxiety has been found to reduce the ability to accurately recognize faces and to discriminate between sounds.[77]

This general degradation in perception caused by emotion may be compensated for by the weapon focus effect, where the presence of an emotionally arousing stimulus, such as a gun, narrows the range of attentional focus to that stimulus.[78] This enhanced attention may result in more accurate observation of the stimulus, even if it detracts from observation of the peripheral or background details of the scene, such as the face and clothing of the bearer of the gun.[79] The attentional effects of the stimulus may arise not only

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74. Laurent Itti & Pierre Baldi, *Bayesian Surprise Attracts Human Attention*, 49 Vision Res. 1295, 1305 (2009); Gernot Horstmann, *Evidence for Attentional Capture by a Surprising Color Singleton in Visual Search*, 13 Psychol. Sci. 499, 504 (2002); Jenny Yiend & Andrew Mathews, *Anxiety and Attention to Threatening Pictures*, 54A Q.J. Experimental Psychol.: Hum. Experimental Psychol. 665, 679 (2001); Anne M. Finucane, *The Effect of Fear and Anger on Selective Attention*, 11 Emotion 970, 973 (2011).

75. It should be noted that different emotions have different effects on attention. *See*, *e.g.*, Finucane, *supra* note 74, at 972 (selective attention costs differ between the fear condition and the anger condition).

76. Hadas Okon-Singer et al., *The Neurobiology of Emotion-Cognition Interactions: Fundamental Questions and Strategies for Future Research*, 9 Frontiers in Hum. Neuroscience 58, at 3 (2015); Michael J. Saks & Barbara A. Spellman, The Psychological Foundations of Evidence Law 194 (2016).

77. Angela S. Attwood et al., *Acute Anxiety Impairs Accuracy in Identifying Photographed Faces*, 24 Psychol. Sci. 1591, 1593 (2013); S.L. Mattys et al., *Effects of Acute Anxiety Induction on Speech Perception: Are Anxious Listeners Distracted Listeners?*, 24 Psychol. Sci. 1606, 1608 (2013).

78. Robin L. Kaplan, Ilse Van Damme & Linda J. Levine, *Motivation Matters: Differing Effects of Pre-Goal and Post-Goal Emotions on Attention and Memory*, 3 Frontiers in Psychol. 404, at 1 (2012); Finucane, *supra* note 74, at 973.

79. Kaplan, Van Damme & Levine, *supra* note 78, at 1; Florin Dolcos & Ekaterina Denkova, *Current Emotion Research in Cognitive Neuroscience: Linking Enhancing and Impairing Effects of Emotion on Cognition*, 6 Emotion Rev. 362, 363 (2014); Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 420–22 (1992); Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the 'Weapon Focus' Literature*, 19 Psychol., Crime & L. 35, 56–58 (2012).

when the stimulus arouses not only emotions of negative valence, such as fear, but also emotions of positive valence.[80]

The effect of arousal may apply not only to the perception of an active event but also to the memories about such events. Emotionally arousing stimulus or events are more likely to be encoded into memory, and memories of emotional events may be more vivid and enduring than memories about more neutral stimuli or events.[81] At the same time, memories about peripheral details may be weaker, and may result, for example, in a decreased ability to remember the appearance of a person encountered under stress and to subsequently identify this person.[82] These memories about peripheral details may be at greater risk of unintentional manipulation and suggestion.[83]

III. Open Questions and the Need for Experimentation

A. Susceptibility of PSI and EU Hearsay Evidence to Fabrication, Coaching, and Confabulation

1. Fabrication and Coaching

The research findings summarized in this memorandum do not yield firm and unequivocal conclusions about the resistance of PSI and EU hearsay evidence to the negative effects of fabrication and coaching. Nonetheless, they do provide some support for the underlying intuition that the conditions surrounding PSI and EU help "produce[] [statements] free of conscious fabrication."[84]

a. Opportunity to Falsify a PSI or an EU

For there to be a falsified piece of PSI or EU hearsay evidence, there must first be an appropriate opportunity. There has been no empirical research examining when such an opportunity may arise; however, it is possible to infer a number of necessary conditions.

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80. Dolcos & Denkova, *supra* note 79, at 363–64.

81. *Id.* at 363–64; Robin L. Kaplan et al., *Emotion and False Memory*, 8 Emotion Rev. 1, 2–3 (2015); Elizabeth A. Kensinger & Suzanne Corkin, *Memory Enhancement for Emotional Words: Are Emotional Words More Vividly Remembered than Neutral Words?*, 31 Memory & Cognition 1169, 1177 (2003); Adam K. Anderson et al., *Emotional Memories Are Not All Created Equal: Evidence for Selective Memory Enhancement*, 13 Learning & Memory 711, 714–15 (2016).

82. Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London Dungeon*, 23 Applied Cognitive Psychol. 151, 159 (2008).

83. Kaplan et al., *supra* note 81, at 5. *See also* Michael E. Lamb, Kathleen J. Sternberg & Phillip W. Esplin, *Conducting Investigative Interviews of Alleged Sexual Abuse Victims*, 22 Child Abuse & Neglect 813, 820 (1998) (discussing the susceptibility of the accounts of very young children to suggestion).

84. Fed. R. Evid. 803(2) advisory committee's note.

To be used as hearsay evidence, that is, to be "offer[ed] in evidence to prove the truth of the matter asserted," a PSI or an EU must have content.[85] Many utterances, such as "Ouch!" or obscenities, are not useful as hearsay evidence because they assert little to no content. Essentially, a PSI or an EU used as hearsay evidence must have descriptive value and is an act of communication from a declarant to a witness, even if the witness may not be known or may not be in proximity to the declarant.[86]

The need for the declarant to communicate to a witness severely limits how the declarant may lie. The declarant cannot blatantly lie to a witness who also is present at the subject event or condition of the PSI or EU or who is in a position to immediately investigate the declarant's claims.[87] And even if the witness is not present to perceive the event or condition, the declarant cannot lie in a way that is entirely divorced from what the witness knows or will come to know.

It is instructive to consider examples that Justice Scalia proposed in a recent dissenting opinion:

> The classic "present sense impression" is the recounting of an event that is occurring before the declarant's eyes, as the declarant is speaking ("I am watching the Hindenburg explode!"). *See* 2 K. Broun, McCormick on Evidence 362 (7th ed. 2013) . . . . And the classic "excited utterance" is a statement elicited, almost involuntarily, by the shock of what the declarant is immediately witnessing ("My God, those people will be killed!"). *See id.*, at 368–369.[88]

Even if the witness were not initially in a position to perceive the explosion of the Hindenburg or the impending deaths, the witness should still respond to the PSI or EU, for example, by arriving on the scene or calling law enforcement. After all, any listener to a statement describing an event or condition would likely direct attention to what the statement describes, particularly if it were something unusual. To that end, if a lie within a PSI or an EU did not comport with what the witness or law enforcement found on site, the PSI or EU likely would be disregarded as a false alarm.[89] And it is difficult to imagine how the examples provided by Justice Scalia, were they lies, could ever have been plausible. If the Hindenburg landed safely, then "I am watching the Hindenburg explode!" would probably never be introduced as hearsay evidence.

Even if an event or condition permits the generation and construction of plausible lies, there still may not be a plausible lie useful to the PSI or EU declarant. If "I am watching the Hindenburg explode!" were a falsified statement, it might be plausible if the Hin-

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85. Fed. R. Evid. 801(c)(2).

86. An example of such a witness would be a 911 operator who hears a PSI declarant describing an ongoing act of criminal activity.

87. Saks & Spellman, *supra* note 76, at 194.

88. Navarette v. California, 134 S. Ct. 1683, 1694 (2014) (Scalia, J., dissenting).

89. The situation is different when the witness is in league with the declarant, but the witness could always be cross-examined about his or her relationship with the declarant.

denburg in reality imploded rather than exploded.[90] But even if such a lie were plausible, it would likely be a very limited number of persons whom the lie could benefit.

It is therefore possible to infer three situational factors for successful falsification of PSI or EU hearsay evidence: (1) the declarant knows that there is a witness to the PSI or EU who at the same time could not directly refute the declarant's description of the event or condition; (2) the available physical evidence of the event or condition allows for a plausible lie to be incorporated into the PSI or EU; and (3) the range of plausible lies permitted by the event or condition must be capacious enough to accommodate a lie that could benefit the declarant.

The frequency of these factors in situations where PSI and EU hearsay evidence arise may be estimated by reviewing cases in which the hearsay exceptions were invoked. However, such a study would be limited by the fact that judicial opinions generally do not provide sufficient details to permit assessment, for example, of the capacity of witnesses to refute the subject PSI or EU or the range of plausible lies that the declarant could have employed.

Accordingly, it may be possible to infer the existence of some situational barriers against the injection of lies about a particular event or condition into PSI or EU hearsay evidence. However, it may not be feasible to measure the degree of protection they provide against the introduction of falsified hearsay into evidence.

b. Deciding to Falsify a PSI or an EU

Even if the declarant has a proper opportunity to lie, the declarant must still make the decision to lie. The committee has explained that "[t]he underlying theory of [the PSI hearsay exception] is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation."[91] Likewise, it stated that "[t]he theory of [the EU hearsay exception] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[92] The logic flow for both exceptions essentially runs as follows: (1) the default behavior is a tendency to truth; (2) "conscious fabrication" requires "reflection"; (3) the "reflection" required for "conscious fabrication" is difficult or unlikely under the "substantial contemporaneity of event and statement" or "condition of excitement"; and (4) PSIs and EUs therefore reflect default, truthful behavior.

The research discussed in section II.B.1.b supports some of these assumptions about the decision to lie. The intuition of the existence of a default response appears to be supported by the literature. Similarly, research supports the committee's beliefs that "capacity of reflection"—or cognitive effort, in modern scientific language—is necessary to overcome this default behavior and that the exertion of cognitive effort is more difficult under time and mental pressure.

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90. The physical evidence of such an implosion would have to allow for an interpretation that the zeppelin exploded.

91. Fed. R. Evid. 803(2) advisory committee's note.

92. *Id.*

However, the assumption that the default response obtained through a PSI or an EU would more likely be truthful is less supported. Research suggests that the default response—whether to tell the truth or to lie—may hinge on the existence of a motivation to lie. When the declarant has no motivation to lie, the resulting PSI or EU likely reflects a default reaction of truth-telling. Likewise, when the advantage of lying is latent or not immediately obvious, the PSI or EU also may stem from a default behavior of truth-telling. But where there is a benefit to lie readily perceptible to the declarant, he or she may be primed to lie. In this case, overcoming the default response to lie, so as to tell the truth, may actually require "capacity of reflection."

Accordingly, the question of whether a particular piece of PSI or EU hearsay evidence may contain lies is context-sensitive and depends on both the circumstances during which the statement was made and the motivations the declarant may have had at the time. To the extent that the hearsay exceptions are formulated based on generalities, a proper evaluation of the exceptions would require balancing those statements made by neutral declarants, or made in such circumstances where the benefit to lying is difficult to detect, against those statements made in circumstances where lying is obviously advantageous.[93]

No research appears to have directly addressed how frequently a motivation to lie exists within the circumstances under which the typical PSI or EU hearsay is made. To that end, the committee may have to draw on the judicial experience rather than experimental research to arrive at an answer. It may be difficult to experimentally replicate the mental stress and danger involved in real-life PSI or EU situations within the ethical boundaries on research with human participants.

There were at least five precedential appellate opinions in 2014 affirming the admissibility of PSI or EU hearsay. These involved: (1) a 911 call by a mother "asking that police come to her residence because her child's father had just hit her and was 'going crazy for no reason'" (in *United States v. Boyce*);[94] (2) a statement made by a supervisor to the employee "that [the supervisor's boss] had told [the supervisor] to do everything in his power to stop [the employee] from going to Human Resources" about a case of sexual harassment (in *Malin v. Hospira, Inc.*);[95] (3) a statement made to a paramedic by an assault victim that "she had been hit with a baseball bat" and sexually assaulted and that revealed the identity of the perpetrator (in *Woods v. Sinclair*);[96] (4) a statement made by a man to his friend that the defendant "had a gun," accompanying a request to the friend to call the police (in *United States v. Zuniga*);[97] and (5) a statement made to a police officer "imme-

93. It is notable that some courts have intuited the strong role that the motivation to lie can play and have therefore weighed a lack of motivation to falsify in determining the admissibility of PSI hearsay. *See* Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 How. L.J. 319, 339 (2009) (providing citations to a number of cases where courts have looked to the motivation to lie).

94. 742 F.3d 792, 793, 796 (7th Cir. 2014).

95. 762 F.3d 552, 554–55 (7th Cir. 2014).

96. 764 F.3d 1109, 1124–25 (9th Cir. 2014).

97. 767 F.3d 712, 715 (7th Cir. 2014).

diately after his arrival at the residence" by a woman "recalling the details of the fight she had with [her fiancé], including the fact that [the fiancé] had pointed the shotgun at [her] and threatened to shoot her in the head" (in *United States v. Graves*).[98]

These examples suggest that statements in the context of domestic violence form an important category of the PSI and EU hearsay evidence presented in court. As in *Boyce*, *Woods*, and *Graves*,[99] the hearsay evidence is used in such cases because declarants recant, will not testify, or cannot testify.[100] Motivations that inform the decisions of such declarants to refuse to support their PSI or EU hearsay with subsequent testimony may include the fear of losing a family breadwinner or worry for the safety of themselves or their children.[101]

Understanding whether real-world declarants may decide to inject lies into a PSI or an EU may therefore require asking questions such as whether a person, fresh from an incident of domestic violence, could so easily and quickly discern the advantages of speaking dishonestly to law enforcement that he or she would be primed to lie. The fact that victims do recant or refuse to testify after initially cooperating with law enforcement suggest that PSI or EU declarants do need some time and reflection to discover the motive to lie.

But it would be both unethical and resource-intensive to experimentally subject humans to the levels of stress and physical danger needed to realistically simulate the settings in which PSI and EU hearsay evidence are generated. While it may be technically possible to conduct experiments of lying that involve lower, and thus more ethical, levels of induced stress, the methodology may not be representative of real-world conditions and the results may not be of interest or use to the committee.

In one experimental paradigm used to study deception, participants are asked to report on the outcome of a die thrown under a cup and are incentivized to lie with the offer of a payment that scales with the reported outcome of the roll.[102] Such an experiment can be modified by tying the reward to a more complicated formula,[103] and may then be used

98. 756 F.3d 602, 604–66 (8th Cir. 2014).

99. In *Boyce*, "[the declarant] did not testify at trial." 742 F.3d at 794. In *Woods*, the declarant did not survive the assault. 764 F.3d at 1117. In *Graves*, "[the declarant] . . . recanted her statements at trial." 756 F.3d at 606.

100. Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 3–4 (2002).

101. *Id.* at 4–5.

102. *See*, *e.g.*, Shalvi, Eldar & Bereby-Meyer, *supra* note 13, at 1265–66.

103. In the typical die-under-the-cup experiment, the reward is directly proportional to the reported outcome of the roll. For example, a reported die throw of 2 yields a reward of $2 and a reported throw of 6 yields a reward of $6. However, the reward can be changed to follow a quadratic formula, such as $Yield = -x^2 + 6x$, where x is the reported outcome. In the example, the yield is maximized at $9 by a reported throw of 3. A reported throw of 6, in contrast, yields $0. The mathematical formula of the yield can be endlessly complicated to increase the difficulty of discerning the reported outcome associated with the optimum reward.

to test the relationship between the difficulty of discerning the motivation to lie and the resulting lying behavior.

But any conclusion that could be drawn from such an experiment cannot easily be extrapolated to situations involving the urgency and the potentially complex and highly personal motives to lie involved in the creation of actual PSI and EU hearsay evidence. Even if the experiment proposed above were to yield a chart tying the mathematical complexity of the reward formula to the incidence of lying, it would be difficult to associate real-life motivations, such as the fear of losing a family breadwinner, to a particular point on the spectrum of mathematical complexity so as to use the chart to predict the behavior of typical declarants.

c. Injecting Lies into a PSI and an EU

Beyond making the decision to lie, while falsifying a PSI or an EU, a declarant also must make effective use of the opportunity and craft lies of a quality sufficient for attorneys to move them into evidence. The committee's rationale that "conscious fabrication" requires "reflection" finds some support in research, discussed in section II.B.1.c, which demonstrates that the construction and convincing delivery of lies require cognitive resources and effort.

The research findings further suggest that the construction of lies may be more difficult under the conditions in which the typical PSI or EU are made.[104] At the outset, the existence of PSI or EU hearsay is itself a guarantee that the declarant did not resort to the easiest lie: silence. According to research, lying by omission may be less cognitively demanding than lying by fabrication because the former does not require generating additional information. And unless a declarant is prompted or required to describe an event or situation, he or she does not actually have to provide a PSI or an EU.[105] For example, in the context of domestic abuse, a victim who wishes to conceal an act of violence by a spouse or partner can elect not to call law enforcement rather than to create a situation where some explanation must be given. The research literature does not speak to how frequently liars who intend to lie about an event or situation do so by silence. But given the prevalence of omission among the various means of deception,[106] there may actually

104. A literature review by scholars in 2002, which does not have the benefit of subsequent research cited within this memorandum, has come to substantially similar conclusions. Myers et al., *supra* note 4, at 6–8.

105. Of the five cases cited in section III.A.1.b, only two involve situations where some form of PSI or EU was arguably compelled by the circumstances. In *Woods*, the declarant was responding to questions from a paramedic, called by a third party, who was asking how the declarant was injured. 764 F.3d 1109, 1117, 1124 (9th Cir. 2014). In *Graves*, the declarant was explaining the cause of gun shots to an officer who was called by a third party in response to the shots. 756 F.3d 602, 603–04 (8th Cir. 2014). The three other cases involve PSI or EU statements volunteered by the declarant. Two cases involve 911 calls triggered by the declarant. *Boyce*, 742 F.3d 792, 793 (7th Cir. 2014); *Zuniga*, 767 F.3d 712, 715 (7th Cir. 2014). In *Malin*, the supervisor did not need to tell the declarant that his own supervisor told him to prevent her from reporting sexual harassment to human resources. 762 F.3d 552, 554 (7th Cir. 2014).

106. Levine et al., *supra* note 35, at 40.

be no PSI or EU at all in a significant portion of the times when would-be declarants encounter an appropriate event or condition for lying.

Even if the declarant chooses or is compelled to generate some spoken lie, such lies are easier when they involve responses to closed-ended yes/no questions or when the possible lies are limited. But it is unlikely that PSI or EU hearsay evidence is made in many circumstances that constrict the universe of potential lies in such a way. In the examples provided by Justice Scalia, none involve close-ended lies.[107] Statements simply contradicting what is observed, such as "I am not watching the Hindenburg explode" and "I am watching the Hindenburg not exploding," do not sound convincing and should be easy to refute. It also may be instructive to consider the case where an officer is called by a third party to investigate an act of domestic abuse involving gun shots.[108] A declarant seeking to shield an abusive spouse from prosecution would have to do better than a simple denial if there were shell casings on the floor or bullet holes in the walls.

To falsify a PSI or an EU that would be introduced into court, a declarant must make a lie of greater sophistication. He or she must process the facts as he or she observes them and adjust the truth, all the while keeping the falsification plausible within a coherent narrative. The need to convince and avoid detection further increases the cognitive burden.

Lies may be made easier with preparation and rehearsal. But PSI and EU hearsay evidence seems unlikely to involve expected situations, rendering it difficult to employ rehearsed lies. The element of a startling event or condition is built into the definition of an EU and should reduce the possibility of a rehearsed lie. And if a PSI declarant predicted the event or condition he or she intended to lie about, it would still be necessary to tailor the prepared statement to fit the events as they actually unfold. To the extent that liars perform poorly in situations where their prepared lies are narrated in reverse,[109] it is probable that liars who are forced to adjust to events as they unfold would perform poorly as well, in that both situations demand extra cognitive resources to keep the narrative straight. Though the possible increased difficulty of lying under the circumstances of the typical PSI and EU does not necessarily mean a reduction in the incidence of lying, which is the assumption upon which the hearsay exceptions rely, humans are generally cognitive misers. That is, they tend toward the simplest cognitive mechanisms.[110] It is quite plausible that, under cognitively demanding conditions, potential declarants would take the path of least resistance and either not lie or stay silent.

It may be possible to experimentally study the connection between the difficulty of lying and instances of lying. For example, the Center could run experiments where participants are invited into a room with a vase, which is constructed to shatter at the slightest touch. An experimenter can walk into the room after the vase is destroyed to demand

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107. Likewise, all of the five cases involve PSIs and EUs that were narrative and open-ended in nature.

108. As in *Graves*. 756 F.3d at 603–04. It should be noted that in *Graves* the EU declarant did not conceal the defendant's actions.

109. Vrij et al., *Increasing Cognitive Load*, *supra* note 39, at 259–60, 262.

110. *See*, *e.g.*, Maggie E. Toplak, Richard F. West, & Keith E. Stanovich, *Assessing Miserly Information Processing: An Expansion of the Cognitive Reflection Test*, 20 Thinking & Reasoning 147, 148 (2014).

payment, which would incentivize the participants to lie by denying their responsibility.[111] The difficulty of lying may be varied by changing the elapsed time between the destruction of the vase and the experimenter's entrance and the type of questions the experimenter asks.[112] Such a study, although artificial, may help determine whether there is a relationship between the presumed difficulty of constructing lies and the actual incidence of lying.

Of course, the responsibility to compensate for a broken vase is not comparable to the stakes typically involved in the context of real-world PSI or EU hearsay evidence, such as domestic violence. Such an experiment therefore may be unable to account for the complex motivations to lie, which, as discussed in section II.B.1.b, may be central to the decision to lie. Nonetheless, experiments might help demonstrate whether the difficulty of lying affects the overall incidence of lying, and therefore test this foundational aspect of the PSI and EU hearsay exceptions.

2. Confabulation

Existing research suggests that experimental studies on the susceptibility of PSI and EU hearsay to confabulations are unwarranted at this time.

As discussed in section II.B.2, spontaneous confabulations typically arise from brain damage. Attorneys are unlikely to frequently introduce statements made by declarants known to suffer from brain damage as PSI or EU hearsay evidence. It also seems unlikely, absent strong corroborating evidence, that jurors would credit such evidence. PSI and EU hearsay may be susceptible to this type of confabulation in a case where the declarant is unknown, but, as Justice Scalia pointed out in his dissenting opinion in *Navarette*, PSI or EU made by unknown declarants may not even be admissible at the outset.[113]

Intrusions may be made by healthy individuals and occur when weak memories are tested. But the typical PSI or EU hearsay evidence is unlikely to involve such a memory challenge. Returning to the examples pointed out by Justice Scalia ("I am watching the Hindenburg explode!" and "My God, those people will be killed!")[114] neither require any test of recollection beyond the need to retrieve specific words, such as "Hindenburg," "explode," and "killed," from memory. The circumstances are entirely unlike a test that requires recitation of a memorized list of words, a research paradigm in which intrusions are most frequently observed.

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111. The method for such an experiment is adapted from a study of false confessions where participants were falsely accused of pressing the wrong key on a computer and thereby damaging it. Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol. Sci. 125, 126–27 (1996).

112. As discussed in section II.B.1.c, it is generally easier to lie to closed-ended questions than to open-ended questions. Walczyk et al., *Lying Person-to-Person, supra* note 22, at 160. The experimenter may therefore increase the difficulty of lying by asking open-ended questions (such as, "What happened?") instead of closed-ended questions (such as, "Did you break the vase?").

113. 134 S. Ct. 1683, 1694 (2014) (Scalia, J., dissenting).

114. *Id.*

The reliability of PSI and EU hearsay evidence is also unlikely to be affected by the types of confabulation that occur in recovered memory and false confession scenarios. While PSI and EU hearsay evidence are, with some frequency, statements made by declarants to law enforcement, as in *Boyce* and *Graves*,[115] such statements do not often appear to be made under the type of pressured questioning typically involved in the formation of false confessions or the recovery of false memories. Furthermore, in order for a piece of hearsay evidence to be corrupted by such confabulations, it would be necessary for law enforcement to develop and force a narrative about the subject event or condition onto the declarant and for the declarant to accept the narrative and generate false memories to support the narrative. The entire process requires a time duration that is unlikely to fit within the window permitted by the applicable hearsay exceptions.[116]

Until there is new research showing that confabulations are more widespread among healthy individuals than is now known, experiments to measure the potential threat of confabulations to the reliability of PSI and EU hearsay evidence seem unnecessary.

B. Accuracy of Observation Underlying PSI and EU Hearsay Evidence

1. PSI

As summarized in section II.C.1, the research literature shows that attention generally improves the accuracy of observation.

Accordingly, it does not seem particularly controversial that the rules of evidence would value PSI hearsay. A PSI—that is, "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it"—necessarily is supported by the force of attention. PSI hearsay evidence may therefore benefit from the enhanced perception due to this attention paid to the subject event or condition. Furthermore, a PSI is contemporaneous with the event or condition, and, unlike courtroom testimony, is less subject to the deleterious effects of time on memories.[117]

At this time, experimental studies on the accuracy of observation underlying PSI hearsay evidence seem unnecessary.

2. EU

The committee has already recognized the criticism of the EU hearsay exception "on the ground that excitement impairs accuracy of observation."[118]

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115. 742 F.3d 792, 793, 796 (7th Cir. 2014); 756 F.3d 602, 604–66 (8th Cir. 2014).

116. The Confrontation Clause may further restrict the admission of such hearsay. Ohio v. Clark, 135 S. Ct. 2173, 2179–81 (2015).

117. United States v. Orm Hieng, 679 F.3d 1131, 1147 (9th Cir. 2012) ("The reason present sense impressions are considered inherently reliable is because statements contemporaneously describing an event are *unlikely to reflect memory loss* or provide an opportunity to lie.") (emphasis added).

118. Fed. R. Evid. 803(2) advisory committee's note. *See also Boyce*, 742 F.3d at 800 (Posner, J., concurring) ("And even if a person is so excited by something that he loses the capacity for reflection (which

Research findings do cast some doubt on the accuracy of observation underlying EU hearsay evidence. The literature reviewed in section II.C.2 suggests that emotion, as broadly defined, can impair some cognitive processes important for accurate observation. This can be particularly relevant in emotional situations where EU hearsay evidence is created.

But at the same time, the literature also posits that emotionally arousing stimuli can draw attention and perceptual resources. The hearsay exception requires that an EU be a "statement relating to a startling event or condition." This requirement of a nexus between the content of the statement with the subject of the declarant's extra attention, that is, the emotionally arousing stimulus, may counteract some of the negative effects of emotion on the accuracy of observation.

These findings about the negative effects of emotion on cognitive processes do not appear to be so different from what the committee knew or considered when it promulgated the EU hearsay exception as to create new concerns about the exception.[119] It is doubtful that further experiments would be helpful to guide the committee's evaluation.

If an EU about a startling event or condition were to be compared with courtroom testimony about the same startling event or condition, then the underlying accuracy of observation could not be a factor. Both the testimony and the EU are backed by the same observation. If the EU is unreliable because the underlying observation is clouded by the stress of excitement, then the live testimony is unreliable for the very same reason. There is no need for experiments to show that the intervening time between the startling event or condition and the live testimony cannot result in an improvement in the accuracy of observation about the startling event or condition.

Indeed, the literature provides some reason to think that the EU would be superior to live testimony. The content of the EU often makes clear what exactly it was that the declarant paid attention to and therefore may have better perceived. For example, an EU about the presence of a gun suggests that the gun may have been the subject of the declarant's attention.[120] But in a trial testimony based on memories, it may not always be easy to separate out the possibly enhanced memories pertaining to the central details from the more potentially vulnerable memories concerning the peripheral details. Still, there is no experiment that can measure such an advantage of EU hearsay evidence against the inability of the evidence to be cross-examined.

If an EU were to be compared against a statement made without the stress of excitement, then literature already makes clear that the statement made without the stress of excitement generally should be superior in terms of the underlying accuracy of observation. Experiments measuring the difference between such statements would not be helpful; the exception is not a rule for choosing the most reliable hearsay from a number of

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doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable?").

119. The negative impact of anxiety and preoccupation on eyewitness ability was recognized as early as 1978. Judith M. Siegel & Elizabeth F. Loftus, *Impact of Anxiety and Life Stress upon Eyewitness Testimony*, 12 Bull. Psychonomic Soc'y 479, 480 (1978).

120. This is the fact pattern of *Boyce*. 742 F.3d at 793.

declarants, but rather a rule for determining the admissibility of a specific EU made by a particular declarant.

If an event or condition so happens to be startling to the declarant, then any contemporaneous statement the declarant makes "under the stress of excitement" and "relating to [the] . . . event or condition" will be an EU. There is no possibility of revisiting the startling event or condition to obtain the contemporaneous statement that the declarant would have made absent the stress of excitement. Accordingly, even if the difference in the accuracy of observation under "stress of excitement" and under a state of dispassion could somehow be experimentally quantified,[121] it may yield no useful conclusion about whether EU as a whole should be admissible hearsay evidence.

The Center therefore does not recommend conducting experiments about the accuracy of observation underlying EU hearsay evidence.

121. It is also unclear how an experimental subject can be put through the same event or condition twice, in a way that is "startling" once and not the other, without the observations made the first time biasing the observations made the second time and thereby rendering the comparison meaningless.

TAB 6D

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Expanding the residual exception to the hearsay rule
Date: April 1, 2016

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be expanded to allow the admission of more hearsay, if it is reliable. In its current form, Rule 807 provides as follows:

> **Rule 807. Residual Exception**
>
> **(a) In General.** Under the following circumstances, 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:
>
> **(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.

As designed by the original Advisory Committee --- and as burnished by Congress --- the residual exception contains several limitations that tend to make it useful only in unusual cases. These textual limitations are in line with the legislative history, which indicates that the residual

exception is to be used "very rarely, and only in exceptional circumstances."[1] The reason for limiting the residual exception was a concern that an unfettered residual exception would provide courts with too much discretion, "injecting too much uncertainty in the law of evidence and impairing the ability of practitioners to prepare for trial."[2]

The question of "rules v. discretion" received an airing at the Symposium on hearsay reform last fall. At the Fall 2015 meeting the Committee, in discussion after the Symposium, expressed some interest in considering a compromise approach that would add a little bit more flexibility to the categorical hearsay exceptions, without going to a completely discretionary system that would allow the judge, in every case, to determine whether hearsay is sufficiently reliable to be admissible. One of the possibilities focused on expanding Rule 807, as described by the Minutes of the meeting:

> Committee members agreed that it would be worthwhile to explore possible compromise alternatives for hearsay reform --- i.e., something not as radical as removing all the exceptions in favor of a Rule 403-type balancing, and yet something more than retaining the current system of categorical rules. One possibility is to expand the applicability of Rule 807, the residual exception. This might be accomplished by removing the "more probative" requirement of that rule, so that it could be invoked without the showing of necessity that is currently required. The trustworthiness requirement might also be changed from one requiring "equivalence" with the other exceptions to something more freestanding and discretionary.

This memo considers various possibilities for expanding the applicability of the residual exception, including the two described above. Before discussing how Rule 807 could be expanded, the following provisos should be emphasized:

- The discussion is, in the first instance, focused on a possible *freestanding* expansion of Rule 807; but it is apparent that an expansion of the residual exception (if deemed a good idea) could also be part of broader revisions of the hearsay system. For example, an expansion of the residual exception might make limitations on or eliminations of other hearsay exceptions more viable. Thus, the proposed elimination of the ancient documents exception might have been more palatable if the residual exception were more useful: the critique on the elimination of the ancient documents exception was in part based on the perceived difficulty of trying to fit ancient documents into the existing, limited residual exception. And Judge Posner's proposal to eliminate the exceptions for excited utterances, present sense impressions, and dying declarations is dependent on an expanded residual exception to take up the slack. Also, an expanded residual exception would have an important role to play if the hearsay system is changed from categorical rules to guidelines --- the residual exception could be the vehicle by which a court would "depart" when the guidelines do not cover the proffered hearsay.

[1] Report of Senate Committee on the Judiciary on Rules 803(24) and 804(b)(5), S.Rep. No. 1277, 93d Cong., 2d Sess., p. 18 (1974).

[2] Report of House Committee on the Judiciary on Rules 803(24) and 804(b)(5), H.R. Rep. No. 650, 93d cong., 1st Sess., p.5 (1973).

The goal of this memo is not the broader one of thinking of multiple amendments as an integrated whole --- that is, to say the least, a long-term project. Rather the goal is to explore ways in which the text of the residual exception might be changed so that it will cover more statements, more flexibly. Obviously, the impact of such an expansion will be different depending on whether it would be implemented in the existing categorical structure, or in a different one.

● The memo assumes that broadening the residual exception --- and thereby allowing for more judicial discretion --- is a good thing. Obviously, allowing more discretion raises complicated questions, many of which were vetted at the Hearsay Symposium. The benefits of expanding the residual exception include:

1. Allowing more flexibility from the categorical constraints of the current system, and reducing arguments about whether a statement fits within those constraints;

2. Alleviating pressure on the existing exceptions to the extent they can be critiqued (as Judge Posner has done); and

3. Admission of more hearsay statements that are in fact reliable, which will serve as at least some response to the arguments that the hearsay rule is itself misguided because it keeps too much evidence away from the jury, because the jury is able to discount hearsay.

The cost of expanding the residual exception, on the other hand, is often told --- any move from a rules-based to a discretion-based system may lead to unpredictability that will cloud the prospects of settlement, prevent summary judgment, increase the costs of litigation, and lead to more *in limine* rulings. Many lawyers believe that any increase in reliable hearsay that might be admitted by an expansion of the residual exception is far outweighed by the costs that would be raised by more judicial discretion.[3]

This memo assumes that the Committee is aware of the arguments on both sides; the memo only considers questions of implementation that will arise if the Committee does make the decision that the benefits of more judicial discretion outweigh the costs.

What follows are four possible ways that the text of Rule 807 might be amended so as to allow more hearsay to be admitted under the exception. They are in order of importance: 1. Lessening the standard of reliability from the current "equivalent circumstantial guarantees of trustworthiness"; 2. Amending the language so that hearsay statements that "nearly miss" a categorical exception will be easier to admit as residual hearsay; 3. Adjusting the requirement that the residual hearsay be more probative than any other evidence that the proponent can obtain through reasonable efforts; and 4. eliminating the requirements that residual hearsay must be

[3] It is notable that 14 states have refused to add a residual exception to their hearsay system --- generally the expressed concern is that judicial discretion has no place in a categorical approach to the hearsay exceptions, and that any expansion of the exceptions is a question for the legislature, not the courts.

evidence of a "material" fact and that admitting the hearsay will "best serve the purposes of these rules and the interests of justice."[4]

It should be emphasized there is nothing in this memo that presents an action item for this meeting. Expanding the residual exception raises complicated policy issues and, as stated above, might be tied into other changes being made. This memo is simply intended to start the discussion on the possible drafting changes that could be used to expand the effect of the residual exception.

I. Equivalent Circumstantial Guarantees of Trustworthiness

The current exception requires the court to find that the proffered hearsay has "equivalent circumstantial guarantees of trustworthiness." "Equivalent" is intended to require the court, in evaluating the hearsay, to find that it has reliability guarantees that are at a comparable level to those found in the categorical exceptions.[5] One can argue that the term "equivalent" is nonsensical, because the trustworthiness guarantees of the categorical exception are widely variant. For example, the reason we admit business records --- regularity --- is completely different from the reason we admit excited utterances. Moreover, it is common ground that the reliability guarantees of the Rule 804 exceptions are weaker than those for the Rule 803 exceptions --- yet the equivalence language requires the court to compare the proffered hearsay to both the Rule 803 and 804 exceptions.[6]

So, one way of making Rule 807 more flexible and, perhaps, more likely to admit reliable hearsay, is to delete the equivalence language in the rule. That would look like this:

> **(a) In General.** Under the following circumstances, 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:
>
> (1) the statement has ~~equivalent~~ circumstantial guarantees of trustworthiness;

[4] This memo does not discuss the possibility of changing the notice requirement. The Rule 807 notice requirement is given extensive treatment in the memo on notice requirements in this agenda book. Any expansion of the residual exception makes it all the more necessary that the proponent be prepared to meet hearsay offered under the exception.

[5] See, e.g., Conoco, Inc., v. Department of Energy, 99 F.3d 387 (Fed. Cir. 1996) (district court erred in admitting summaries under Rule 807, in part because they did not possess guarantees of trustworthiness that were "equivalent" to those of market reports or commercial tabulations).

[6] "Equivalence" in this regard might have had more meaning when the rules were enacted, because at that time there were two residual exceptions, one for Rule 803 and one for Rule 804. By combining the two into one exception in 1996, the Advisory Committee made the "equivalence" standard more opaque and difficult to apply. Moreover, the 1996 addition of Rule 804(b)(6) further muddies the waters, because that exception --- for forfeiture --- is not based on any circumstantial guarantees of reliability at all. Yet Rule 807 still, at least on its face, requires the court to compare the proffered hearsay with the reliability requirements in all of the Rule 804 exceptions.

The Committee Note to this change might be pitched not only to the difficulty of the "equivalence" standard but also to the Committee's interest in allowing more reliable hearsay to be admitted under the exception. So, for example:

Possible Committee Note on Deleting "Equivalence"

> Rule 807 has been amended to delete the term "equivalence" from the trustworthiness standard. The "equivalence" standard has been difficult to apply because the trustworthiness standards of the hearsay exceptions in Rules 803 and 804 are not uniform. Moreover, the "equivalence" standard may unnecessarily limit the court in exercising its discretion to determine whether a particular hearsay statement is trustworthy. The intent of the amendment is to free the court from prior restraints that have been used to exclude hearsay that is in fact trustworthy. While Rule 807 is not a device that should be used to create new hearsay exceptions, it is a device that should be used to admit hearsay that is reliable under the circumstances.

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While deleting the term "equivalence" might be a signal toward a more flexible approach to the residual exception, it would probably be more effective if coupled with some tweaking of the trustworthiness language itself. Given the consistent theme over forty years that the residual exception is to be narrowly construed and applied, it would seem that something more drastic than taking out the word "equivalence" would be needed to truly open up the exception. See, e.g., *United States Trujillo*, 136 F.3d 1388, 1395-96 (10th Cir. 1988) (because the residual exception is to be used "very rarely and only in exceptional circumstances" the proponent of evidence bears a "heavy burden" of presenting the trial court with sufficient indicia of trustworthiness).

Some possibilities for broadening the residual exception's trustworthiness requirement, while continuing to screen out unreliable hearsay, include

1. A dampening modifier, such as:

> the statement has ~~equivalent~~ some circumstantial guarantees of trustworthiness.

The note language above could be amplified to state that "many courts have applied an unnecessarily strict approach to determining trustworthiness under Rule 807, and the amendment is intended to lift some of those constraints, without, on the other hand, allowing unlimited discretion to establish new hearsay exceptions."

2. Take out the word "circumstantial":

the statement has ~~equivalent~~ some ~~circumstantial~~ guarantees of trustworthiness.

Taking out the word "circumstantial" might provide two benefits. First, it would resolve a dispute in the courts on whether the trustworthiness requirement can be met by a showing of corroborative *evidence,* as opposed to limiting the inquiry to circumstances surrounding the making of the statement itself. Compare *United States v. Bailey,* 581 F.2d 341, 349 (3d Cir. 1978) (trustworthiness analysis must focus on "the facts corroborating the veracity of the statement" as well as "the circumstances in which the declarant made the statement"), with *Huff v. White Motor Corp.,* 609 F.2d 286, 293 (7th Cir. 1979) ("the probability that the statement is true, as shown by corroborative evidence, is not, we think, a consideration relevant to its admissibility under the residual exception to the hearsay rule").

It would appear that the better rule is to allow consideration of corroborating evidence, as most courts do. The ultimate inquiry is whether the declarant is telling the truth, and reference to corroborating evidence is a typical and time-tested means of helping to establish that a person is telling the truth. It is used in trials every day, and there is no good reason to prevent consideration of corroboration when it comes to residual hearsay. Thus, deleting the word "circumstantial' might have the twin effect of providing uniformity as well as more flexibility in the application of the residual exception.

3. Reformulate the language as an indication of change of tone and allowance of more judicial discretion:

~~the statement has equivalent circumstantial guarantees of trustworthiness.~~ the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy.

Something like this reconfiguration could provide a signal for a new start in applying the residual exception. The challenge is to set a change in tone while still retaining trustworthiness requirements. Arguably the above language could be construed more flexibly than the existing rule, and it might be read to indicate that the trustworthiness requirement is to be construed anew, free from the original legislative history --- and that point could be emphasized in the Committee Note. The language also resolves the conflict about the relevance of corroborating evidence.

4. What about a trustworthiness clause that shifts the burden to the opponent to show *un*trustworthiness?

Such a clause is found in Rules 803(6)-(8), and it is set forth for consideration in the memos on Rules 803(2) and 803(16) in the agenda book. But burden-shifting would not make sense when it comes to the residual exception. Burden-shifting works when the proponent has

done enough to warrant a presumption of reliability --- such as when the proponent has established that a record was prepared in the ordinary course of regularly conducted activity. But simply imposing a burden on the opponent to show that hearsay offered under the residual exception is untrustworthy will essentially give the proponent a windfall. There is no reason to presume that hearsay is trustworthy just because it is *offered* under Rule 807.

What's more, adding burden-shifting to Rule 807 would create an uncomfortable fit with Rule 803(6). Under that Rule, the burden shifts *after* the proponent shows that the reliability-based admissibility requirements of the exception are met --- while under the residual exception nothing would have to be shown, in terms of reliability, before the burden-shifting would kick in. It makes little sense to have a residual exception that might be easier to use than a categorical exception --- at least it makes no sense to retain a categorical exception if that is the case.

Nor would it make sense, on the other hand, to add a burden-shifting clause to the existing reliability requirements of the residual exception. That would mean that Rule 807 would read something like "the hearsay is admissible if the proponent shows that it is trustworthy, unless the opponent shows that it is untrustworthy." That's not a rule, it's a tautology.

It is of course for the Committee to determine whether any of the above changes will work to expand the possibilities of admissibility under the residual exception, without establishing an "open door" to hearsay --- that is, whether it will establish something more flexible than the current system, but not the free-for-all of unbridled judicial discretion. If the Committee is interested in any of the above possibilities, the Reporter will provide a formal proposal at the next meeting.

II. Relationship to the Categorical Exceptions

There is some dispute in the courts about whether the residual exception can be used if the hearsay statement is a "near miss" of a categorical exception. Examples include:

● A statement that is against the interest of a declarant, but the interest is not a risk of civil or criminal liability. An example is a statement like "I am a bad mother for letting my son keep his guns in my house, so soon after he served his felony conviction." That statement does not subject the mother to pecuniary or penal liability, but it does put her parenting in a bad light, so it is a "near miss" of Rule 804(b)(3).

● A prior statement of a testifying witness that is inconsistent with his trial testimony, but was not made under oath at a prior proceeding. If the government wants to use it for substantive

effect, it won't qualify under Rule 801(d)(1)(A) --- but the government might argue that it should be admissible under the residual exception as a "near miss."[7]

● A statement of a person who died after an assault, but the statement was made too far after the assault to qualify as an excited utterance, and yet was made before death became imminent and so it is not a dying declaration.

Whether "near misses" can be admitted under the residual exception is dependent on how one construes the language in Rule 807 allowing admissibility of hearsay that is "not specifically covered" in Rules 803 or 804. A court admitting hearsay that fails a particular admissibility requirement of another exception is construing "not specifically covered" to mean "not admissible under." In other words, that language is essentially superfluous, because it is read to mean "don't use the residual exception if hearsay is actually admissible under another exception." See, e.g., *United States v. Laster*, 258 F.3d 525 (6th Cir. 2001) ("the phrase 'specifically covered' means only that if a statement is admissible under one exception, such subsection should be relied upon instead of the residual exception"). Given the extra requirements that must be satisfied under Rule 807(e.g., notice, more probative than other evidence, particularized showing of trustworthiness), it would appear quite unlikely that a party would try to admit hearsay under Rule 807 if it could qualify under another exception.

There is an indication in the legislative history that "not specifically covered" was intended to mean that the residual exception could not be used as an evasion of a specific limitation in another exception. A major concern of some members of Congress was that certain types of hearsay deliberately excluded from the categorical exceptions might nevertheless be admitted as residual hearsay.[8] And surely, as a matter of statutory construction, words are supposed to mean something --- the "near miss" analysis tends to read the words "not specifically covered" out of the rule.

A strong majority of courts have nonetheless construed the term "not specifically covered" to mean "not admissible under" --- thus allowing the residual exception to be used for "near misses."[9] But a few courts refuse to use the residual exception if the statement misses a critical component of a categorical exception.[10]

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[7] That argument was made by the government, successfully, in *United States v. Valdez-Soto*, 31 F.3d 1467 (9th Cir. 1994). When the defendant argued that allowing the statement as a "near miss" was inconsistent with the legislative history indicating that the residual exception should be narrowly construed, Judge Kozinski responded: "We decline the defendants' invitation to go skipping down the yellowbrick road of legislative history."

[8] See 120 Cong. Rec. H12255–57 (Dec. 18, 1974).

[9] See, e.g., *United States v. Popenas*, 780 F.2d 545 (6th Cir. 1985) (statement that nearly misses Rule 801(d)(1)(A) may be admitted as residual hearsay); *United States v. Hitsman*, 604 F.2d 443 (5th Cir. 1979) (record not admissible under Rule 803(6) for lack of a custodian may be admissible as residual hearsay); *United States v. Banks*, 514 F.3d 769 (8th Cir. 2008) (ATF purchase form in the records of a gun seller was not admissible under Rule 803(6) because no foundation witness had been provided; however, the record was admissible as residual hearsay because it was similar to other documents admitted by the courts as business records); *Turbyfill v. International Harvester Co.*, 486 F. Supp. 232 (E.D. Mich. 1980) (a statement that failed to meet the requirements of Rule 803(5) because the preparer of the record was not available to testify was admitted as residual hearsay on "near miss" grounds); *United*

One possible amendment that might be considered in opening up the residual exception is simply to eliminate the language that refers to the other categorical exceptions. Then there would be no problem with the "near miss" application --- and uniformity on the point would be achieved as well. That change would look like this:

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay if ~~even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:

(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.

This proposal could, of course, be coupled with changes to the trustworthiness clause, as discussed above. But the reference to "equivalence" would have to be deleted in any case, because it would make no sense if the prior reference to Rules 803 and 804 is deleted.

One might argue that taking out any reference to the other exceptions would allow the residual exception to be *too* freely used. But as stated above, the likelihood that the residual exception would be used when another exception actually applies is remote.

It should be noted that the above amendment will not move the needle very far in opening up the residual exception --- that is because almost all courts read the language "not specifically covered" to mean "not admissible under." But the change would bring more uniformity to the residual exception, and may serve to emphasize a more open-ended view going forward.

A more positive statement

Another possibility that might be considered (on the relationship between the residual and the other exceptions) is to track the language of the Nevada residual exception, Nev. Stat. 51.075, which states that the categorical exceptions "are illustrative and not restrictive of the exception provided by this section." This would be a more affirmative statement that the

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States v. Gotti, 641 F.Supp. 283, 289 (E.D.N.Y. 1986) (residual exception may be used to admit a misdemeanor conviction even though such convictions are specifically excluded from admissibility under Rule 803(22)).
.

[10] See, e.g., *United States v. Vigoa*, 656 F.Supp. 656 F.Supp. 1499 (D.N.J. 1987) (grand jury testimony cannot be admissible as residual hearsay because it fails the requirements of the prior testimony exception).

residual exception is not to be limited by anything in Rule 803 or 804. The language might look like the following:

> **(a) In General.** Under the following circumstances, 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~~:
>
> (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) Other Hearsay Exceptions**. The hearsay exceptions in Rules 803 and 804 are illustrative and not restrictive of the exception provided in this Rule.

Experience under the Nevada residual exception does not appear to indicate overuse --- there are only a handful of reported cases in which a Nevada court found a statement admissible under the exception. But there are some interesting cases in which the residual exception is used to admit hearsay that cannot be admitted under other exceptions. See, e.g., *McDermett v. State*, 2015 WL 1879764 (Nev. App.) (inventory list not admissible as a business record because it was prepared for purposes of litigation; but it was admissible as residual hearsay because it was reliable and corroborated).

The Nevada rule, in making the categorical exceptions "illustrative," bears some of the hallmarks of a guidelines system. Another memo in this agenda book explicitly treats the costs and benefits of substituting guidelines for the categorical hearsay exceptions.

III. More Probative Than Any Other Evidence Reasonably Available

Rule 807 requires not only that the proffered hearsay be trustworthy but also that it must be "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." This provision, added by Congress, is intended to add a "necessity" provision to the Rule, thus limiting the instances in which it can be invoked --- Congress made the residual exception one of "last resort."

What is being compared in the "more probative" analysis? It is not the comparison discussed in the previous section, i.e., that the proffered hearsay could be admitted under another exception. Rather it is that there might be other evidence that could be used to prove the point for

which the hearsay is offered. The other evidence might be other witness testimony,[11] or some kind of document. Often it is the possibility of in-court testimony by the declarant of the hearsay being offered. Thus, in *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), the plaintiff offered newspaper accounts of a City official's statements. The court found that the newspaper accounts were sufficiently trustworthy to be admitted as residual hearsay, largely because they cross-corroborated each other. But the newspaper accounts were erroneously admitted as residual hearsay because the reporters were available to testify.

The "more probative" requirement is, essentially, a best evidence requirement. As the court in *Larez* stated, the newspaper quotations were not "the best evidence available." That best evidence requirement imposes a substantial limitation on the use of the residual exception. *Assuming* that Rule 807 should be amended to allow it to be used more easily and more broadly, the question is whether and how the "more probative" requirement should be amended to promote that goal.

Deleting the more probative requirement would likely be too drastic. It would mean that, in all cases, a reliable hearsay statement would be admissible even if the declarant were available to testify--- even if they were sitting in the courtroom and not called to testify, as was the case with the reporters in *Larez.* While that is the consequence for statements admitted under the Rule 803 exceptions, it is because statements fitting under those exceptions are considered *better* than in-court testimony. The same could not be said for every statement found trustworthy under the residual exception --- especially if the trustworthiness requirements were reduced in any of the ways discussed above.

On the other hand, the hearsay rule is concerned about live testimony from the *declarant*, not testimony from alternative sources on the same subject matter. (An excited utterance is not excluded because there is other evidence that can be presented). Thus, if the other evidence available comes from other witnesses or documents, there is something to be said for a rule allowing the proponent to elect whether to offer reliable hearsay in lieu of that other evidence. Forcing the proponent to seek out that other evidence, or to establish that it is not as probative as the residual hearsay, seems outside the concerns of the hearsay rule --- and runs contrary to the basic principle that the parties get to choose which admissible evidence to present. Moreover, when the question is whether there is evidence from other sources to prove the point, the argument between the adversaries turns weird. The opponent will find it necessary to point to all the other great evidence that the proponent can offer against him, which in many cases will be the equivalent of shooting himself in the foot.

So one possibility is to amend the "more probative" language to require the proponent to show only that the evidence is more probative than any other evidence that can be obtained *from the declarant.* That would mean that Rule 807 could be used if the declarant were unavailable, even though there are other alternatives to proving the point for which the hearsay is offered. It would also mean that the hearsay could be introduced even if the declarant was available but, for some reason, the residual hearsay would be better evidence than the declarant's in-court

[11] See, e.g., *United States v. Welsh*, 774 F.2d 670, 672 (4th Cir. 1985) (a hearsay statement was not more probative than the in-court testimony of another eyewitness, and so it was not admissible under the residual exception -- even though the hearsay declarant was a trustworthy person and the in-court witness's credibility was subject to attack).

testimony. A possible example would be a residual hearsay statement from a child; the child's trustworthy out-of-court statement concerning sexual abuse, for example, is often considered under current law to be more probative because the child may not be able to communicate as well on the stand as he or she did out of court. [12]

An amendment that would focus on the declarant, rather than all other available evidence, might look like this:

(3) it is more probative on the point for which it is offered than any ~~other evidence~~ testimony from the declarant that the proponent can obtain through reasonable efforts;

The Committee Note for that alteration of the "more probative" requirement might look like this:

The rule has been amended to narrow the "more probative" requirement. Under the original rule, the proponent was required to show that there was no reasonably available evidence from any source that was as probative as the proffered hearsay. Under the amendment, the only source that needs to be assessed is the declarant. This narrowing avoids an often "apples and oranges" comparison of evidence, and allows the residual exception to be used somewhat more freely, but without sacrificing the basic preference of the rule against hearsay for live testimony from the declarant.

Under the amendment, the proffered hearsay will usually be inadmissible under Rule 807 if the declarant is available to testify. In some cases however, the proponent may be able to establish that the hearsay is more probative than in-court testimony from the available declarant. For example, if the declarant is a child who has made a trustworthy statement about a traumatic event, that statement might be more probative than subsequent in-court testimony from the child.

Another possibility is to start from scratch and use language similar to that employed under the Nevada residual exception, N.R.S. 51.075:

A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though the declarant is available.

[12] See, e.g., *United States v. St. John*, 851 F.2d 1096 (8th Cir. 1988) (child-witness was hampered by developmental problems, and his verbal abilities were overcome by the courtroom setting and the delicate nature of the material to which he was attesting; "Under these circumstances, we are unwilling to hold that a child victim's testimony is always more probative than the prior hearsay statements he or she may have made in the more relaxed environs of a doctor's or social worker's office.").

This provision is verbatim the original conception of Professor Cleary, in the first draft of the Federal Rules of Evidence --- that was to be the single exception to the hearsay rule. This provision combines the concepts of trustworthiness and necessity, and focuses the necessity requirement on the declarant as opposed to other sources of evidence.

It should be noted that any alteration of the "more probative" requirement would need to be integrated with any change that would *add* the more probative requirement to the ancient documents exception. It would be problematice to employ the language anew in one exception and limit it in the other --- especially because one of the reasons for borrowing the language is that has already been applied by courts, and so the case law can be instructive. That argument is undermined if the case law has construed language that is no longer in the original rule.

IV. Materiality and Interests of Justice

In order to emphasize that the residual exception should be rarely used, Congress added two further admissibility requirements to the exception: 1. The statement must be offered as evidence of a material fact; and 2. Admitting it will serve the purposes of the rules and the interests of justice.

Neither of these admissibility requirements appear to have much content. They will be discussed in turn.

Materiality

It is ironic that the word "material," which found its way into the residual exception, was studiously avoided in the definition of relevance set forth in Rule 401. The Advisory Committee believed that the word should not be used because it has many different legal meanings. Congress in reintroducing the word "materiality" appears to have intended to limit the use of the residual exception to *important* evidence—evidence highly likely to affect the outcome of a case. But courts have essentially read "material" to mean "relevant"; put another way, there is little that the requirement does that Rule 403 does not already do. As Weinstein says, the material fact requirement "would be imposed in any event, however, by Rules 401 and 402." *Weinstein's Evidence* at 807-7.

A good discussion of the weirdness of the materiality requirement is found in *United States v. Gotti*, 641 F.Supp. 283, 289 (E.D.N.Y. 1986):

> To qualify for admission under this so-called "catchall" rule Gelb's statements as to the threats must be, among other things, evidence of "a material fact," a term not defined in the Federal Rules of Evidence. If a "material" fact is simply a "relevant" fact, the qualification adds nothing to the sentence in Rule 402 excluding irrelevant evidence. Rule 401 of the Federal Rules of Evidence recites that " '[r]elevant evidence' means

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The notes of the Advisory Committee on the proposed Rules show that it used this language because "it has the advantage of avoiding the loosely used and ambiguous word 'material.' "
>
> But Congress and not the Advisory Committee drafted [the residual exception] and nothing in the legislative history throws light on the question of whether the drafters sought to make a distinction between "material" and "relevant." Chief Judge Weinstein has suggested that use of the word "material" probably requires that the evidence concern a matter that is not "trivial or collateral." *United States v. Iaconetti*, 406 F.Supp. 554, 559 (E.D.N.Y.), aff'd, 540 F.2d 574 (2d Cir.1976), cert. denied, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). At least the evidence must be relevant.

At most, the term "material" is a mild guideline to treat the question of relevance and cumulativeness with some care. As Mueller and Kirkpatrick (at page 1120) say:

> Perhaps the purpose was to say the catchall should be invoked only if the point to be proved is important rather than minor. Understood this way, the material fact requirement means that the decision whether to apply the catchall should take special note of the factors set out in FRE 403. If the point to be proved is already strongly supported and the proffered hearsay would add little to what is already there, or if it would waste or consume time out of the proportion to its apparent value, it does not satisfy the material fact requirement.

The bottom line from all this appears to be that the material fact requirement of Rule 807 helps to set the tone that the residual exception is only to be used in cases of necessity. But other than tone, it has little practical effect because its concept is already embraced in Rule 403.

That said, if the exception is going to be expanded, eliminating the materiality requirement would make some sense because the whole enterprise is to lighten the tone --- i.e., to change the idea that the residual exception is to be left to very narrow circumstances and is to be rarely invoked. Deleting the requirement that the residual hearsay must be "material" could be considered a change in tone.

Interests of Justice

The interests of justice requirement is what the restylists call a "redundant intensifier." It was intended as a signal that the exception is to be rarely employed, but in practical effect it adds nothing to what is already set forth in Rule 102. As Mueller and Kirkpatrick explain (at page 1121):

> The third requirement is that a statement offered under the catchall must serve "the purposes of these rules and the interests of justice." This requirement echoes the directive in FRE 102, to construe the Rules so as to "administer every proceeding fairly,

> eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just result." These high aims are important, but are unlikely to provide much guidance in solving specific problems, and this provision has not proved significant.

See also Weinstein's Evidence at 807-33 ("Admission of evidence under the residual exception must accord with "the purposes of these rules and the interests of justice. This requirement is largely a restatement of Rule 102."); *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979) (interest of justice requirement is "simply a further emphasis upon the showing of necessity and reliability and a caution that the hearsay rule should not be lightly disregarded").

Like the materiality requirement, the interest of justice requirement is largely one of tone --- it sends the message that the residual exception is to be rarely used. And as with the materiality requirement, any effort to change that tone might well include deletion of the admissibility requirement --- it won't make a difference but it will send the signal that the residual exception can be used more frequently than previously.

Deletion of the materiality and interest of justice requirements might be useful in sending a signal that the residual exception should be applied more liberally than previously. But deletion of these symbolic provisions would not appear important enough to justify a freestanding amendment. That is, they might be part of a package that would open up the residual exception, but they are not significant enough on their own to justify an amendment to Rule 807.

Conclusion

Assuming that Rule 807 should be amended to allow for greater use, the most fruitful amendments would be: 1. Deleting the equivalence requirement and the reference to the other exceptions; 2. Specifically allowing the court to consider corroborating evidence; 3. using general trustworthiness language; and 4. Amending the "more probative" requirement to compare the hearsay to the possible testimony of the declarant, rather than all other evidence. In addition, if some amendment is proposed, it should probably include an elimination of the redundant intensifiers: materiality and the interests of justice.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Changing the categorical hearsay exceptions to guidelines
Date: April 1, 2016

At the last Committee meeting, after the Hearsay Symposium, the Committee added the following agenda item for the Spring 2016 meeting, as stated in the Minutes:

> Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. This would allow some discretion but yet would be likely to provide some consistency from judge to judge. Another Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a).
>
> * * *
>
> At the end of the discussion, the Committee asked the Reporter to prepare materials on the following topics:
>
> 1. Replacing the current rule-based system with a system of guided discretion, which would include a list of standards or illustrations taken from the existing exceptions.

The purpose of this memo is to set out what hearsay guidelines might look like. The memo is in two parts. Part One discusses the Advisory Committee's original draft of the hearsay exceptions, which were essentially guidelines, and their difference from the current system. Part Two sets forth drafting possibilities.

Here are the provisos:

● It goes without saying that nothing in this memorandum presents an action item for the Spring 2016 meeting. Changing the categorical exceptions to guidelines would be a structural change with significant consequences and so presents a long-term project. It might be a project for some FJC research if the Committee is interested in pursuing the guidelines alternative.

● Like other memos on hearsay in this agenda book, this memo assumes arguendo that it is a good idea to allow judges more discretion to admit and exclude hearsay than is provided under the current system.

●The Committee should consider this memorandum in relationship to the separate memoranda on expanding the residual exception and limiting the excited utterance exception. As will be seen, many of the issues raised in those memoranda are raised here.

II. Implementing Hearsay Guidelines

Guidelines, as opposed to binding rules, could allow discretion to work in two ways. Take the Sentencing Guidelines as an example. The judge can depart upward or downward. The analogous move, as applied to hearsay exceptions, is for two different exercises of discretion: 1. The judge could exclude hearsay that fits one of the guidelines; or 2. The judge could admit hearsay even though it does not fit within any of the guidelines.

It would seem that any decision to depart either "upward" or "downward" from the guidelines (so to speak) would be dependent on the same considerations of trustworthiness and necessity that animate the guidelines in the first place --- what other principled reasons would a court have for departing? So in that sense a hearsay guidelines system would be quite different from the sentencing guidelines, in which departures often occur because the guidelines fail to take into account certain factors that might be relevant to sentencing. For hearsay guidelines, the departures would occur because the guidelines, while based on reliability, don't accurately apply under the specific circumstances of the case. Significant thought needs to be given to whether departures are as justified when the only complaint is that the rules, while having the same goal as the departure, are not accurately applied to the facts.

The History of Hearsay Exceptions as Guidelines

The original Reporter to the Advisory Committee, Professor Cleary, initially conceived of the hearsay exceptions as being a set of guidelines. In the initial, 1969 draft of the Federal Rules of Evidence, **Rule 803 began as follows:**

(a) General Provisions. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.

b) Illustration. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule:

[Then came the language of what are now the exceptions].

Similarly, **Rule 804 began as follows:**

(a) General Provisions. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness.

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

[Then came the language of the Rule 804 exceptions]

There was no residual exception in this initial draft, of course, because the way the rules were structured, the residual exception was *basically the predominant mode of analysis*, guided by the illustrations. That is to say, it would have made no sense to have a separate residual exception when the entire structure is geared to a case-by-case, discretionary approach to reliability.

A few comments about the 1969 "illustrations" draft are in order:

1. Most importantly, the initial draft received a chilly reception, to say the least. Lawyers, judges and members of Congress objected to the unpredictability and disuniformity that would result in allowing judges to decide reliability case-by-case. This is, of course, the "rules vs. discretion" controversy that was vetted at the Symposium on hearsay reform. The pushback was so great that in the Revised Draft of 1971, the Committee reverted to a rule-based system, in which the exceptions became categorical; but a residual exception was added to provide some discretion to depart in order to admit trustworthy hearsay that did not qualify under those categorical exceptions. (No discretion was allowed to exclude hearsay that fit an exception if the judge found it to be unreliable --- with the exception of Rules 803(6)-(8), each of which contains an untrustworthiness safety valve).

2. In truth, the 1969 draft and the 1971 draft are not all that different. The 1969 exceptions were billed as "illustrations" but the rules provided that if the proffered hearsay fit one of those illustrations, it would be admissible for its truth. So if a statement fit the provision it wouldn't really matter whether it was a categorical "rule" or an "illustration" --- the court had no discretion to exclude it. And in terms of discretion to admit trustworthy hearsay, the language permitting that discretion is found in both drafts, only in different places --- up front in 1969, at the end (in the residual exception) in 1971. So the real difference in the two drafts was basically one of tone --- starting off with the residual type analysis, coupled with "illustrations," appears to allow for more discretion at the margins than the current system, which starts off with categorical rules and a (currently narrow) residual exception at the end.[1]

3. A "return" to the 1969 draft seems not worth the candle at this point, given the relatively minor differences between that system and the one we have. That kind of reconstruction will impose significant transaction costs --- probably too significant for what essentially amounts to a change in tone and an allowance of a bit more judicial discretion at the margins. The same goal of allowing some more (but not too much) discretion can probably be implemented by retaining the categorical exceptions and: 1) expanding the residual exception in one (or more) of the ways suggested in the memo on the residual exception in this agenda book, and/or 2) providing an untrustworthiness safety valve either at the outset or in individual exceptions. The optics of these changes are less disruptive than changing 30 hearsay exceptions from rules to guidelines.

Put another way, the question of what system to *begin with* is significantly different from what system to *change to* after 40 years. Maybe the 1969 draft and its sunnier tone would have been marginally better than the system we have. Maybe not. But the difference does not appear to be great enough to scrap the current system and revert to guidelines. Such a structural change would send the signal that the intent is to do something significantly more than a change in tone.

4. If the Committee were to go to all the trouble of implementing guidelines (having determined, in order to make that decision, that adding more discretion to the system would be valuable) then it should probably take a step beyond the 1969 draft and provide authority for the judge to depart "downward" --- i.e., to allow the judge to exclude hearsay that fits a guideline, if it is found to be untrustworthy under the circumstances. That topic is explored in the memo on excited utterances in this agenda book. As discussed there, one possibility for exceptions that are questionable is to add a trustworthiness burden-shifting provision to that exception. A broader implementation, more like a guidelines approach, would be to add a trustworthiness burden-shifting provision as a general rule. See the next section for how that general rule might be added to the current system.

5. When Professor Cleary proposed his structure of hearsay exceptions as "illustrations" he was considering something even broader --- allowing judicial discretion to admit or exclude hearsay under Rule 403. The rule 403 solution was discussed in detail at the Hearsay

[1] As discussed in the memo on the residual exception in this agenda book, Nevada took the language from the beginning of the 1969 draft of Rule 803 and turned it into the residual exception. At least insofar as the reported cases show, the result has been unremarkable. There is little to indicate that judges are exercising any more judicial discretion under the Nevada catchall than are judges under Federal Rule 807.

Symposium, and it is safe to say that proposing such a change would be --- as it was in 1969 --- controversial. But then as now, there is a question of why judicial discretion should be limited with respect to hearsay but not with respect to questions of probative value and prejudice. Under Rule 403, judges have enormous discretion to make probative value/prejudicial effect determinations. Presumably the result of that discretion is, at least to some extent, unpredictability and inconsistent results. And yet this is tolerated and even embraced under Rule 403. So what would be so bad about the court exercising more discretion over hearsay determinations along the lines of Rule 403 balancing? Are hearsay exception determinations somehow different from probative value/prejudicial effect determinations?

Professor Cleary, in a memorandum to the original Advisory Committee, offered a reason why judicial discretion as to hearsay is more troublesome than judicial discretion on questions of probative value and prejudicial effect. He stated that "when it is proposed to confer upon the trial judge a greater discretion to admit or exclude hearsay depending on its probative force, the effect is to move him into the area of credibility, one traditionally reserved to the trier of fact and in any event not a basis heretofore for admitting or excluding evidence generally." Professor Cleary was relying on the basic principle that when a judge is ruling on Rule 403 grounds, she is not making a credibility determination – the question is how probative the evidence is *if believed. See, e.g., United States v. Welsh,* 774 F.2d 670, 672 (4th Cir. 1985) ("The law does not consider credibility as a component to relevance."); *Bowden v. McKenna,* 600 F.2d 282, 284 (1st Cir. 1979) ("Weighing probative value against unfair prejudice under Fed.R.Evid. 403 means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable."); *Gardner v. Galetka,* 568 F.3d 862, 876 (10th Cir. 2009) ("Rule 403 is not to be used to exclude testimony that a trial judge does not find credible, because credibility questions are the prerogative of the jury."). So there is a distinction that can be made between use of discretion to assess probative value and prejudice and use of discretion to assess the credibility of a hearsay statement.

Moreover, once again the question is not whether a system of discretion along the lines of Rule 403 can be implemented as an initial matter. The question is whether it can and should be implemented after 40 years of a rule-based system. Changing the rules of the game at this point to a completely discretionary Rule 403-type system would result in the erosion of 40 years of practice in which the hearsay exceptions have, by and large, become clear and predictable. And, as many have stated, the result would likely be a return over time to the same categories we started with, but only by way of many years of common-law development.

For all these reasons, it would appear that a return to the 1969 draft of "illustrations" would impose more costs than benefits at this point. But if the Committee is interested in pursuing a 1969-type structure, a formal proposal will be drafted for the next meeting.

The alternative is to provide some discretion to allow judges to depart from the categorical exceptions, but to do so within the structure of the current rules. The possible devices that can be used are addressed in other memos in this agenda book in the context of particular

rules. They are: 1) expanding the residual exception to allow courts somewhat more discretion to admit reliable hearsay not covered by the categorical rules; and 2) providing a trustworthiness safety valve to allow the judge to exclude hearsay that fits under an exception if she finds that the hearsay is unreliable. If these two proposals are implemented, it probably wouldn't matter whether the exceptions are stated as "exceptions" or "illustrations" as the effect would be the same. These alternatives are explored in the next section.

II. Allowing Courts More Discretion Within the Current System

As discussed above, even if the Committee believes that courts should have more discretion to admit and exclude hearsay, the substitution of guidelines for rules at this point is probably not worth the cost as it would be disruptive and would probably signal a greater change than intended. Within the existing system, however, changes can be made that would allow more discretion but retain the basic "rule" structure. What follows is a draft of how those changes--- to Rules 803, 804 and 807 --- might be implemented.

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

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness, unless the opponent shows that the statement is untrustworthy under the circumstances :

(1) ***Present Sense Impression*****.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) ***Excited Utterance*****.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(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 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.

(4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(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 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.

(6) ***Records of a Regularly Conducted Activity*****.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity; and

(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~~.

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist; and

(B) a record was regularly kept for a matter of that kind~~; and~~

~~**(C)** neither the possible source of the information nor other circumstances indicate a lack of trustworthiness~~.

(8) ***Public Records.*** A record or statement of a public office if it sets out:

~~**(i)**~~ **(A)** the office's activities;

~~**(ii)**~~ **(B)** 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)**~~ **(C)** 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~~.

(9) ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(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:

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

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

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

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

(11) ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or

marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose~~ — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document~~.

(16) ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the

community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) ***Reputation Concerning Boundaries or General History*.** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) ***Reputation Concerning Character*.** A reputation among a person's associates or in the community concerning the person's character.

(22) ***Judgment of a Previous Conviction*.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) ***Judgments Involving Personal, Family, or General History, or a Boundary*.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) **[*Other Exceptions*.]** [Transferred to Rule 807.]

Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness, unless the opponent shows that the statement is untrustworthy under the circumstances:

(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 had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) ***Statement Under the Belief of Imminent Death*.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) ***Statement Against Interest*.** A statement that~~:~~

~~**(A)**~~ a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability~~; and~~

~~**(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability~~.

(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.

(5) **[*Other Exceptions*.]** [Transferred to Rule 807.]

(6) ***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability*.** A statement, regardless of its reliability, offered against a party that wrongfully

caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

Rule 807. Residual Exception

(a) In General. Under the following circumstances, 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~~:

(1) the statement has ~~equivalent~~ [some] ~~circumstantial~~ guarantees of trustworthiness [or: the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy) ; and

~~**(2)** it is offered as evidence of a material fact;~~

~~**(3)**~~ **(2)** it is more probative on the point for which it is offered than any ~~other evidence~~ testimony from the declarant 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.

Reporter's Comments:

1. Much of this draft comes from other memos in this agenda book. Most importantly the untrustworthiness safety valve, discussed in the memo on Rule 803(2), has been applied more broadly to all the Rule 803 and 804 exceptions. Another possibility, of course---if the Committee decides to go down this path at all --- is to consider the application of such a clause exception by exception.

2. Applying the untrustworthiness clause generally requires a change to several of the existing rules:

- Rules 803(6)-(8) already have a trustworthiness clause, so it needs to be deleted from there. It should be noted that the clause in those rules is slightly different because it refers to "sources of information" and "manner and circumstances of preparation" rather than a general reference to untrustworthiness. Those factors set forth in Rules 803(6)-(8) are tailored toward records and wouldn't apply to other exceptions. For example, as stated in the Rule 803(2) memo, an excited utterance is not "prepared." The differences in the Rule 803(6)-(8) trustworthiness language may counsel applying different language exception by exception. An alternative is to state in the Committee Note that there is no intent to change the application of untrustworthiness factors in Rules 803(6)-(8).

One collateral advantage of taking the untrustworthiness language out of Rule 803(8) is that the rule would be reconfigured back to the original subdivisions --- Rules 803(8)(A), (B), and (C) --- thus erasing one of the more unfortunate decisions made during the restyling.

● The Rule 803(15) requirement—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document --- is deleted because it would be subsumed within the greater "unless" clause at the beginning of Rule 803. A Committee Note to indicate no change of intent would be appropriate.

● The Rule 804(b)(3) requirement of "corroborating circumstances clearly indicating trustworthiness" would have to be deleted, because it can't coexist with an untrustworthiness safety valve. To have both provisions would be to say that a declaration against interest is admissible if the proponent shows corroborating circumstances clearly indicating trustworthiness, unless the opponent shows it is untrustworthy. That is the equivalent of adding an untrustworthiness safety valve to Rule 807 --- a nonsensical outcome. The result, though, of deleting the corroborating circumstances requirement from Rule 804(b)(3) in favor of general burden-shifting is that the trustworthiness-related burden is shifted from the proponent to the opponent. Maybe that is a good result, given the fact that the proponent still has to show that the statement was disserving of the declarant's interest, and also must show that the declarant is unavailable. But it is a change that the Committee will have to think about. If the Committee wants to retain the burden as it is, then that counsels for an exception-by-exception consideration of where to place an untrustworthiness safety valve.

● The untrustworthiness safety valve cannot be applied to Rule 804(b)(6), because if a forfeiture is found, it doesn't matter whether the hearsay is reliable or not. Rule 804(b)(6) is not grounded in any considerations of reliability. Adding the trustworthiness safety valve would mean that even if a party killed a witness to keep them from testifying, they could have that witness's hearsay excluded if they could show it to be unreliable. That would mean that the only hearsay that could be admitted under Rule 804(b)(6) would likely be admissible under some other exception anyway because it is reliable.

The drafting solution provided above is not ideal. The language added to Rule 804(b)(6) is in conflict with the untrustworthiness language at the beginning of Rule 804. This might again counsel for an exception-by-exception consideration for the trustworthiness safety valve. Or it might counsel for moving Rule 804(b)(6) into a separate rule --- that solution makes at least theoretical sense, because a forfeiture provision (which was added in 1996) should probably have not been placed in Rule 804 in the first place. The original Rule 804 exceptions are grounded in circumstantial guarantees of reliability --- but, again, Rule 804(b)(6) has nothing to do with reliability. While this theoretical disconnect is probably not sufficient to support an amendment on its own, it is something that might be considered as a broader package of amendments to the hearsay exceptions --- especially where the bulk of the changes are grounded in trustworthiness considerations.

3. The changes made to the residual exception are taken from the Rule 807 memo in the agenda book. As seen in that memo, there are other drafting possibilities for expanding the residual exception. The ones included here are simply used to illustrate what changes to the residual exception would look like in tandem with a trustworthiness safety valve.

4. The end result of adding a trustworthiness safety valve on one end, and an expanded residual exception on the other, is probably something pretty close to a system of guidelines. But optically, at least, it is surely not as drastic as an explicit reconfiguration of rules-to-guidelines would be.

5. No change has been proposed to the Rule 801(d) exceptions/exemptions. Because statements under Rule 801(d) are not admitted because they are reliable when made, it makes no sense to add language allowing the judge to exclude if she finds them unreliable. And no change is necessary to Rule 801(d) to allow the judge to admit reliable hearsay not covered by those exceptions --- because the expanded Rule 807 does that.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Request to review Rule 803(22)
Date: April 1, 2016

Judge Graber, a member of the Standing Committee, requests that the Evidence Rules Committee consider the possibility of amending Rule 803(22), as part of its review of the hearsay rule and its exceptions. Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. It provides that the following is not barred by the rule against hearsay:

> **(22)** ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if:
> **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
> **(B)** the conviction was for a crime punishable by death or by imprisonment for more than a year;
> **(C)** the evidence is admitted to prove any fact essential to the judgment; and
> **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.
>
> The pendency of an appeal may be shown but does not affect admissibility.

Judge Graber has this to say about Rule 803(22):

> If the committee does not do away with Rule 803 altogether, it might consider clarifying Rule 803(22), which pertains to judgments of conviction.
>
> Because hearsay concerns *reliability*, it makes no sense --- to me at least --- to distinguish among types of final judgments. A judgment of conviction has a certain level

of reliability no matter the type of proceeding that led to the judgment --- trial, plea of guilty, or plea of nolo contendere. It is no more or less necessary to call as a witness the clerk of the court for one type of judgment compared to another. Other rules --- substantive in nature --- properly distinguish among types of pleas. See, e.g., Rule 410 (admissibility of plea agreements).

As a matter of policy, Rule 803(22) may make good sense. But, because the policy that the rule advances has nothing to do with reliability of the document, its inclusion in the hearsay rule should be reconsidered.

I read Judge Graber's comment as a request to consider two things:

- most importantly, whether to delete the language providing that convictions based on nolo contendere pleas are outside the exception, i.e., Rule 803(22)(A); and

- whether to delete Rule 803(22)(B), which carves misdemeanors out of the exception.

In other words, the question is whether to extend the coverage of Rule 803(22) to all convictions.

This memo explains the rationale for the current rule's treatment of nolo contendere and misdemeanor convictions. If the Committee believes one or both of these carve-outs are unjustified, then an amendment to Rule 803(22) to accord with the Committee's interest will be prepared for the next meeting.

I. Nolo Contendere Convictions and Rule 803(22)

The basic reason for a hearsay exception for the facts essential to prior convictions is that these facts have been subject to adversarial testing and have been shown (or conceded) beyond a reasonable doubt. Arguably that rationale would counsel inclusion of convictions based on nolo contendere pleas within the exception. A nolo contendere plea is dependent on the defendant's assessment that he needs to avoid a criminal trial because he cannot win, and by pleading nolo

contendere he can avoid making evidence against himself in a subsequent civil suit. Thus, the defendant's concession of the facts essential to the judgment could be thought to be fairly found when the defendant pleads nolo contendere.

But the reason for the nolo contendere carve-out is not about the rationale of the rule. It is about preserving the inadmissibility of nolo *pleas*, a protection found in Rule 410. Rule 410 provides that evidence of a nolo plea is not admissible in a subsequent civil or criminal case. That protection for nolo pleas would be undermined if the conviction based on the plea were admissible under Rule 803(22). As the Advisory Committee Note states:

> Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

The rationale for providing an option for a nolo plea is to encourage compromise.[1] If that decision is substantively correct, then the Rule 803(22) carve-out of nolo pleas is sound. A defendant would be unlikely to take a nolo plea if only the plea was protected, while the conviction resulting from the plea was not. *See United States v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006) ("Rule 410's exclusion of a nolo contendere plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea.").[2]

If the Committee were to decide to eliminate the nolo plea carve-out in Rule 803(22), then it would have to think about deleting the protection of nolo pleas in Rule 410 as well. At least it would have to think about the fact that the nolo protection in Rule 410 would be undermined to the point of irrelevance. And the whole enterprise would require careful consideration of whether nolo pleas (which essentially encourage settlement) are good or bad public policy. As *nolo* pleas have been approved by the Supreme Court --- *see North Carolina v. Alford*, 400 U.S. 25 (1970) --- and are a part of federal practice, any decision that would impact their use is more than one about evidence rules. The effect on state processes will also have to be worked through. For example, if a state allows nolo pleas, deleting the protection for nolo

[1] As one court put it, the availability of the nolo contendere plea to the accused reflects society's "desire to encourage compromise resolution of criminal cases." *Olsen v. Correiro*, 189 F.3d 52, 60 (1st Cir.1999).

[2] It should be noted that the bar on admissibility of nolo plea convictions is only one involving hearsay. That means that if the nolo plea conviction is not offered to prove the truth of an essential fact, it will be admissible, because it is not hearsay for the purpose proffered. So assume, for example, that the defendant pleads nolo to a consumer fraud and is convicted. He is later charged with consumer fraud based on subsequent, similar actions, and his defense is that he had no idea that what he was doing was a fraud. The fact of the nolo plea conviction can be offered to show that he was on notice that his conduct was, at the very least, questionable.

pleas in the Federal Rules will have repercussions in that state. See *United States v. Nguyen,* 465 F.3d 1128, 1131 (9th Cir. 2006) (Alaska conviction based on *nolo* plea held inadmissible under Rule 803(22)).

It should be noted that a handful of states do provide that nolo plea convictions can be offered to prove the truth of essential facts. See, e.g., Ark. R.Evid. 803(22); Me. R.Evid. 803(22); N.Dak. R.Evid. 803(22); Tenn.R.Evid. 803(22). Interestingly, each of these states does provide that nolo contendere pleas are inadmissible under Rule 410; but they don't protect the convictions from admissibility under Rule 803(22).[3] In other words they reject the Advisory Committee's argument that allowing admissibility of the conviction undermines the protection provided by the plea. If the Committee does wish to proceed, it would be prudent to see how the rules in those states are working.

II. Misdemeanor Convictions and Rule 803(22)

The Advisory Committee Note explains the rationale for excluding misdemeanor convictions from admissibility under Rule 803(22):

> Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. [Citing cases and articles]. Hence the rule includes only convictions of felony grade, measured by federal standards.

The Advisory Committee's assumption is of course a generalization. Certainly there are many misdemeanor convictions that were hotly contested and thoroughly litigated. But on the other hand, it seems pretty safe to assume that the lesser the offense, the less likely it is that the adversarial testing that is the basis for the exception will be found. Notably, it appears that only one state (Vermont) admits all convictions of any kind; all other states follow some form of the federal model, attempting to draw a line between those convictions that are most likely to be adversarially tested and those that are not.

Assuming that the Advisory Committee is on to something --- i.e., that there should be a distinction between convictions that are adversarially tested and those that are not --- the question is whether the concern about adversarial testing supporting a conviction could be handled in a more nuanced way than by an adherence to the felony-misdemeanor line. Here are some possibilities:

[3] Tennessee goes even further and does not provide an exception for convictions obtained through a guilty plea.

● Limit the exclusion to certain kinds of subject matter offenses that are unlikely to be the subject of adversarial testing. For example, Or.R. Evid. 803(22) covers evidence of a conviction "adjudging a person guilty of a crime other than a traffic offense." The problem with this option is to try to find a description that will cover the kinds of usually-uncontested convictions that will occur in all 50 states and federally. What is a "traffic offense" and does it mean the same thing in every jurisdiction? It seems that the sentence to be imposed is a far more useful --- and easily described --- guideline as applied to all the states than is the subject matter of the conviction.

● Establish adversarial testing as a textual component of admissibility and impose the burden on either the proponent or the opponent to show that the conviction was the result of adversarial testing.

For example, the Rule could be amended to state that

(B) the conviction was ~~for a crime punishable by death or by imprisonment for more than a year,~~ obtained as a result of adversarial testing. [Burden on proponent].

Or it could be amended to state that

(B) ~~the conviction was (i) for a crime punishable by death or by imprisonment for more than a year,~~ the opponent does not show that the conviction was obtained in the absence of adversarial testing. [Burden on opponent; awkward phrasing].

The problems with this solution are pretty apparent. Trying to capture what the rule is looking for in rule-based language will probably be imprecise. Is the term "adversarial testing" explicit enough, and comprehensive enough? Note also that in order to make any sense the provision has to apply to both felonies and misdemeanors. It seems too awkward to put the adversarial testing language together with the misdemeanor language --- it makes the provision too balky. Moreover, the provision also applies to guilty pleas, and query whether they are obtained pursuant to "adversarial testing." If not, the rule would have to be fundamentally restructured because, as it now stands, all the subdivisions are integrated with each other. That seems like a lot of work to cover misdemeanor convictions.

There is another solution: retain the current rule and allow the proponent to establish that a particular misdemeanor conviction was the subject of adversarial testing --- but admit such a conviction under the residual exception. That is basically the system we have now. At least one court has found that a misdemeanor conviction can be admissible under Rule 807 if the proponent shows that it was obtained after vigorous litigation. The case is *United States v. Gotti,* 641 F.Supp. 283, 289 (E.D.N.Y. 1986), where the government sought to admit misdemeanor convictions to prove facts that would constitute predicate acts for RICO offenses. The court held that the residual exception could be used:

> The court sees no reason in principle why such misdemeanor convictions should not be admitted provided they meet the conditions of [then] Rules 803(24) and 804(b)(5). The omission from Rule 803(22) of a hearsay exception for a misdemeanor conviction does not imply a prohibition against admission of such a conviction under some other exception to the hearsay rule. In fact Rules 803(24) and 804(b)(5) apply by their terms only to statements "not specifically covered" by other exceptions.
>
> The Advisory Committee explained in its notes that Rule 803(22) made only convictions of a felony an exception to the hearsay rule "because motivation to defend at this [misdemeanor] level is often minimal or nonexistent." Where the motivation to defend against a misdemeanor charge is comparable to the motivation to defend against a felony charge, the misdemeanor conviction has "equivalent circumstantial guarantees of trustworthiness." If the government can so satisfy the court, the misdemeanor convictions of defendants will be admitted.[4]

This case-by-case approach to admissibility of misdemeanor convictions seems like a fair substitute for any amendment to Rule 803(22) that would apply a case-by-case approach under the text of an amended rule. At least in the reported cases, the calls for admitting misdemeanor convictions seem pretty sparse. The cost of amending an exception to cover the infrequent case --- that could be handled in any case under the residual exception --- may seem outweighed by any benefit.

It is true that Congress wanted the residual exception: 1) to be used only rarely, and 2) not to be used in a way that would undercut any of the categorical exceptions. But using the residual exception to admit contested misdemeanors is arguably consistent with those limitations. First, it is apparently a rare occurrence. Second, admitting such misdemeanors is consistent with the basic policy of Rule 803(22), which is to admit convictions to prove essential facts when

[4] The convictions were later used against Gotti at trial.

there has been a contested litigation --- it is simply a more refined and inclusive application of that principle.[5]

Finally, the solution of "leave it up to the residual exception" might be thought to be improved if the residual exception were to be amended in a way that would increase its usefulness. The topic of loosening up the residual exception is taken up in another memo in this agenda book.

Conclusion

For a change to the provision on nolo contendere convictions, the Committee will probably need to conclude that the resulting limitation on the effectiveness of the Rule 410 protection of nolo pleas is acceptable. That conclusion would likely have to be affected by substantive assumptions about the usefulness of the nolo contendere process in general. That more fundamental doctrinal concern should probably take account of the interests of the many states that permit nolo contendere pleas, as a diminishment of protections against admissibility at the federal level will affect these state interests.

For a change to the provision on misdemeanor convictions, the Committee will probably need to conclude that amending the rule to provide a more nuanced test that would allow admissibility of contested misdemeanor convictions would be superior to the current situation, in which that more nuanced approach has been and can be accomplished by the use of the residual exception.

[5] It should be clarified that the discussion here is about admitting a misdemeanor conviction to prove the truth of the essential facts supporting the conviction. If a party seeks to admit a misdemeanor conviction not to prove the underlying facts but for some other purpose, Rule 803(22) (and the misdemeanor carve-out) is inapplicable. For example, in *United States v. Loera*, 923 F.2d 725, 730 (9th Cir.1991), a defendant's prior drunk driving misdemeanor judgments of conviction were admitted for the limited purpose of establishing the element of malice required for second degree murder, i.e., that the defendant had grounds to be aware of the risk that drunk driving presented to others. And in *United States v. Wilson*, 690 F.2d 1267, 1275 n. 2 (9th Cir.1982), at the defendant's trial on escape charges, his prior misdemeanor judgment of conviction for counterfeiting was admitted to establish that he had been incarcerated at the time that he was alleged to have escaped. In both these cases, the conviction was admitted to prove the fact of conviction, not for any underlying fact that was determined through the conviction. The relevant hearsay exception to be used here is Rule 803(8) --- the public record of the conviction itself.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Research Regarding the Recent Perception (e-Hearsay) Exception
Date: April 1, 2016

The Evidence Rules Committee has decided not to proceed at this point with an amendment that would add a "recent perceptions" exception to Rule 804. The genesis of the proposal was an article by Professor Jeffery Bellin, in which he argued that such an exception was necessary to allow admission of reliable electronic communications --- particularly texts and tweets – that would not be admissible under the traditional hearsay exceptions. The Committee was concerned that the exception would be too broad, allowing admission of texts and tweets based more on crowd-sourcing than personal knowledge. And it also concluded that there was no indication that any problem existed that needed to be addressed --- no showing that reliable texts and tweets are currently being excluded.

The Committee did, however, resolve to monitor developments in the case law on hearsay objections to texts, tweets, and other social media communication. The minutes of the Fall 2014 meeting describe the Committee's determination:

> Ultimately, the Committee decided not to proceed on Professor Bellin's proposal to add a recent perceptions exception to Rule 804. It did not reject a possible reconsideration of a recent perceptions exception, however. The Committee asked the Reporter * * * to monitor both federal * * * case law to see how personal electronic communications are being treated in the courts. Are there reliable statements being excluded? Are such statements being admitted but only through misinterpretation of existing exceptions, or overuse of the residual exception?

This memo provides an update on the federal case law involving electronic communications --- especially texts, tweets and Facebook posts --- in cases where a hearsay objection has been made. The goal of the memo is to determine: 1) whether electronic communications that appear to be reliable are being excluded because they don't fit into existing exceptions; and 2) whether such communications are being admitted as reliable, but only by

misapplying existing exceptions (e.g., finding the declarant excited when she was not, overusing the residual exception,[1] etc.).

Before getting to the cases, though, there is one interesting addition to the argument about the potential unreliability of social media communications and the need for contemporaneity. The FJC report on excited utterances and present sense impressions --- also included in this agenda book --- cites a study which indicates that it is easier to lie if the communicants are not face to face:

> Lying appears to be more difficult when conducted in personal settings; for example, the decision to lie has been observed to take twice as much time when testing is conducted person-to-person instead of by computer.

The FJC cites Jeffrey J. Walczyk et al., *Lying Person-to-Person about Life Events: A Cognitive Framework for Lie Detection*, 58 Pers. Psychol. 141, 159–60 (2005) for this proposition. A hearsay exception for recent perceptions, basically geared toward electronic communications, would be in tension with these findings. If the findings are correct, there should be less time permitted between the event and the electronic communication, not more.

The FJC also makes the point that it is difficult to lie if the statement is being made to a person who can also perceive the event. (That is part of the reliability-grounding for present sense impressions). But the problem with electronic communications is that they are often *not* made to one with personal knowledge of the event described. This could be thought to be another reason to be cautious before adopting a hearsay exception for recent perceptions, as applied to electronic communications.

[1] The phrase "overusing the residual exception" is intended to mean use of the residual exception beyond the narrow application that Congress intended. If, however, the Committee decides to expand the coverage of the residual exception --- a topic taken up in another memo of this agenda book --- then it is possible that the exception properly could cover a fair amount of electronic communications that are not admitted under other exceptions. It might be that an expanded residual exception would make it unnecessary to take up the possibility of a recent perceptions exception.

Outline on Recent Cases Involving Admissibility of Electronic Communications Under the Federal Hearsay Rule and Its Exceptions.

I. Electronic Communications Properly Found to be Not Hearsay

Threats: ***United States v. Encarnacion-LaFontaine,*** 2016 WL 611925 (2nd Cir.): The defendant, appealing convictions for drug crimes and extortion, argued that threatening Facebook messages should not have been admitted because they were hearsay. The court stated: "His hearsay challenge is easily dismissed because the messages * * * were not admitted for the truth of the matters asserted in them. See Fed.R.Evid. 801(c)(2); see also United States v. Bellomo, 176 F.3d 580, 586 (2d Cir.1999) ('Statements offered as evidence of ... threats ... rather than for the truth of the matter asserted therein, are not hearsay.').

Context: ***United States v. Mathis,*** 767 F.3d 1264 (11th Cir. 2014): In a prosecution for enticing minors, the trial court admitted text exchanges between the defendant and a minor concerning sexual activity. The defendant's side of the text exchange was admitted as statements of a party-opponent; the minor's side of the exchange was admitted as necessary to provide context for the defendant's statements, and the jury was instructed that the minor's statements could not be used for their truth. The court of appeals found no error.

Effect on the listener: ***Meyer v. Callery Conway Mars HV, Inc.***, 2015 U.S. Dist. LEXIS 937 (W.D. Pa. Jan. 5, 2015): In an employment discrimination action, the defendant offered an email about a dangerous condition that the plaintiff was alleged to have created at the plant. That email was admissible over a hearsay objection, because it was not offered to prove that the plaintiff created the condition, but only the state of mind of the supervisor in deciding whether to fire the plaintiff. ***See also United States v. Gonzalez,*** 560 Fed. Appx. 554 (6th Cir. 2014): In a prosecution involving fraud and credit card theft, text messages to the defendant were properly admitted as non-hearsay because they provided him information that made him aware of the fraud.

Effect on the listener, and context: ***United States v. Farley,*** 2015 WL 6871920 (N. D. Cal. November 9, 2015): In a felon-firearm case, text messages received by the defendant on his cellphone, concerning arrangements to set up gun sales, were found admissible both for effect on the listener and to put the defendant's own statements in context.

Verbal acts: ***Turner v. Am. Building Condo. Corp.***, 2014 U.S. Dist. LEXIS 15804 (S.D. Ohio Feb. 7, 2014): Emails in a contract case were found not hearsay because they were "verbal acts, offered to show what was said when and by whom. The statements themselves are the evidence, not the truthfulness or lack thereof of what the statements purport to express."

Incoming texts requesting drugs are admissible for the fact they were made: ***United States v. Ellis,*** 2015 WL 5637551 (6th Cir.): The court found no error in the lower court's ruling that incoming text messages were not hearsay because "they were used to prove that individuals repeatedly contacted Ellis for narcotics purchases, not for their truth. *See, e.g., United States v. Rodriguez–Lopez*, 565 F.3d 312, 315 (6th Cir.2009) ("Even if the statements were assertions, the government offers them, not for their truth, but as evidence of the fact that they were made. The fact that Rodriguez received ten successive solicitations for heroin is probative circumstantial evidence of his involvement in a conspiracy to distribute heroin.")."

Consumer confusion: ***OraLabs, Inc. v. King Group LLC,*** 2015 WL 4538444 (D. Colo. July 28, 2015): In a case under the Lanham Act, consumer tweets indicating confusion about a product were admitted as not hearsay, because the assertions in the tweets were not offered for their truth but rather for the fact that they were untrue. (Other courts admit such statements, electronic or otherwise, under the state of mind exception).

Circumstantial evidence of connection: ***United States v. Edelen,*** 561 Fed.Appx. 225 (4th Cir. 2014): Appellants were charged and found guilty of conspiracy to kidnap. They argued it was error to admit a text that was sent to Edelen's phone the day before the attack, by a contact named "Puffy." The text informed Edelen of the victim's location. The court found that the text was properly admitted as not hearsay: it formed a link between Edelen and "Puffy" by the fact that it was made, and it supported the inference that Edelen had access to, and likely received, certain information about the victim prior to the commission of the offense. It was not offered to prove that the victim was actually located at a certain place.

Circumstantial evidence of state of mind: ***United States v. Churn,*** 800 F.3d 768 (6th Cir. 2015): In a bank fraud prosecution, the court admitted emails sent to the defendant by a loan officer, in which the officer reported his concerns about the truthfulness of some of the defendant's representations in obtaining bank loans. The emails were not offered for the truth of any fact, but only to show the officer's state of mind and her concern over whether she was receiving inaccurate information.

II. Hearsay Found Admissible — Correctly — Under Existing Exceptions:

Party-opponent statement: *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014): A text message from the defendant to a prostitute was properly admitted as the defendant's own statement under Rule 801(d)(2)(A). The prosecution showed by a preponderance of the evidence that the text was sent by the defendant: the account was registered to an email address registered to the defendant; the defendant's first name was used in the text; a witness testified that the defendant had identified himself by a nickname that was in the text; and two witnesses testified that the defendant's Facebook name was that nickname. ***See also United States v. Moore,*** 2015 WL 2263987 (11th Cir. May 15, 2015) (text messages were party-opponent statements); ***Greco v. Velvet Cactus, LLC,*** 2014 U.S. Dist. LEXIS 87778 (E.D. La.) (text messages admitted as party-opponent statements); ***Vaughn v. Target Corp.***, 2015 WL 632255 (W.D. Ky. Feb. 13, 2015) (In a slip and fall case, an entry on the plaintiff's Facebook page indicating her lack of injury was admitted under Rule 801(d)(2)(A)).

Texts are party-opponent statements where the government presents evidence that they were more likely than not made by the defendant: *United States v. Ellis,* 2015 WL 5637551 (6th Cir.): "The government used Ellis's outgoing messages to prove his intent to distribute the marijuana found in his possession. Ellis maintains that the phone's outgoing messages constitute hearsay statements, inadmissible as admissions of a party-opponent * * * because the government failed to show that Ellis is in-fact the declarant. But Ellis cannot point to any clear error in the district court's preliminary finding that it was more likely than not that he made the statements in question. *See* Fed.R.Evid. 104(a). As the court noted, several pieces of evidence supported that finding: the phone was in his possession, contained photographs of Ellis and text messages addressed to "J" and "Javon," and listed his brother and girlfriend as contacts."

Party-opponent statement --- so long as the government can show that the text was from the defendant: *United States v. Benford,* 2015 WL 631089 (W.D. Okla. Feb. 12, 2015): In a felon-firearm prosecution, the defendant challenged text messages that were setting up a gun transaction. The defendant argued that the texts were hearsay but the court stated that "a statement is not hearsay if it is offered against a party and is the party's own statement." The court further noted that "[t]he government, as proponent of the text messages, must show by a preponderance of the evidence that defendant made the statement. *See United States v. Brinson*, 772 F.3d 1314, 1320 (10th Cir.2014)." Thus, while the standard for authentication is enough for a reasonable person to find that the text is from the defendant, the test for satisfying the hearsay standard is higher --- Rule 104(a). On the Rule 104(a) question, the court ruled as follows:

> Here, the government contends the text messages were retrieved from the cellphone found on Defendant's person at the time of his arrest. The government intends to offer evidence that the phone was password protected and that Defendant provided his password to police at the time of his arrest. According to the government, police thereafter obtained a search warrant to search the contents of the phone. Although the text messages at issue contain no identifying information, *i.e.*, no names are referenced in the

> text messages, the government contends other text messages retrieved from the cellphone include monikers that sufficiently identify Defendant. Moreover, Defendant does not offer evidence that the cellphone did not belong to him or that some other person had access to his cellphone. Subject to appropriate identifying information presented by the government to sufficiently demonstrate Defendant authored the text messages, those messages are not inadmissible hearsay.

The court also noted that while the defendant did not challenge the *incoming* texts on hearsay grounds, any such challenge would fail because those statements were admissible for the non-hearsay purpose of providing context for the defendant's own statements. *See United States v. Beckman,* immediately below. **Compare *Linscheid v. Natus Medical Inc.,*** 2015 WL 1470122 (N.D. Ga. Mar. 30, 2015) (Linkedin posting to prove what the plaintiff's job was in an FLSA case: the posting was inadmissible because the defendant made no attempt to show that the posting was made by the plaintiff; the standard of proof for establishing that the party-opponent made the statement is a preponderance of the evidence; there is no indication in the facts that the posting would fit a recent perceptions exception).

Chatroom conversation admissible as party-opponent statement and as non-hearsay context: *United States v. Beckman,* 2015 U.S.App. Lexis 12238 (6th Cir. July 13, 2015): In a child pornography case, a chatroom conversation was properly admitted against the defendant:

> Beckman also claims that the chats with unidentified persons constituted inadmissible hearsay. But Beckman concedes he is jimmyab2010; thus his portion of the chats were admissions of a party opponent, not hearsay. The other parties' portions of the chats were properly admitted to provide context to Beckman's own statements. See United States v. Henderson, 626 F.3d 326, 336-37 (6th Cir. 2010) (observing that statements Henderson made during recorded telephone conversations were non-hearsay admissions under Fed. R. Evid. 801(d)(2)(A), and the statements made by others were not admitted to show the truth of the matter asserted, but to provide context for Henderson's admissions).

See also United States v. Lemons, 792 F.3d 941 (8th Cir. 2015): In a trial involving social security disability fraud, the trial court admitted the defendant's Facebook posts indicating that she had a very active lifestyle. These posts were party-opponent statements. Some people replied to her posts, and, to the extent that the defendant replied back to those posts, the third party reply posts could have been admitted for the non-hearsay purpose of context: "Some of the Facebook posts at issue here are in the nature of a conversation between Lemons and third parties, and the district court could reasonably have believed that review of [the complete conversation] would enlighten the jury about the meaning of admissions by Lemons." But the trial court erred because it did not provide a limiting instruction to that effect. The court held that the error did not meet the plain error standard.

Party-opponent agent's statement: *United States v. Wilson,* 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting to his personal use checks issued as a result of fraudulently filed federal tax returns. He claimed he was a legitimate check casher and didn't

know the Treasury checks were obtained by fraud. The defendant's former attorney had engaged in text exchanges with an I.R.S. agent, and the government proffered the attorney's texts at trial. The defendant lodged a hearsay objection but the court admitted the texts. The court of appeals found no error, holding that the text was made by the lawyer acting as the attorney's agent, and concerned a matter within the scope of that agency.

Party-opponent agent's statement: ***United States v. McDonnell,*** 2014 WL 6772480, at *1 (E.D. Va.) (admitting an e-mail by the defendant's employee against the defendant pursuant to Rule 801(d)(2)(D) because the email was about a matter within the scope of the declarant's employment).

Co-conspirator Exemption: ***United States v. Thompson***, 568 Fed. Appx. 812 (8th Cir. 2014): Appellants were found guilty of conspiring to possess and possessing oxycodone with intent to distribute. The government's case against the Thompson twins included text messages between Wadley and the twins discussing a trip from New York to Florida, the specific amount of pills to be purchased from the undercover agent, and elaborate negotiations of the purchase price. One defendant contended that the text messages constituted impermissible hearsay, but the court found them properly admitted as statements between co-conspirators during the course and in furtherance of the conspiracy. ***See also United States v. Moore,*** 2015 WL 2263987 (11th Cir. May 15, 2015) (text messages were statements by a coconspirator during the course and in furtherance of a conspiracy); ***United States v. Arnold,*** 2015 WL 1347186 (W.D. Okla. Mar. 25, 2015) (same); ***United States v. Norwood,*** 2015 WL 2250481 (E.D. Mich. May 13, 2015) (rap videos made by a coconspirator were admissible under the coconspirator exemption; they were made specifically to threaten witnesses who would testify against conspirators).

Declarations against interest: ***Linde v. Arab Bank PLC,*** 2015 WL 1565479 (E.D.N.Y. Apr. 8, 2015): In a civil case against a bank for providing material support to Hamas, the court found that web postings in which Hamas claimed responsibility for terrorist attacks were properly admitted as declarations against interest. The court noted that accepting such responsibility clearly subjected Hamas to a risk of criminal punishment. The fact that Hamas may also have had a "public relations" motive to claim responsibility did not render the statements inadmissible because there is nothing in Rule 804(b)(3) requiring the declarant to have solely a disserving interest. The court also noted that because this was a civil case, the corroborating circumstances requirement of Rule 804(b)(3) was not applicable. (Of course the web postings had to be authenticated, but the court found sufficient authentication given the circumstances of the posting, under Rule 901(b)(4)).

III. Use—or Possible Overuse? --- of the Residual Exception

Facebook Post: ***Ministers and Missionaries Ben. Bd. v. Estate of Flesher,*** 2014 WL 1116846 (S.D.N.Y.): In a weird case involving a dispute about an estate, a major fact question was whether Flesher was domiciled in Colorado at the time of his death. The defendant offered a

printout of a post from Flesher's Facebook page, in which Flesher stated that he was in Colorado and intended to stay there. The court found these statements admissible under Rule 807, in light of authentication by a close friend and "corroboration by other documentary evidence." It is difficult to assess whether the court stretched the residual exception and would not have had to do so if a recent perceptions exception had been available. The analysis is terse. But even if the analysis were wrong, a recent perception exception would not have been needed to admit the Facebook post. The assertions in the post, about intent to stay in Colorado, were surely admissible under the state of mind exception and the *Hillmon* doctrine. If the *Hillmon* doctrine allows hearsay to prove an intent to *go* to Colorado, it clearly allows hearsay to prove an intent to *stay* there.

IV. Hearsay Properly Found Inadmissible --- Would Not Have Been Admissible Under a Recent Perceptions Exception

Email Chain: ***Ira Green, Inc. v. Military Sales & Serv. Co.,*** 775 F.3d 12 (1st Cir. 2014): the trial court admitted a chain of emails between business people under the business records exception. The court found that this was error because the emails were exchanged in 2012 and described what purportedly occurred in 2011. The court stated that "[t]his lack of contemporaneity puts the exhibit outside the compass of the business records exception." Nor would that time period be "recent" enough to be within any fair conception of the recent perceptions exception.

Email on an Employee's Activity: ***United States v. Lloyd,*** 807 F.3d 1128 (9th Cir. 2015): Two of five defendants convicted of selling unregistered securities appealed their convictions and sentences. The court agreed with one defendant that the trial judge abused discretion in admitting an e-mail from the office manager where the defendant worked as a telemarketer, to a third party, stating that the defendant had been given five warnings to stop giving potential investors false information. Although the government argued the e-mail was admissible to prove the defendant's state of mind, the court reasoned that it could not prove his state of mind unless the content of the e-mail were used for its truth.

The manager's email was a summary of information occurring over a year after the recounted events. Hopefully it is not the kind of email that would be admitted under a "recent" perceptions exception.

Emails in Business: ***Am. Home Assur. Co. v. Greater Omaha Packing Co.,*** 2014 U.S. Dist. LEXIS 51287 (D. Neb.) (emails not admissible as business records because no showing of regularly conducted activity; no indication that these emails could have been considered statements of recent perception).

V. Hearsay Found Inadmissible That Might Be Admissible Under a Statement of Recent Perceptions Exception

Defendant's exculpatory text after an alleged sexual attack: *United States v. Harry,* 2016 WL 767028 (10th Cir.): The defendant was charged with sexually assaulting a woman at a party hosted by his friend. After the sex act, the defendant had a text conversation with the friend, and in one text he stated that the complainant was "all over me" during the party. The court held that this text message was properly excluded as hearsay. It might have qualified as a statement of recent perception because it was made only an hour or so after the sex act. It can be debated whether it is a good idea to sponsor a hearsay exception that would admit exculpatory statements of defendants accused of sexual assault, an hour or so after the alleged act.

Text indicating a payment arrangement held inadmissible hearsay: *United States v. Thomas,* 2015 WL 237337 (D. Conn. Jan. 17, 2015): The defendant was charged with sex trafficking of a minor and sought to exclude a number of text messages he exchanged with the minor. The court found that many of the texts from the minor were admissible for the non-hearsay purposes of context or effect on the listener; others were admissible as adoptions because the defendant, by his responses, indicated assent. But one text from the minor, which indicated that the defendant paid for the minor's cross-country trip, was found inadmissible hearsay. The defendant did not send a responsive text to the assertion; while courts have in many cases found that silence can be an adoption, that assumption is less sustainable when it comes to texts, because there is no indication that the party ever read or considered the accusation.

The minor's statement about the defendant paying her ticket would probably be admissible under a recent perceptions exception --- the minor was not going to testify at trial, and the statement was relatively close in time to whatever payment arrangement was made.

Text messages between the defendant and the witness on the day of the crime: *United States v. Rolle*, 2015 WL 7444844 (2d Cir. Nov. 24, 2015): The defendant, charged with violating the Hobbs Act, argued that the trial court erred in prohibiting him from cross-examining a prosecution witness with text messages that he had sent to the witness on the day of the crime. The court found no error, as the statements were hearsay --- they could not be admitted in his favor under Rule 801(d)(2)(A) because they were his own statements. The court's analysis is sparse, and there is no description of what the texts actually were. But as they were sent on the day of the crime, they might well have qualified as statements of recent perception. Whether that would have been a good result is another question. The defendant's own exculpatory statements on the day of the crime don't sound very reliable.

Facebook instant messages about a teacher's termination: *Matye v. City of New York,* 2015 WL 1476839 (E.D.N.Y. Mar. 31, 2015): In a case involving an alleged retaliatory termination in violation of the FMLA, the plaintiff sought to admit two instant messages with former students about an event that had occurred in the school. The court held, without analysis, that the messages were inadmissible hearsay. There is not enough in the reported case to determine whether the messages would have been admissible under a recent perceptions

exception. For example, there was no discussion of the time lapse between the event and the statement. Moreover, there was no indication that the students would have been unavailable for trial. Nonetheless, it is at least possible that these messages were the kinds of statements that might be covered by a recent perceptions exception.

Facebook messages and tweets relevant to an employment action: *Herster v. Board of Supervisors,* 2015 WL 5443673 (M.D. La.): The defendant, LSU, moved to exclude Facebook comments and tweets that were made in support of the plaintiff in her disputes with LSU. The comments and tweets were hearsay, and LSU argued that they did not fall under the present sense impression exception to hearsay because it was impossible to know whether the comments were made while or immediately after the declarants learned of the events related. The court agreed with LSU and excluded the evidence. It is unclear, but at least possible, that the court would have been more forgiving of the lack of a showing of timing under a recent perceptions exception. But on the other hand, the case presents the classic kind of "crowdsourcing" social media communications that may not be based on personal knowledge.

TAB 8

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: March 15, 2016

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 outline begins with a short discussion of the Court=s two latest cases on confrontation, *Ohio v. Clark* and *Williams v. Illinois,* and then summarizes all the post-*Crawford* cases by subject matter heading.

I. Recent Supreme Court Confrontation Cases

A. Ohio v. Clark

The Court's most recent opinion on the Confrontation Clause and hearsay, *Ohio v. Clark*, 135 S.Ct. 2173 (2015), sheds some more light on how to determine whether hearsay is or is not Atestimonial.@ As shown in the outline below, the Court has found a statement to be testimonial when the Aprimary motivation@ behind the statement is that it be used in a criminal prosecution. *Clark* raised three questions about the application of the primary motivation test:

1. Can a statement be primarily motivated for use in a prosecution when it is not made with the involvement of law enforcement? (Or put the other way, is law enforcement involvement a prerequisite for a finding of testimoniality?).

2. If a person is required to report information to law enforcement, does that requirement render them law enforcement personnel for the purpose of the primary motivation test?

3. How does the primary motivation test apply to statements made by children, who are too young to know about use of statements for law enforcement purposes?

In *Clark*, teachers at a preschool saw indications that a 3 year-old boy had been abused, and asked the boy about it. The boy implicated the defendant. The boy's statement was admitted at trial under the Ohio version of the residual exception. The boy was not called to testify --- nor could he have been, because under Ohio law, a child of his age is incompetent to testify at trial. The defendant argued that the boy's statement was testimonial, relying in part on the fact that under Ohio law, teachers are required to report evidence of child abuse to law enforcement. The defendant argued that the reporting requirement rendered the teachers agents of law enforcement.

The Supreme Court in C*lark*, in an opinion by Justice Alito for six members of the Court, found that the boy's hearsay statement was not testimonial.[1] It made no categorical statements as to the issues presented, but did make the following points about the primary motive test of testimoniality:

1. Statements of young children are *extremely unlikely* to be testimonial because a young child is not cognizant of the criminal justice system and so will not be making a statement with the primary motive that it be used in a criminal prosecution.

2. A statement made without law enforcement involvement is *extremely unlikely* to be found testimonial because if law enforcement is not involved, there is probably some other motive for making the statement other than use in a criminal prosecution. Moreover, the formality of a statement is a critical component in determining primary motive, and if the statement is not made with law enforcement involved, it is much less likely to be formal in nature.

3. The fact that the teachers were subject to a reporting requirement was essentially irrelevant, because the teachers would have sought information from the child whether or not there was a reporting requirement --- their primary motivation was to protect the child, and the reporting requirement did nothing to change that motivation. (So there may be room left for a finding of testimoniality if the government sets up mandatory reporting in a situation in which the individual would not otherwise think of, or be interested in, obtaining information).

[1]All nine Justices found that the boy=s statement was not testimonial. Justices Scalia and Ginsburg concurred in the judgment, but challenged some of the language in the majority opinion on the ground that it appeared to be backsliding from the *Crawford* decision. Justice Thomas concurred in the judgment, finding that the statement was not testimonial because it lacked the solemnity required to meet his definition of testimoniality.

B. Williams v. Illinois

In *Williams v. Illinois*, 132 S.Ct. 2221 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion C the expert relied in part on a Cellmark DNA report to conclude that the DNA found at the crime scene belonged to Williams. The splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the confrontation clause bar on testimonial hearsay.

The question in *Williams* was whether an expert=s testimony violates the Confrontation Clause when the expert relies on hearsay. A plurality of four Justices, in an opinion written by Justice Alito, found no confrontation violation for two independent reasons. 1) First, the hearsay (the report of a DNA analyst) was never admitted for its truth, but was only used as a basis of the expert=s own conclusion that Williams=s DNA was found at the crime scene. Justice Alito emphasized that the expert witness conducted her own analysis of the data and did not simply parrot the conclusions of the out-of-court analyst. 2) Second, the DNA test that was conducted was not testimonial in any event, because at the time it was conducted the suspect was at large, and so the DNA was not prepared with the intent that it be used against a *targeted individual.*

Justice Kagan, in a dissenting opinion for four Justices, rejected both of the grounds on which Justice Alito relied to affirm Williams=s conviction. She stated that it was a Asubterfuge@ to say that it was only the expert=s opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert=s opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. As to Justice Alito=s Atargeting the individual@ test of testimoniality, Justice Kagan declared that it was not supported by the Court=s prior cases defining testimoniality in terms of primary motive. Her test of Aprimary motive@ is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was. [2]

[2] Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay C as permitted by Fed.R.Evid. 703 C would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to permitting/limiting experts= reliance on lab reports, some of which he found Amore compatible with *Crawford* than others@ and some of which Aseem more easily considered by a rules committee@ than the Court.

The problem of course with consideration of these alternatives by a rules committee is that if the Confrontation Clause bars these approaches, the rules committee is just wasting its time. And given the uncertainty of *Williams*, it is fair to state that none of the approaches listed by Justice Breyer are clearly constitutional.

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan=s critique of Justice Alito=s two grounds for affirming the conviction. But Justice Thomas concurred in the judgment because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently Aformalized.@ He tried to explain that the Cellmark report

> lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

Fallout from Williams:

It must be noted that *eight* members of the Court rejected Justice Thomas=s view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it might be necessary for the government to comply with the rather amorphous standards for Ainformality@ established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of Aprimary motive@ but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then it seems that the government must establish that the hearsay is not tantamount to a formal affidavit C this is because five members of the court rejected the argument that the Confrontation Clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert=s opinion.

There is a strong argument, though, that counting Justices after *Williams* is a fool's errand for now --- because of the death of Justice Scalia and the uncertainty over his replacement. What can at least be said is that Justice Alito's opinion becomes more viable on both points --- use of experts and a requirement of targeting for testimoniality --- at least for now, because if *Williams* were retried today Justice Alito's opinion would not be rejected by a majority of the Court.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor AI=ve just been shot by Bill. Call an ambulance.@ Surely that statement C admissible against the accused as an excited utterance C satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfied the less restrictive Alito view. Thus Justice Thomas=s Aformality@ test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would

find no constitutional problem with its admission. See *Michigan v. Bryant*, 562 U.S. 344 (2011) (Thomas, J., concurring) (excited utterance of shooting victim Abears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.@).

Similarly, there is extensive case law allowing admission of testimonial statements on the ground that they are not offered for their truth C for example a statement is offered to show the background of a police investigation, or offered to show that the statement is in fact false. That case law appears unaffected by *Williams.* As will be discussed further below, while both Justice Thomas and Justice Kagan reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause Adoes not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted.@ And they both approve of the result in *Tennessee v. Street*, 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant=s own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true C and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

II. Cases Defining ATestimonial@ Hearsay, Arranged By Subject Matter

AAdmissions@ C 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 Afor 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 United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006) (admission of defendant=s own statements does not violate *Crawford*); *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): Athe Sixth Amendment simply has no application [to the defendant=s own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself.@**

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.

Text messages were properly admitted as coming from the defendant: *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had established by a preponderance of the evidence that the texts were sent by the defendant. They were therefore Anot

hearsay@ under Rule 801(d)(2)(A), and A[b]ecause the messages did not constitute ›hearsay= their introduction did not violate the Confrontation Clause.@

Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is Anot hearsay@ its admission does not violate the Confrontation Clause. (See the many cases collected under the Anot hearsay@ headnote, infra). But party-opponent statements are only technically Anot hearsay.@ They are in fact hearsay because they are offered for their truth C they are hearsay subject to an exemption. The Evidence Rules= technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as Anot hearsay@ under the Federal Rules. That would have made the Supreme Court=s decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.

Bruton C 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 A*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place.@

Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant:** ***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 Aagainst@ the defendant within the meaning of the Confrontation Clause. ***See also Chrysler v. Guiney,*** 806 F.3d 104 (2nd Cir. 2015) (noting that if an accomplice confession is properly redacted to satisfy *Bruton*, then *Crawford* is not violated because the accomplice is not a witness "against" the defendant within the meaning of the Confrontation Clause).

Bruton* protection limited to testimonial statements:** ***United States v. Berrios, 676 F.3d 118 (3rd Cir. 2012): A[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court=s holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings.@ ***See also United States v. Shavers,*** 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant=s inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore Ano resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent@).

Bruton* protection does not apply unless the codefendant=s statements are testimonial:** ***United States v. Dargan, 738 F.3d 643 (4th Cir. 2013): The court held that a statement made to a cellmate in an informal setting was not testimonial C therefore admitting the

statement against the nonconfessing codefendant did not violate *Bruton* because the premise of *Bruton* is that the nonconfessing defendant=s confrontation rights are violated when the confessing defendant=s statement is admissible at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

The defendant=s own statements are not covered by *Crawford,* but *Bruton* remains in place to protect against admission of testimonial hearsay 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.

Codefendant=s testimonial statements were not admitted Aagainst@ 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 Aagainst@ 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 Apowerfully incriminating@ as the confession in *Bruton.* The court concluded that because Athe 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.*@

Bruton* inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v.Vasquez, , 766 F.3d 373 (5th Cir. 2014): The defendant=s co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant=s statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton* Ais no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation Clause.@ The court further stated that Astatements from one prisoner to another are clearly non-testimonial.@

Bruton* protection does not apply unless codefendant=s statements are testimonial: *United States v. Johnson, 581 F.3d 320 (6th Cir. 2009): The court held that after *Crawford, Bruton* is applicable only when the codefendant=s statement is testimonial.

Bruton* protection does not apply unless codefendant=s statements are testimonial: *United States v. Dale, 614 F.3d 942 (8th Cir. 2010): The court held that after *Crawford, Bruton* is applicable only when the codefendant=s statement is testimonial.

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 C *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 Awitness against@ the defendant. ABecause Fenton=s words were never admitted into evidence, he could not >bear testimony= against Mason.@

Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson,* 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. ***See also United States v. Clark,*** 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because A*Bruton* applies only to testimonial statements@ and the statements were made between coconspirators dividing up the proceeds of the crime and so Awere not made to be used for investigation or prosecution of crime.@).

Child-Declarants

Statements of young children are extremely unlikely to be testimonial: *Ohio v. Clark,* 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement from a young child is extremely unlikely to be testimonial because the child is not aware of the possibility of use of statements in criminal prosecutions, and so cannot be speaking with the primary motive that the statement will be so used. The Court refused to adopt a bright-line rule, but it is hard to think of a case in which the statement of a young child will be found testimonial under the primary motivation test.

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* Aexplicitly 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); ***United States v. Ciresi,*** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are Aby their nature@ not testimonial because they are Amade for a purpose other than use in a prosecution.@).

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3rd 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 (3rd 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 Atestimonial@ 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); ***United States v. Alaniz,*** 726 F.3d 586 (5th Cir. 2013). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) (ABecause 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 Apresented by the government for their testimonial value.@ Accepting that argument would mean that all hearsay is testimonial. The court observed that A*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* because they were not made with the intent that they would be used in a criminal investigation or prosecution. ***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 Ahas 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*, Aco-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 Aby their nature are not testimonial@) ***United States v. Tragas,*** 727 F.3d 610 (6th Cir. 2013) (AAs coconspirator statements were made in furtherance of the conspiracy, they were categorically non-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 A*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*, Athe Supreme Court specifically cited *Bourjaily* C which as here involved a coconspirator=s statement made to a government informant C 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 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 Aco-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); ***United States v. Grasso,*** 724 F.3d 1077 (9th Cir. 2013) (Aco-conspirator statements in furtherance of a conspiracy are not testimonial@); ***United States v. Cazares,*** 788 F.3d 956 (9th Cir. 2015) (“a

conversation between two gang members about the journey of their burned gun is not testimonial").

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 Aconfrontation 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*); ***United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013) (same); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they Awere not made to be used for investigation or prosecution of crime.@). .

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 Aclearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.@ The court concluded as follows:

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

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator=s statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely Abragging to a friend@ and not a formal statement intended for trial.

Cross-Examination

Cross-examination of prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman,* 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford.* The question was whether the witness C who was unavailable for the second trial C was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be inadequate at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate C that court found Abaseless@ the defendant=s argument that counsel had failed to explore the witness=s immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that A[t]here is no Supreme Court precedent to suggest that Goldstein=s cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court=s finding was not contrary to, or an unreasonable application of, *Crawford*.@

Attorney=s cross-examination at a prior trial was adequate and therefore admitting the testimony at a later trial did not violate the right to confrontation: *United States v. Richardson,* 781 F. 3d 287 (5th Cir. 2015): The defendant was convicted on drug and gun charges, but the conviction was reversed on appeal. By the time of retrial on mostly the same charges, a prosecution witness had become unavailable, and the trial court admitted the transcript of the witness=s testimony from the prior trial. The court found no violation of the right to confrontation. The court found that *Crawford* did not change the long-standing rule as to the opportunity that must be afforded for cross-examination to satisfy the Confrontation Clause. What is required is an Aadequate opportunity to cross-examine@ the witness: enough to provide the jury with Asufficient information to appraise the bias and the motives of the witness.@ The court noted that while the lawyer=s cross-examination of the witness at the first trial could have been better, it was adequate, as the lawyer explored the witness=s motive to cooperate, his arrests and convictions, his relationship with the defendant, and Athe contours of his trial testimony.@

State court was not unreasonable in finding that cross-examination by defense counsel at the preliminary hearing was sufficient to satisfy the defendant=s right to confrontation: *Williams v. Bauman,* 759 F.3d 630 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and the

defense counsel cross-examined him at the preliminary hearing. The court found that the state court was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that AWilliams has failed to identify any Supreme Court precedent supporting his contention that his opportunity to cross-examine Banks at his own preliminary hearing was inadequate to satisfy the rigors of the Confrontation Clause.@ The court noted that Athere is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes@ but concluded that if there is Areasonable room for debate@ on the question, then the state court=s decision to align itself on one side of the argument is beyond the federal court=s power to remedy on habeas review.

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

Accomplice=s jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier,* 666 F.3d 1 (1st Cir. 2011): The defendant=s accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements Ato fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility.@ For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made Anot under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier.@

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 223 (2nd 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 officerCthe 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*Cit was not the kind of formalized statement to law enforcement, prepared for trial, such as a Awitness@ 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).

Intercepted conversations were admissible as declarations against penal interest and were not testimonial: *United States v. Berrios,* 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between criminal associates in a prison yard. The court held that the statements were non-testimonial, because neither of the declarants Aheld the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded;

there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance.@ A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant Aonly to complain that he crashed the getaway car.@

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: ATo 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 that a statement is testimonial if the *government=s* primary motivation is to prepare the statement for use in a criminal prosecution C 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 Aintent 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.@

Note: This case was decided before *Michigan v. Bryant, infra,* but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication.

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 C 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 both himself and the defendant. These statements were made to the accomplice=s roommate. The court found that these statements were not testimonial under *Crawford*: AThere 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 Astressed 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 Athe 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 Athe 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 Awould 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 Athey 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 Aand 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.

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, Aunder *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: AA statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes.@ ***Accord United States v. Volpendesto*** , 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant,* had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry Ais not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had.@ Applying this objective approach, the court concluded that the conversation Alooks like a casual, confidential discussion between co-conspirators.@

Accomplice=s confession to law enforcement was testimonial, even if redacted: *United States v. Shaw,* 758 F.3d 1187 (10th Cir. 2014): At the defendant=s trial, the court permitted a police officer to testify about a confession made by the defendant=s alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that the confession could be admitted so long as all references to the defendant were replaced with a neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement was, under *Crawford*, clearly testimonial. It stated that A[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant.@ The trial court=s reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

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 Anot 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 Athe 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 Apart 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 B or even all conceivable statements in response to police interrogation B 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 defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 562 U.S. 344 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter C and admitted as an excited utterance under a state rule of evidence C was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis*C whether the primary motive for making the statement was to have it used in a criminal prosecution C 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 Aongoing emergency@ at the time of the encounter is among the most important circumstances informing the interrogation's Aprimary 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 C 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 Aprimary purpose.@ Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

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

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's Aprimary purpose@ was Ato 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*, the circumstances presented in *Bryant* 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 Aprimary purpose@ Ato 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 Ato meet an ongoing emergency@ C 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 suggested that their primary purpose was to address what they considered to be an ongoing emergency C apprehending a suspect with a gun C and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law C he found no such formalization in this case. 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 the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events Ain real time, as she witnessed them transpire@; 2) she specifically requested police assistance; 3) the dispatcher=s questions were tailored to identify Athe location of the emergency, its nature, and the perpetrator@; and 4) the daughter was Ahysterical 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 Aprimary 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 court declared that the relevant question is whether the statement was made with an eye toward Alegal 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 Ausually 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 Ajust@ 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 Aimminent 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 Ait would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher C a question that only momentarily interrupted an otherwise continuous stream of consciousness.@

911 call C including statements about the defendant=s felony statusCwas 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 Aprimary purpose@ test and evaluated the call in the following passage:

> 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 C 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.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as Aeach caller simply reported his observation of events as they unfolded@; the 911 operators were not attempting to Aestablish or prove past events@; and Athe transcripts simply reflect an effort to meet the needs of the ongoing 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 Afixing 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 Aa 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 Athat=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 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 Atestimonial@ 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 C 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 not testimonial*:* ***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 as follows:

> [T]he 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: AIn 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*.@).

Statement made by a child immediately after an assault on his mother was admissible as excited utterance and was not testimonial: *United States v. Clifford,* 791 F.3d 884 (8th Cir. 2015): In an assault trial, the court admitted a hearsay statement from the victim's three-year-old son, made to a trusted adult, that the defendant "hurt mama." The statement was made immediately after the event and the child was shaking and crying; the statement was in response to the adult asking "what happened?" The court of appeals held that the statement was admissible as an excited utterance and was not testimonial. There was no law enforcement involvement and the court noted that the defendant "identifies no case in which questions from a private individual acting without any direction from state officials were determined to be equivalent to police interrogation." The court also noted that the interchange between the child and the adult was informal, and was in response to an emergency. Finally, the court relied on the Supreme Court's most recent decision in *Ohio v. Clark:*

> As in *Clark,* the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured. [The child's] age is significant since "statements by very young children will rarely, if ever, implicate the Confrontation Clause."

911 calls and statements made to officers responding to the calls were 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. 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.* The court first found that the nephew=s 911 call was not Atestimonial@ within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had Ano 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 Awas 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* and then *Bryant,* 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 (and to the observation that emergency is only one factor in the primary motive test) that the Court found in *Michigan v. Bryant.***

Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales,* 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage=s mother, describing a telephone call with her son=s captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother=s statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call C and thus the report about it to the police officers C was to rescue the son. The court noted that throughout the event the mother was Avery nervous, shaking, and crying in response to continuous ransom demands and threats to her son=s life.@ Thus the agents faced an Aemergency situation@ and Athe primary purpose of the telephone call was to respond to these threats and to ensure [the son=s] safety.@ The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent Aprimarily sought to record the call to obtain information about Aguilar=s location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco=s actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation.@

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 applying the primary motive test established in *Michigan v. Bryant.***

Expert Witnesses

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois,* 132 S.Ct. 2221 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this early stage, the answer appears to be that an expert can rely on testimonial hearsay so long as it is not in the form of an affidavit or certificate C that proviso would then get Justice Thomas=s approval. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than controlling cases that present the same facts as *Williams.* And other courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

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* Adid 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, AThomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury.@

> **Note: These opinions from the D.C. Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and some lower courts are treating the Alito opinion as controlling on an expert=s reliance on testimonial hearsay.**

Confrontation Clause violated where expert does no more that restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez,* 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant=s vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz*, and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant=s right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) (A[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay,@ there is likely a Crawford violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) (A[T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion.@). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to Asay what are the results of the test,@ and he did exactly that, responding A[b]oth bricks were positive for cocaine.@ This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

Note: Whatever *Williams* may mean, the court=s analysis in *Ramon-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely *at all* on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Confrontation Clause not violated where testifying expert conducts his own testing that confirms the results of a testimonial report: *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant=s laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico,* in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through

> Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The court reviewed the votes in *Bullcoming* and found that Ait appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination.@ This count resulted from the fact that Justice Ginsburg, joined by Justice Scalia, stated that the Confrontation problem in *Bullcoming* could have been avoided if the testifying expert had simply retested the substance and testified on the basis of the retest.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

> Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

See also Barbosa v. Mitchell, 812 F.3d 62 (1st Cir. 2016): On habeas review, the court held that *Melendez-Diaz* did not clearly establish that expert reliance on a testimonial lab report violated the Confrontation Clause. The defendant was convicted in the time between *Melendez-Diaz* and *Williams.* The Court held that, "[t]o the contrary, four Justices [in *Williams*] later read *Melendez-Diaz* as not establishing at all, much less beyond doubt" the principle that such testimony violates the Confrontation Clause.

Expert reliance on a manufacturing label to conclude on point of origin did not violate the Confrontation Clause, because the label was not testimonial: *United States v. Torres-Colon,* 790 F.3d 26 (1st Cir. 2015): In a trial on a charge of unlawful possession of a

firearm, the government's expert testified that the firearm was made in Austria. He relied on a manufacturing inscription on the firearm that stated "made in Austria." The court found no violation of confrontation in the expert's testimony. The statement on the firearm was clearly not made by the manufacturer with the primary purpose of use in a criminal prosecution.

Expert=s reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury*: United States v. Lombardozzi*, 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that Ait 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 Aonly 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).

> **Note: These opinions from the 2nd Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and as indicated in this outline, many lower courts permit an expert to rely on testimonial hearsay, so long as the hearsay is not admitted at trial and the expert reaches his own conclusions.**

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government=s failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a Apure instrument read-out.@ The court stated that A[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine@ should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. ***See also United States v. Shanton,*** 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*: A[W]e believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted.@).

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson,* 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court stated that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts C as it was in this case. It stated that A[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 Aappropriate 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. AInstead, each expert presented his independent judgment and specialized understanding to the jury.@ Because the experts Adid not become mere conduits@ for the testimonial hearsay, their consideration of that hearsay Aposes no *Crawford* problem.@ ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts Adid not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury.@). ***Accord United States v Palacios,*** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert Adid not specifically reference@ any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia,* 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied, in coming to her conclusion, on input from coconspirators whom she had debriefed. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that Athe question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.@ In this case, Awe cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just has well have been the result of the Government=s failure to elicit a proper foundation for Agent Dayton=s interpretations.@ The government argued that the information from the coconspirators only served to confirm the

Agent=s interpretations after the fact, but the court concluded that A[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton=s analysis, to Garcia=s prejudice.@

Police officer's reliance on statements from people he had arrested for drug crimes did not violate *Crawford: United States v. Collins,* 799 F.3d 554 (6th Cir. 2015): In a trial involving manufacture of methamphetamine, a law enforcement officer testified as an expert on the conversion ratio between pseudoephedrine and methamphetamine. He relied in part on statements from people he had interviewed after he had arrested them for manufacturing methamphetamine. The court found no plain error because there was "no evidence that the suspected methamphetamine manufacturers Agent O'Neil questioned throughout his career 'intended to bear testimony' against Collins or his co-defendants." Thus the expert was not relying on testimonial hearsay.

> **Note: The court appears to be applying --- maybe without realizing it --- Justice Alito's definition of testimoniality in *Williams.* The court is saying that the arrestees did not target their testimony toward the defendant. But under the view of five Justices in *Williams,* the statements of the arrestees would probably be testimonial, as they were under arrest --- just like Mrs. Crawford --- and the statements could be thought to be motivated toward some criminal proscecution**

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 Adata 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 the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could Ainsist 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 makes two holdings in *Moon.* The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* C at least it can be said that *Williams* says nothing about whether machine output is testimony. The second holding, that an expert=s reliance on lab notes he did not prepare, is at the heart of *Williams.* It would appear that such a practice would be permissible even after *Williams* because 1) *post-Williams* courts have found that an expert may reliable on testimonial hearsay so long as the expert does his own analysis and the hearsay is not**

introduced at trial ; and 2) in any case, lab Anotes@ are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.

Expert reliance on drug test conducted by another does not violate the Confrontation Clause C though on remand from *Williams* the court states that part of the expert=s testimony might have violated the Confrontation Clause, but finds harmless error*: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant=s drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant C 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, emphasizing 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.

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams.* On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum Acasts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge.@ But the court noted that even after *Williams,* much of what the expert testified to was permissible because it was based on personal knowledge:

> We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *
>
> As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data

> produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion.
>
> Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

The *Turner* court on remand saw two Confrontation problems in the expert=s testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, ABlock necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine.@ And while the case was much like *Williams*, the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito=s not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the report was Acertified@ and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results C the certification was made by the Attorney General to the effect that the report was a correct copy of the *report.* But the court implied that it was sufficiently formal in any case, because it was Aboth official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report.@

Ultimately the court found it unnecessary to decide whether the defendant=s Confrontation rights were violated because the error, if any, in the use of the analyst=s report was harmless.

No confrontation violation where expert did not testify that he relied on a testimonial report: ***United States v. Maxwell,*** 724 F.3d 724 (7th Cir. 2013): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

> What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying * * * , she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that AMaxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied=s data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance.@

Expert=s reliance on report of another law enforcement agency did not violate the right to confrontation: ***United States v. Huether,*** 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

No confrontation violation where expert who testified did so on the basis of his own retesting: *United States v. Ortega,* 750 F.3d 1020 (8th Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator=s car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody C whether the composite tested by the expert witness was in fact derived from what was found in the car C and the court observed that Ait is up to the prosecution to decide what steps are so crucial as to require evidence.@ The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government=s introduction of the original chemist=s statement about creating the composite sample did not violate the Confrontation Clause because Achain of custody alone does not implicated the Confrontation Clause@ as it is Anot a testimonial statement offered to prove the truth of the matter asserted.@

No Confrontation Clause violation where expert=s opinion was based on his own assessment and not on the testimonial hearsay: *United States v. Vera,* 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert Ais used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation.@ But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive experience with gangs and that his opinion Awas not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination.@

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), ***on remand for reconsideration under Williams,* 696 F.3d 1280 (10th Cir. 2012)**: 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. In the original appeal the court found no plain error, reasoning 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 C which the court found to be permissible under Rule 703. The court observed that A[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 Asimply 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.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that Awe need not decide the precise mandates and limits of *Williams*, to the extent they exist.@ The court noted that five members of the *Williams* Court Amight find@ that the expert=s reliance on the lab test was for its truth. But Awe cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission.@ The court explained as follows in a parsing of *Williams:*

> On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in Williams. The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms. Snider's credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite Asolemnity@ required for the statements therein to be considered testimonial for purposes of the Confrontation Clause. Since Ms. Dick's report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas's solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider's testimony, so reversal is unwarranted on this basis.

The *Pablo* court on remand concluded that A the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4B1B4 divide of opinions in *Williams*.@

Expert=s testimony on gang structure and practice did not violate the Confrontation Clause even though it was based in part on testimonial hearsay, where expert applied his own expertise. *United States v. Kamahele,* 748 F.3d 984 (10th Cir. 2014): Appealing from convictions for gang-related activity, the defendants argued that a government expert=s testimony

about the structure and operation of the gang violated the Confrontation Clause because it was based in part on interviews with cooperating witnesses and other gang members. The court found no error and affirmed, concluding that the admission of expert testimony violates the Confrontation Clause Aonly when the expert is simply parroting a testimonial fact.@ The court noted that in this case the expert Aapplied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion.@ Therefore, no testimonial hearsay was offered for its truth against the defendant. ***Compare United States v. Garcia,*** 793 F.3d 1194 (10th Cir. 2015) (gang-expert's testimony violated the Confrontation Clause, where he parroted statements from former gang members that were testimonial hearsay: "The government cannot plausibly argue that Webb applied his expertise to this statement. It involves no interpretation of gang culture or iconography, no calibrated judgment based on years of experience and the synthesis of multiple sources of information. He simply relayed what DV gang members told him. Admission of the testimony violated the Confrontation Clause.").

Forfeiture

Constitutional standard for forfeiture C like Rule 804(b)(6) C 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 Astatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment,@ are not testimonial C 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 C 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 Asurely 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 Aperverse consequence@ of allowing criminals to avoid forfeiture if they could articulate more than one bad 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* Aforeclose@ the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson,* 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while

he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant=s drug operation and as retaliation for robbing one of the defendant=s friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, Athe Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts.@

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because ABass 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.

Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson,* 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that a forfeiture of the right to object under the hearsay rule and under the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and convincing evidence before forfeiture of a right to confrontation can be found. But the court

disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after Crawford v. Washington, the Confrontation Clause does not bar unreliable hearsay from being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford*, Athe forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing.@ The court also noted that the Supreme Court=s post-*Crawford* decisions of Davis v. Washington and Giles v. California Astrongly suggest, if not squarely hold, that the preponderance standard applies.@ On the facts, the court concluded that Athe evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard.@

Evaluating the kind of action the defendant must take to justify a finding of forfeiture: *Carlson v. Attorney General of California,* 791 F.3d 1003 (9th Cir. 2015): Reviewing the denial of a habeas petition, the court found that statements of victims to police were testimonial, but that the state trial court was not unreasonable in finding that the petitioner had forfeited his right to confront the declarants. In a careful analysis of Supreme Court cases, the court provided "a standard for the kind of action a defendant must take" to be found to have forfeited the right to confrontation. The court concluded that

> [T]he forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case. Simple tolerance of, or failure foil, a third party's previously unexpressed decision either to skip town himself rather than testifying or to prevent another witness from appearing [is] not a sufficient reason to foreclose a defendant's Sixth Amendment confrontation rights at trial.

On the merits --- and applying the standard of deference required by AEDPA, the court concluded that the trial court could reasonably have found, on the basis of circumstantial evidence, that the petitioner more likely than not was actively involved in procuring unavailability, with the intent to keep the witness from testifying.

> **Note: The court says that a defendant's mere "acquiescence" is not enough to justify forfeiture. That language might raise a doubt with whether a forfeiture may be found by the defendant's mere membership in a conspiracy; many courts have found such membership to be sufficient where disposing of a witness is within the course and furtherance of the underlying conspiracy. See, e.g., *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012). The *Carlson* court, however, cited the conspiracy cases favorably, and noted that in such cases, the defendant *has* acted affirmatively and committed wrongdoing by joining a conspiracy in which a foreseeable result is killing witnesses.**

A different panel of the Ninth Circuit, in a case decided around the same time as *Carlson*, upheld a finding of forfeiture based on conspiratorial liability. *See United States Cazares,* 788 F.3d 956 (9th Cir. 2015).

The *Carlson* court noted that the restyled Rule 804(b)(6) provides that mere passive agreement with the wrongful act of another is not enough to find forfeiture, but that that forfeiture can be found if a defendant "acquiesced in wrongfully causing" the absence of the witness --- and that would include joining a conspiracy where one of the foreseeable consequences is to kill witnesses. The court found the restyling to be a helpful clarification of what the original rule meant by "acquiescence."

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2nd 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 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: Aany 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 (2nd 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 (2nd 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 (2nd 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).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer=s guilty plea: *United States v. Head,* 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend=s guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford=s* statement that Aprior testimony that the defendant was unable to cross-examine@ is one of the Acore class of >testimonial= statements.@

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 Atestimonial@ (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 an out-of-court 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 was irrelevant 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 stated that Aany 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.@ ***Compare United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015)**:** In a drug case, an officer testified that he arranged for a cooperating informant to buy drugs from the defendant; that he monitored the transactions; and that the drugs that were in evidence were the same ones that the defendant had sold to the informant. The defendant argued that the officer=s conclusion about the drugs must have rested on assertions from the informant, and therefore his right to confrontation was violated. The defendant relied upon *Meises,* but the court distinguished that case, because here the officer=s testimony was based on his own personal observations and did not necessarily rely on anything said by the informant. The fact that the officer=s surveillance was not airtight did not raise a confrontation issue, rather it raised a question of weight as to the officer=s conclusion.

Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: *Ocampo v. Vail,* 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court=s denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant=s testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only Aproduced@ the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language C contradictions, hesitations, and other clues often used to test credibility C are lost, and instead a veneer of objectivity conveyed.
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> * * *
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> Whatever locution is used, out-of-court statements admitted at trial are Astatements@ for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

See also United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014): An agent testified that he telephoned a postal supervisor and provided him a description of the suspect, and then later searched a particular parcel with a tracking number and mailing information he had been provided over the phone as identifying the package mailed by the suspect. The postal supervisor was not produced for trial. The government argued that the agent=s testimony did not violate the Confrontation Clause because the postal supervisor=s actual statements were never offered at trial. But the court declared that Aout-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause.@ Fairly read, the agent=s testimony revealed the substance of the postal supervisor=s statements. And those statements were made with the motivation that they be used in a criminal prosecution. Therefore the agent=s testimony violated the Confrontation Clause.

Informal Circumstances, Private Statements, etc.

Statement of young child to his teacher is not sufficiently formal to be testimonial: *Ohio v. Clark,* 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement is extremely unlikely to be found testimonial in the absence of some participation by or with law enforcement. The presence of law enforcement is what signifies a statement made formally with the motivation that it will be used in a criminal prosecution. The Court did not establish a bright-line rule, however, leaving at least the remote possibility that an accusation might be testimonial even if law enforcement had no role in the making of the statement.

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 Ain 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 Ato 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 (2nd 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; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) 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

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, Aanything he said was meant not as an accusation in its own right but as bait.@

> **Note: Other courts, as seen in the ANot 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 C therefore it does not violate the right to confrontation because it is not offered as an accusation.**

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones,* 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that Aa declarant=s understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent@ and that Ajust because recorded statements are used at trial does not mean they were created for trial.@ The court also noted that a prison Ahas significant institutional reasons for recording phone calls outside or procuring forensic evidence C i.e., policing its own facility by monitoring prisoners= contact with individuals outside the prison.@

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012)**:** The court found no error in the state court=s admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements Aunknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial.” The court elaborated further:

> The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would

be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become available at trial. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An objective analysis would conclude that the primary purpose of the unidentified individuals' statements was to arrange the drug deal. Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause.

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 Anarrow characterization of nontestimonial statements.@ The court relied on the statement in *Giles v. California* that Astatements 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 Astatements 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 Areasonably anticipate@ that the note would be passed on to law enforcement C especially because the declarant was a former police officer.

Note: The court=s Areasonable anticipation@ test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant.* The Court in *Davis* looked to the Aprimary motivation@ of the speaker. In this case, the Aprimary motivation@ of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken,* 541 F.3d 1146 (8th Cir. 2008): When the defendant=s murder prosecution was pending, the defendant=s accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime C 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:

> Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a Asolemn declaration@ or a Aformal statement.@ Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a Atestimonial@ 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 private conversation he had with the other victim, 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 Astatements 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 Atestimonial@ 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).

Defendant's lawyer's informal texts with I.R.S. agent found not testimonial: *United States v. Wilson,* 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting checks that he knew to be issued as a result of fraudulently filed income tax returns. He claimed that he was a legitimate cashier and did not know that the checks were obtained by fraud. The trial court admitted texts sent by the defendant's lawyer to the I.R.S. The texts involved the return of certain records that the I.R.S. agent had allowed the defendant to take to copy; the texts contradicted the defendant's account at trial that he didn't know he had to return the boxes (in essence a showing of consciousness of guilt). The defendant argued that the lawyer's texts to the I.R.S. agent were testimonial, but the court disagreed: "Here, the attorney communicated through informal text messages to coordinate the delivery of the boxes. The cooperative and informal nature of those text messages was such that an objective witness would not reasonably expect the texts to be used prosecutorially." ***See also United States v. Mathis,*** 767 F.3d 1264 (11th Cir. 2014) (text messages between defendant and a minor concerning sex were informal, haphazard communications and therefore not made with the primary motive to be used in a criminal prosecution).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony recounting the interpreter=s translation does not violate *Crawford*: *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): At the defendant=s drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter=s statements about what the defendant said violated his right to confrontation. The court found that the interpreter had acted as a Amere language conduit@ and so he was not a witness against the defendant within the meaning of the Confrontation Clause. The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as "which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter=s qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.@ The court found that these factors cut in favor of the lower court=s finding that the interpreter in this case had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, Athe Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself.@ ***See also United States v. Romo-Chavez,*** 681 F.3d 955 (9th Cir. 2012)(where an interpreter served only as a language conduit, the defendant=s own statements were properly admitted under Rule 801(d)(2)(A), and the Confrontation Clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself); ***United States v. Aifang Ye,*** 808 F.3d 395 (9th Cir. 2015) (adhering to pre-*Crawford* case law that a translator acting as a language conduit does not implicate the Confrontation Clause, because that case law "is not clearly irreconcilable with *Crawford*"; finding on the facts that the translator was a language conduit, by applying the four-factor test from *Orm Hieng*). .

Interpreter=s statements were testimonial: *United States v. Charles,* 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant=s statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter=s translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, supra. ***See also United States v. Curbelo,*** 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator=s implicit out-of-court representation that the translation was correct, and the translator=s implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Tips to Law Enforcement, 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 Atestimonial,@ 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 C 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* because Athe term >testimonial= at a minimum applies to police interrogations.@ The court also noted that the statement was sworn and that a person who Amakes a formal statement to government officers bears testimony.@ ***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).

Anonymous tip to law enforcement is testimonial: ***Etherton v. Rivard,*** 800 F.3d 737 (6th Cir. 2015): On habeas review, the court held that an anonymous tip to law enforcement, accusing the defendant of criminal misconduct, was testimonial. It further held that the defendant's right to confrontation was violated at his trial where the tip was admitted into evidence for its truth. It noted that "[t]he prosecutor's repeated references both to the existence and the details of the tip went far beyond what was necessary for background --- thereby indicating the content of the tip was admitted for its truth."

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 an interrogation. The court noted that even the first part of Volz=s statement C that she did not have access to the floor safe C 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, AHow 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.

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 Atestimony 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.

Investigative Reports

Reports by a law enforcement officer on prior statements made by a cooperating witness were testimonial: ***United States v. Moreno,*** 809 F.3d 766 (3rd Cir. 2016): After a cooperating witness testified on direct, defense counsel attacked his credibility on the ground that he had made a deal. On redirect, the trial court allowed the witness to read into evidence the reports of a law enforcement officer who had interviewed the witness. The reports indicated that the witness had made statements consistent with his in-court testimony. The court of appeals found a violation of the Confrontation Clause, because the officer's hearsay statements (about what the witness had told him) were testimonial and the officer was not produced for cross-examination. The court found that the reports were "investigative reports prepared by a government agent in actual anticipation of trial."

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 Adoes 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 Ano 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 Awas not made in anticipation of future litigation@).

Law Enforcement Involvement

Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly,* 759 F.3d 535 (6th Cir. 2014): A three year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who interviewed the boy with the understanding that she would try to Aextract information@ from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child=s statements to the psychologist were testimonial and erroneously admitted in the defendant=s state trial. The court noted that the sessions Awere more akin to police interrogations than private counseling sessions.@

> **Note: *McCarley* was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *McCarley* differs in one respect from *Clark*, though. In *McCarley*, the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result in *McCarley* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

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 about 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 for child sexual abuse 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 Athis 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 stated that the only difference

between the questioning in this case and that in *Crawford* was that Ainstead 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 Aa 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 Awas simply acting as a surrogate interviewer for the police.@

> **Note: *Bobadilla* was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *Bobadilla* differs in one respect from *Clark*, though. In *Bobadilla*, the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result in *Bobadilla* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

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: This case was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. This case differs in one respect from *Clark*, though --- the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result here is questionable after *Clark* --- and especially so in**

light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer. Moreover, the court concedes that there may have been a dual motive here --- treatment being the other motive. At a minimum, a court would have to make the finding that the prosecutorial motive was primary.

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: AWhere statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.@); ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012) (discussed below under Amedical statements@ and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machines

Printout from machine is not hearsay and therefore its admission 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 C 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 Astatements@ of the machines themselves, not their operators. But Astatements@ 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: The result in *Washington* appears unaffected by *Williams,* as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert=s reliance on a Apure instrument read-out@ did not violate the Confrontation Clause because such a read-out is not Atestimony@).

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 Adata is not >statements= in any useful sense. Nor is a machine a >witness against= anyone.@

Google satellite images, and machine-generated location markers, are not hearsay and therefore, even if prepared for trial, their admission does not violate the Confrontation Clause: *United States v. Lizarraga-Tirado,* 789 F.3d 1107 (4th Cir. 2015): The defendant was convicted of illegal entry as a previously removed alien. The defendant contended that when he was arrested, he was still on the Mexican side of the border. At trial the arresting officer testified that she contemporaneously recorded the coordinates of the defendant's arrest using a handheld GPS device. To illustrate the location of these coordinates, the government introduced a Google Earth satellite image. The image contained a "tack" showing the location of the coordinates to be on the United States side of the border. There was no testimony on whether the tack was automatically generated or manually placed and labeled. The defendant argued that both the satellite image and the tack were inadmissible hearsay and that their admission violated his right to confrontation. As to the satellite image itself, the court found that "[b]ecause a satellite image, like a photograph, makes no assertion, it isn't hearsay." The court found the tack to be a more difficult question. It noted that "[u]nlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, that is what makes them useful." The court concluded that if a tack is placed manually and then labeled, "it's classic hearsay" --- for example, a dot manually labeled with the name of a town "asserts that there's a town where you see the dot." On the other hand, "[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay" because it is completely machine-generated and so no assertion is being made.

In this case, the court took judicial notice that the tack was automatically generated because the court itself accessed Google Earth and typed in the same coordinates to which the arresting officer testified --- which resulted in a tack identical to the one shown on the satellite image admitted at trial. Thus the program "analyze[d] the GPS coordinates and, without any human intervention, place[d] a labeled tack on the satellite image." The court concluded that "[b]ecause the program makes the relevant assertion --- that the tack is accurately placed at the labeled GPS coordinates --- there's no statement as defined by the hearsay rule." The court noted that any issues of malfunction or tampering present questions of authenticity, not hearsay, and the defendant made no authenticity objection. Finally, "[b]ecause the satellite images and tack-coordinates pair weren't hearsay, their admission also didn't violate the Confrontation Clause."

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 Athe witnesses with whom the Confrontation Clause is concerned are *human* witnesses@ and that the purposes of the Confrontation Clause Aare 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/Therapeutic Statements

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon,* 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program Aincorporates reporting requirements and a security component@ but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the Aprimary motive@ test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan=s answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.
>
> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties= actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan C not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon=s Sixth Amendment rights.

Note: The court's analysis is strongly supported by the subsequent Supreme Court decision in *Ohio v. Clark.* The *Clark* Court held that: 1) Statements by children are extremely unlikely to be primarily motivated for use in a criminal prosecution; and 2) public officials do not become an agent of law enforcement by asking about suspected child abuse.

Statement admitted under Rule 803(4) are presumptively non-testimonial: ***United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005): AWhere statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.@

Miscellaneous

Labels on electronic devices, indicating that they were made in Taiwan, are not testimonial: *United States v. Napier,* 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government proved the interstate commerce element by offering two cellphones used to commit the crimes. The cellphones were each labeled AMade in Taiwan.@ The defendant argued that the statements on the labels were hearsay and testimonial. But the court found that the labels clearly were not made with the primary motive of use in a criminal prosecution.

> **Note: The court in *Napier* reviewed the confrontation argument for plain error, because the defendant objected at trial only on hearsay grounds; a hearsay objection does not preserve a claim of error on confrontation grounds.**

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 Awere not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed.@ Finally, while Taylor=s statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Non-Testimonial Hearsay and the Right to Confrontation

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 Awatershed@ 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.

Non-Verbal Information

Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation: ***United States v. Wallace,*** 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

> a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was Aconfronted.@ [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define Astatement@ to include Anonverbal conduct,@ but only if the person whose conduct it was Aintended it as an assertion.@ We can=t fit the videotape to this definition.

Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause: ***United States v. Brooks,*** 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined Atestimony@ as Aa solemn declaration or affirmation made for the purpose of establishing or proving some fact.@ The photographs did not meet that definition because they Awere not ›witnesses= against Brooks. They did not ›bear testimony= by declaring or affirming anything with a ›purpose.=@

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. Bostick,* 791 F.3d 127 (D.C.Cir. 2015): In a surreptitiously taped conversation, the defendant made incriminating statements to a confidential informant in the course of a drug transaction. The defendant argued that the informant's part of the conversation violated his right to confrontation because the informant was motivated to make the statement for purposes of prosecution. But the court found that the Confrontation Clause was inapplicable because the informant's statements were not offered for their truth, but rather to provide "context" for the defendant's own statement regarding the drug transaction. Statements that are not hearsay cannot violate the Confrontation Clause even if they fit the definition of testimoniality.

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* C 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* Adoes 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.@); ***United States v. Santiago,*** 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth Abut as exchanges with Santiago essential to understand the context of Santiago=s own recorded statements arranging to >cook= and supply the crack@); ***United States v. Liriano,*** 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violation the Confrontation Clause where they were properly offered to place the defendant=s responses in context). ***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).

Note: Five members of the Court in *Williams* disagreed with Justice Alito=s analysis that the Confrontation Clause was not violated because the testimonial lab report was never admitted for its truth. The question from *Williams* is whether those five Justices are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert=s use of the lab report from the prosecution=s admission of an accomplice=s confession in *Tennessee v. Street,* where the confession Awas not introduced for its truth, but only to impeach the defendant=s version of events.@ In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele=s confession. Peele=s confession was introduced not for its truth but only to show that it differed from Street=s. For that purpose, it didn=t matter whether it was true. Justice Thomas stated that A[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert=s opinion are not introduced for a plausible nonhearsay purpose@ because Ato use the inadmissible information in evaluating the expert=s testimony, the jury must make a preliminary judgment about whether this information is true.@ Justice Kagan in her opinion essentially repeats Justice Thomas=s analysis and agrees with his distinction between legitimate and illegitimate use of the Anot-for-truth@ argument. Both Justices Kagan and Thomas agree with the Court=s statement in *Crawford* that the Confrontation Clause Adoes not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.@ Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.*

It follows that the cases under this Anot-for-truth@ headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered Anot-for-truth@ only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

Also it should be noted that one of the "five members" of the Court that rejected Justice Alito's broader "not-for-truth" reasoning is no longer on the Court.

Statements by informant to police officers, offered implausibly to prove the Abackground@ 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 Athe 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 background of the police investigation:

> The government=s articulated justification C 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* C 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 Ainformation 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 Awas 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 Abackground@ 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 for the purpose of explaining the police investigation. 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.*

Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams.* The prosecution=s was not offering the accusations for any *legitimate* not-for-truth purpose.

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 Alittle more than brief responses to Hicks=s much more detailed statements.@ ***See also United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015) (statements by undercover informant made to defendant during a drug deal were properly admitted; they were offered not for their truth but to provide context for the defendant=s own statements, and so they did not violate the Confrontation Clause).

Accomplice=s confession, when offered in rebuttal 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 Aeleven 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 C 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 Aif 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@ C for example, by stating that the police chose to truncate the investigation Abecause of information the agent had.@ But the court held that this kind of sanitizing of the evidence was not required, because it Awould have come at an unjustified cost to the government.@ Such generalized testimony, without any context, Awould not have sufficiently rebutted Ayala=s line of questioning@ because it would have looked like one more cover-up. The court concluded that A[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.@ ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012) (testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: AThe government offered Perez=s out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.@).

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 Adoes 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 Athe 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: AIt 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.@

> **Note: This typical use of Acontext@ is not in question after *Williams*, because the focus is on the defendant=s statements and not on the truth of the declarant=s statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant=s statements. See, e.g., *United States v. Powers* from the Sixth Circuit, infra.**

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 Aprovided in a testimonial setting.@ It noted first that to the extent the statements were false, they did not violate *Crawford* because A*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.

Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams.* That is, to the extent some members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.

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 (3rd 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 (3rd 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 Awere 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 identified by the administrator 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 Aour 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 a 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 accomplices' 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.
>
> **Note: The use of the cohort=s confessions to show differences from the defendant=s confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while some Justices in *Williams* rejected the Anot-for-truth@ analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street.***

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 Ais 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 C recorded and sworn civil deposition testimony.@ Ultimately the court found it unnecessary to determine whether the deposition testimony was Atestimonial@ within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony Ato establish its *falsity* through independent evidence.@ ***See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice=s statement offered to impeach him as a witness C by showing it was inconsistent with the accomplice=s refusal to answer certain questions concerning the defendant=s involvement with the crime C 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 C because it was an accusation made to a police officer C but it was not hearsay and therefore its admission did not violate Deitz=s right to confrontation. The court found that the testimony Aexplaining 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 Ahad defense counsel objected to the testimony at trial, the court could have easily restricted its scope.@ ***See also United States v. Al-Maliki,*** , 787 F.3d 784 (6th Cir. 2015) (in a prosecution for child sex abuse, the trial court admitted the defendant's wife=s statement to police accusing the defendant of sexual abuse; the court found no error because it was offered for the limited purpose of explaining why an official investigation began: ATwo conclusions follow: It is not hearsay, * * * and the government did not violate the Confrontation Clause@); ***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 C and so even though testimonial did not violate the defendant=s right to confrontation C 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. ***Accord United States v. Napier,*** 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government offered a document from Time Warner cable, obtained pursuant to a government subpoena, showing that an email

address was accessed at the defendant=s home and that the defendant was the subscriber to the account. The court found no confrontation violation because the document was offered not for its truth, but rather Ato demonstrate how the Cincinnati office of the FBI located Napier.@ The court noted that the trial court gave the jury a limiting instruction that the document could be considered only to prove the course of the investigation.

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 told 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: ADavidson=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.@

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was Aminimal at best@; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant=s statements were not properly offered for Acontext,@ 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 the Confrontation Clause, because they were offered Ato show why the police conducted a sting operation@ against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that Adetails 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 Abackground@ 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, Abecause the testimony did not bear on Gibbs=s alleged possession of the .380 Llama pistol with which he was charged.@ Rather, it was admitted Asolely as background evidence to show why Gibbs=s bedroom was searched.@ ***See also United States v. Macias-Farias,*** 706 F.3d 775 (6th Cir. 2013) (officer=s testimony that he had received information from someone was offered not for its truth but to explain the officer=s conduct, thus no confrontation violation).

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 Acontext@: ***United States v. Nettles,*** 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government had an undercover informant contact him and ostensibly offer 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 Acontext.@ 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 Acontext@ doctrine, stating A[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 Aput 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: A*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: AWhere 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: Awe see no indication that Mitchell tried to put words in York=s mouth@); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant=s part of conversations were not hearsay, as they were offered to place the defendant=s statements in context; because they were not offered for truth their admission did not violate the defendant=s right to confrontation); ***United States v. Gaytan,*** 649 F.3d 573 (7th Cir. 2011) (undercover informant=s statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: AGaytan=s responses [>what you need?= and >where the loot at?=] would have been unintelligible without the context provided by Worthen=s statements about his or his brother=s interest in >rock=@; the court noted that there was no indication that the informant was Aputting words in Gaytan=s mouth@); ***United States v. Foster,*** 701 F.3d 1142 (7th Cir. 2012) (AHere, the CI=s statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant=s acts and make his statements intelligible. The defendant=s statement to >give me sixteen fifty= (because the original price was 17) would not have made sense without reference to the CI=s comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation.@); ***United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between

two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation); ***United States v. Faruki,*** 803 F.3d 847 (7th Cir. 2015) (no confrontation violation where out-of-court statements were offered to place the defendant's own statements in context).

For more on Acontext@ see ***United States v. Wright,*** 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant=s statement to a confidential information that he was Astocked up@ would have been unintelligible without providing the context of the informant=s statements inquiring about drugs, Aand a jury would not have any sense of why the conversation was even happening.@ The court also noted that Amost of the CI=s statements were inquiries and not factual assertions.@ The court expressed concern, however, that the district court=s limiting instruction on Acontext@ was boilerplate, and that the jury Acould have been told that the CI=s half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI=s statements standing alone were not to be considered as evidence of Wright=s guilt.@

> **Note: The concerns expressed in *Nettles* about possible abuse of the Acontext@ usage are along the same lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If the relevance of the statement requires the factfinder to assess its truth, then the statement is not being offered for a legitimate not-for-truth purpose.**

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 Aintelligence 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 Afor 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 Athe problem that *Crawford* addresses is the admission of hearsay@ and the witness=s statement was not hearsay. It was not admitted for its truth C that the witness saw the man he described pointing a gun at people C but rather Ato 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 C Afor example, why they looked across the street * * * and why they handcuffed Taylor when he approached.@ The court noted that absent Acomplicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem.@ The court found no Acomplicating circumstances@ in this case.

> **Note: The Court=s reference in *Taylor* to the possibility of exploiting a not-for-truth purpose unfairly runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.***

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 buy 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 Afoundation 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 Awere 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 C 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 United States v. Walker, 673 F.3d 649 (7th Cir. 2012) (confidential informant=s statements to the police C that he got guns from the defendant C were not properly offered for context but rather were testimonial hearsay: AThe government repeatedly hides behind its asserted needs to provide >context= and relate the >course of investigation.= These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that >the informant said he got this gun from X= as proof that X supplied the gun.@); ***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).

Note: *Adams, Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams.*

Statements by a 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 C after defense counsel had questioned the connection of the defendant to the residence C 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 Aonly 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, Aa question asking whether someone had told him that he had seen Holmes at the

residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh.@ ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011) (AIn this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted C that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI=s information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here.@). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant=s accusation made to police officer was properly offered to prove the propriety of the investigation: AFrom the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting.@); ***United States v. Wright,*** 739 F.3d 1160 (8th Cir. 2014) (Officer=s statement to another officer, Acome into the room, I=ve found something@ was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel=s argument that the officer entered the room in response to a loud noise: AIf the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant=s Sixth Amendment rights.@).

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 AClean@ who was accompanied by a man named Charmar. The officer who took this statement testified that he entered ACharmar@ into a database to help identify AClean@ and the database search led him to the defendant. The court found no error in admitting the victim=s statement, stating that Ait 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 Awas only a subterfuge to get Williams= statement about Brown before the jury.@ But the court responded that the defendant Adid 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 properly was not offered for its truth, Ait 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 C indeed they were not admitted at all. The court noted that there was Ano authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause.@

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant=s statements were statements by a party-opponent and admitting the defendant=s own statements cannot violate the Confrontation Clause. The informant=s statements were not hearsay because they were admitted only to put the defendant=s statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that Athe point of the prosecutor=s introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false.@ The court found that the government introduced other evidence to show that the declarant=s assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause: *United States v. Young*, 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young=s husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was remarkably consistent in all details with the alibi that Young had independently provided, and many of the assertions were false. The government offered Mock=s statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock=s statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock=s statement was not offered for its truth but rather Ato show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock=s statements to Deputy Salsberry are valuable to the government because they are false.@

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 Ait 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 Aas a basis@ for the officer=s action, and therefore its admission did not violate the Confrontation Clause); ***United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to an undercover police officer that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: AThe prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he knew the price, and why he agreed to pay for oral sex.@; the court also found that the statements were not testimonial anyway because the declarant did not know she was talking to a police officer.); ***United States v. Ibarra-Diaz,*** 805 F.3d 908 (10th Cir. 2015) (confidential informant's statements to a police officer about the defendant's interest in doing a drug deal were testimonial, but the right to confrontation was not violated because the statements were offered to "explain why the officer did not put a body wire on the CI for this significant drug transaction --- i.e., because, unlike situations where the detective is in control of the informant from the outset and * * * of the circumstances of the informant's dealings with a potential target, in this instance the CI just called the detective 'out of the blue' about the possible drug transaction"; other statements from accomplices were properly admitted because they were not offered for their truth but to explain the conduct of the detective who heard the statements).

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 to 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, Athat 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 Athere is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence.@**

See also United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant=s statements Awere not offered for the truth of the matters asserted, but rather to provide context for [the defendant=s] own statements@).

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore,* 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction C together with answers to questions from the 911 operators C was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander=s statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency C rather the caller was simply recording that a crime was taking place across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive to whether statements about a crime are testimonial. Ultimately the court found that the caller=s statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. * * * The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession.

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 Athe 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.@

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio,* 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a Abuy-bust@ operation, the defendant argued that hearsay statements of DEA agents at the scene C which were admitted as present sense impressions C were testimonial and so should have been excluded under *Crawford.* The court disagreed. It concluded that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, Aby assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly.@ Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation Awas a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs@ and also that the defendant was visibly wary of the situation.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009): In a drug case, the trial court admitted three Acertificates of analysis@ showing the results of the forensic tests performed on the seized substances. The certificates stated that Athe 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 Atestimonial@ 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 Atestimonial@ statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that A[w]e can safely assume that the analysts were aware of the affidavits= evidentiary purpose, since that purpose C as stated in the relevant state-law provision C was reprinted on the affidavits themselves.@

The implications of *Melendez-Diaz* C beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation C 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 Adocuments 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 C 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 Aaccusatory@ 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 Acontemplates two classes of witnesses C 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* C 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, Athe 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.@

4. The majority noted that cross-examining a forensic analyst may be necessary because A[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 C because a machine can=t make a Astatement@ C and have also held that a machine=s output is not Atestimony@ within the meaning of the Confrontation Clause. This case law appears to survive the Court=s analysis in *Melendez-Diaz* C and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

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 C it was prepared by a public officer in the regular course of his official duties C and although the clerk was certainly not a Aconventional 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. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to

produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and became effective December 1, 2013.

It should be noted that the continuing viability of *Melendez-Diaz* has been placed into some doubt by the death of Justice Scalia, who wrote the majority opinion.

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.

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, Athe challenge could presumably take the form of calling a certificate=s signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause.@ In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Warrant of deportation is not testimonial: *United States v. Garcia*, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held Athat 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 Amechanically register an unambiguous factual matter.@

Note: Other circuits before Melendez-Diaz 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 Athe 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 Aare 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 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 that 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. See also *United States v. Lopez,* 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).**

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:

> The Court in *Crawford* plainly characterizes business records as Astatements 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 and the record itself was not prepared for litigation purposes.**

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 Aresemble 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) (AThe 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 primarily 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 Athe 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* C 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 somewhat 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. Primary motive for use in a prosecution is obviously less likely to be found if the tester is a private organization.**

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:

> 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: Three circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz,* and that 902(11) and (12) certificates are not testimonial. *See United States v. Yeley-Davis,*** 632 F.3d 673 (10th Cir. 2011), ***United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012), and ***United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012) all 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 C the crime had not occurred at the time the records were prepared.

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 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, Aas 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*: ANot 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.**

In *United States v. Albino-Loe,* 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland,* declaring that a routine certification of authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they Adid not accomplish anything other than authenticating the A-file documents to which they were attached.@

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 Aa 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 Aare 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,* Athe 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 Atool 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[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 Aany piece of evidence which aids the prosecution would be testimonial.@

> **Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is about the absence of public records C 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. Drug ledgers in particular are absolutely not prepared for purposes of litigation.**

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 Ait 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 C they Arespond[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.**

Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz: United States v. Moore,* 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

> The Office of the Medical Examiner is required by D.C.Code ' 5B1405(b)(11) to investigate A[d]eaths for which the Metropolitan Police Department [AMPD@], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation.@ The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: AMobile crime diagram (not [Medical Examiner]Cuse for info only).@ Still another report included a ASupervisor's Review Record@ from the MPD Criminal Investigations Division commenting: AShould have indictment re John Raynor for this murder.@ Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled Areports.@ These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are Acircumstances which would lead an objective

witness reasonably to believe that the statement would be available for use at a later trial.@ *MelendezBDiaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent.

Finally, the court rejected the government=s argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence.

State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: *Nardi v. Pepe,* 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *MelendezBDiaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133B34 (1st Cir.2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with Aclearly established@ law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: *United States v. Phoeun Lang,* 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses C thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the

interview. But the court found no error. The court concluded that the form was not Aprimarily to be used in court proceedings.@ Rather it was a record prepared as Aa matter of administrative routine, for the primary purpose of determining Lang=s eligibility for naturalization.@ For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between Adocuments produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii).@ The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

> **Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the Aprimary motive@ test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification C the statement is testimonial only if it was made to be used in the *defendant=s* criminal prosecution. In *Phoeun Lang* the first premise was not met C the statements were made for administrative purposes, and not primarily for use in any criminal prosecution.**

Expert=s reliance on standard samples for comparison does not violate the Confrontation Clause because any communications regarding the preparation of those samples was not testimonial: *United States v. Razo*, 782 F.3d 31 (1st Cir. 2015). A chemist testified about the lab analysis she performed on a substance seized from the defendant=s coconspirator. The crime lab used a Aknown standard@ methamphetamine sample to create a reference point for comparison with seized evidence. That sample was received from a chemical company. The chemist testified that in comparing the seized sample with the known standard sample, she relied on the manufacturer=s assurance that the known standard sample was 100% pure. The court found no confrontation violation because the known standard sample C and the manufacturer=s assurance about it C were not testimonial. Any statements regarding the known standard sample were not made with the primary motivation that they would be used at a criminal trial, because the sample was prepared for general use by the laboratory. The court noted that the chemist=s conclusions about the *seized* sample would raise confrontation questions, but the government produced the chemist to be cross-examined about those conclusions. As to the standard sample, it was prepared Aprior to and without regard to any particular investigation, let alone any particular prosecution.@

In reaching its result, the *Razo* court provided a good interpretation of *Williams*. The court saw support in the fact that the Alito plurality would find any communications regarding the known standard sample to be non-testimonial because that sample was Anot prepared for the primary purpose of accusing a targeted individual.@ And the fifth vote of support would come from Justice Thomas, because nothing about the known standard sample was in the nature of a formalized statement.

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that admission of certain records about suspicious internet activity violated the defendant=s right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a reportC called a ACP Report@ C to the National Center for Missing and Exploited Children (NCMEC) listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant=s computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. But the court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because the primary purpose for the reports was to record past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a Asuspect@ screen name, email address, and IP address C and Yahoo did not treat its customers as Asuspects@ in the ordinary course of its business; 2) before a CP Report is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users= IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that A[i]f the CP Reports simply consisted of the raw underlying

records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible.@

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams.* Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had Ano way of knowing whether it will turn out to be incriminating or exonerating.@ In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: AYahoo=s employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody.@*

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user=s account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

> **Note: *Cameron* cannot be read to hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman,* 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation. Thus according to the court, the Yahoo reports were probably not admissible as business records anyway.**

Telephone records are not testimonial: *United States v. Burgos-Montes,* 786 F.3d 92 (1st Cir. 2015): The government introduced phone records of a conspirator. They were accompanied by a certification made under Rule 902(11). The defendant argued that the phone records were testimonial but the court disagreed. The defendant argued that the records were produced by the phone company in response to a demand from the government, but the court found this irrelevant. The records were gathered and maintained by the phone company in the routine course of business. AThe fact that the print-out of this data in this particular format was

requested for litigation does not turn the data contained in the print-out into information created for litigation.@

Routine autopsy report was not testimonial: ***United States v. James,*** 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law C stating that autopsy reports were not testimonial C was still valid. The court adhered to its view that Aroutine@ autopsy reports were not testimonial because they are not primarily motivated to create a record for a criminal trial. Applying the test of Aroutine@ to the facts presented, the court found as follows:

> Somaipersaud's autopsy was nothing other than routine C there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. [A government expert] testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."
>
> The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. [N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that Asomething in the order of ten percent of deaths investigated by the OCME lead to criminal investigations.@ It distinguished the 11th Circuit=s opinion C discussed below C which found an autopsy report to be testimonial, noting that Athe decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office.@ Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit=s view.

> **Note: In considering the effect of *Williams,* the court found that in fact there was no lesson at all to be derived from *Williams,* as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only in cases exactly like it.**

Business records are not testimonial: ***United States v. Bansal,*** 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that Athe statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury.@

Admission of credit card company=s records identifying customer accounts that had been compromised did not violate the right to confrontation: ***United States v. Keita,*** 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted Acommon point of purchase@ records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that Abusiness records are generally admissible absent confrontation.@ The court concluded that the records were primarily prepared for the administration of Amex=s regularly conducted business.

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 Aqualified 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 C and because the accomplice was not produced to testify C 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 C the cohort=s production of the records at a proffer session C was testimonial.**

Pseudoephedrine logs are not testimonial: *United States v. Towns,* 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies of pseudoephedrine purchases. The court found that the logs C and the certifications to the logs provided by the pharmacies C were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that Athe regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage.@ As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) C the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

> The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver=s license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

Court rejects the Atargeted individual@ test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera,* 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant=s grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant=s parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant=s mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was not targeted toward the defendant, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used Aat *a* later trial.@ Finally, the court contended that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be confronted with the A*witnesses against him.*@ In this case, the grandmother, by way of affidavit, was a witness against the defendant.

Reporter=s Note: **The Court=s construction of the Confrontation Clause could come out the other way. The reference to Awitnesses against him@ in the Sixth Amendment could be interpreted as *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads Awitnesses@ as of the time the statement is being introduced. But at that time, the witness is not there. All the Awitnessing@ is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying Aagainst him.@**

Another note from *Duron-Caldera:* The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams*, there is nothing on which the plurality and Justice Thomas agreed.

Pseudoephedrine purchase records are not testimonial: *United States v. Collins,* 799 F.3d 554 (6th Cir. 2015): Relying on the Fifth Circuit's decision in *United States v. Towns, supra,* the court held that pharmaceutical records of pseudoephedrine purchases were not testimonial. The court noted that while law enforcement officers use the records to track purchases, the "system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions" and accordingly was not primarily motivated to generate evidence for a prosecution.

Preparing an exhibit for trial is not testimonial: ***United States v. Vitrano,*** 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the technician who prepared the phone calls as an exhibit did not testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that A[p]reparing an exhibit for trial is not itself testimonial.@

Records of sales at a pharmacy are business records and not testimonial under ***Melendez-Diaz: United States v. Mashek,*** 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, A*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 A*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.@); ***United States v. Wells,*** 706 F.3d 908 (8th Cir. 2013) (*MelendezBDiaz* did not preclude the admission of pseudoephedrine logs, because they constitute non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: ***United States v. Thompson,*** 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit itself, the court stated that A[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights.@ The court

emphasized that A[b]oth the majority and dissenting opinions in *MelendezBDiaz* noted that a clerk's certificate authenticating a recordCor a copy thereofCfor use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial.@ It concluded that A[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument.@ ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: ***United States v. Brooks,*** 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant=s argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit C not for use at trial. The court stated that A[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union=s security company for the purpose of locating a robber and recovering stolen money.@

Prior conviction in which the defendant did not have the opportunity to 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 C 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.

Note: The statements of facts underlying the prior conviction are testimonial under both versions of the primary motive test contested in *Williams.* They meet the Kagan test because they were obviously prepared for purpose of C indeed as part of C a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Phillipines as part of the investigation into the defendant-s citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records Acreated for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.@ *MelendezBDiaz*, 129 S.Ct. at 2539B40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *MelendezBDiaz*, despite being labeled a copy of the certificate, Exhibit 1 is Aquite plainly@ an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Filed statement of registered car owner, made after impoundment, that he sold the car to the defendant, was testimonial: *United States v. Esparza,* 791 F.3d 1067 (9th Cir. 2015): The defendant was arrested entering the United States with marijuana hidden in the gas tank and

dashboard; the fact in dispute was the defendant's knowledge, and specifically whether he owned the car he was driving. At the time of arrest, the registered owner was Donna Hernandez. The government relied on two hearsay statements made in records filed with the DMV by Hernandez that she had sold the car to the defendant six days before his arrest. But these records were filed *after* the defendant was arrested and Hernandez had received a notice indicating that the car had been seized because it was used to smuggle marijuana into the country. Under the circumstances, the court found that the post-hoc records filed by Hernandez with the DMV were testimonial. The court noted that Hernandez did not create the record "for the routine administration of the DMV's affairs." Nor was Hernandez merely "a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a notice of seizure from [Customs and Border Protection]."

> **Note: This is an interesting case in which a statement was found testimonial in the absence of significant law enforcement involvement in the generation of the statement. As the Court has noted in *Bryant* and *Clark*, law enforcement involvement is critical to finding a statement testimonial, because a statement not made to or with law enforcement is unlikely to be sufficiently formal, and unlikely to be primarily motivated for use in a criminal trial. But at least it can be said that there is formality here --- Hernandez filed formal statements claiming that the ownership was transferred. And there was involvement of the state both in spurring her interest in filing and in receiving her filing.**

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* that 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 Aclearly inconsistent with *Melendez-Diaz*@ because like the certificates in that case, a CNR is prepared solely for purposes of litigation, after the crime has been committed. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that Aneither 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 Asmall fraction of these warrants are used in immigration prosecutions.@ The court concluded that A*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal C or, for that matter, any business or public record C 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. Rojas-Pedroza,*** 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant=s argument that it had been undermined by *Bullcoming* and *Bryant;* holding that a Notice of Intent in the defendant=s A-File C which apprises the alien of the determination that he is removable C was non-testimonial because Atheir primary purpose is to effect removals, not to prove facts at a criminal trial.@); ***United States v. Lopez,*** 762 F.3d 852 (9th Cir. 2014) (verification of removal C recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal Ais that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration judge@; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the exclusion for law enforcement reports); ***United States v. Albino-Loe,*** 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant=s alienage in a notice of removal C which is the charging document for deportation C are not testimonial in an illegal entry case; the primary purpose of a notice of removal Ais simply to effect removals, not to prove facts at a criminal trial@); ***United States v. Torralba-Mendia,*** 784 F.3d 652 (9th Cir. 2015) (I-213 Forms, offered to show that passengers detained during an investigation were deported, were admissible under the public records hearsay exception and were not testimonial: AThe admitted record of a deportable alien contains the same information as a verification of removal: The alien=s name, photograph, fingerprints, as well as the date, port and method of departure . . . .[T]he admitted forms are a ministerial, objective observation [and] Agents complete I-213 forms regardless of whether the government decides to prosecute anyone criminally.@).

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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 C a Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge C were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales,* 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien=s possession, and basic biographical data about the alien, and also provides the alien options, including an admission that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant=s argument that these forms were testimonial. It stated that Aa Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of >testimonial.=@ The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant=s conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8) and also that its admission violated his right to confrontation. The court disagreed, reasoning that "a SSA interviewer completes the application as part of a routine administrative process@ and such a record is prepared for each and

every request for benefits. ANo affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose.@ The court quoted *MelendezBDiaz* for the proposition that A[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but becauseChaving been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trialCthey are not testimonial.@ The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavit seeking to amend a birth certificate, prepared by border patrol agents for use at trial, was testimonial: *United States v. Macias,* 789 F.3d 1011 (9th Cir. 2015): The defendant was arrested for illegal reentry but claimed that he had a California birth certificate and was a U.S. citizen. He was charged with illegal reentry and making a false claim of citizenship. During his trial he introduced a "delayed registration of birth" document issued by the State of California, and the jury deadlocked. After the trial, border patrol agents conducted an investigation into the defendant's place of birth, interviewing family members and reviewing family documents, and determined that he had been born in Mexico. They then attempted to correct the birthplace on the California document; pursuant to California law, they submitted sworn affidavits in an application to amend the California document. At the second trial, the government introduced the delayed registration as well as the amending affidavit. On appeal, the defendant argued that the amending affidavit was testimonial and its admission violated his right to confrontation. The court reviewed this claim for plain error because at trial the defendant's objection was on hearsay grounds only. The court found that the amending affidavit was clearly testimonial, as its sole purpose was to create evidence for the defendant's second trial. However, the court found that the plain error did not affect the defendant's substantial rights, because the government at trial introduced the defendant's Mexican birth certificate, as well as testimony from family members that the defendant was born in Mexico.

Affidavits authenticating business records and foreign public records are not testimonial: ***United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C. ' 3505 for foreign records and Rule 902(12) for foreign business records. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit=s decision in *Yeley-Davis,* immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is 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 Asimply 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: AA 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 (AContrary 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.

The court found *Yeley-Davis* Adispositive@ in *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis C whereas the certificate of authenticity Adoes not contain any >analysis= that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity.@ ***See also United States v. Keck,*** 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they Awere 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 C 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. 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 A[b]usiness records are not testimonial.@ And A[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial.@

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,* 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that the admission of autopsy reports of the defendant=s former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were filed from an arm of law enforcement. The court reasoned as follows:

> We think the autopsy records presented in this case were prepared Afor use at trial.@ Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. ' 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. Id. The medical examiner for each district Ashall determine the cause of death@ in a variety of circumstances and Ashall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney.@ Fla. Stat. ' 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section ' 406.11 has a duty to report the death to the medical examiner. Id. at ' 406.12. Failure to do so is a first degree misdemeanor. Id.

* * *

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: Amade under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.@ As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

Note: The Court's test for testimoniality is broader than that used by the Supreme Court. The Supreme Court finds statements to be testimonial only when they are *primarily motivated* to be used in a criminal prosecution. The 11th Circuit's "reasonable anticipation" test would cover many more statements, and accordingly the court's decision in *Ignasiak* is subject to question.

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 Atestimonial@ within the meaning of *Crawford*. The court explained that the statements Awere 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 C 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 AAcosta 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. AUnder *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 C 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 into evidence. 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 about the statements. 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 Acould 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 A*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 of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez,* 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant=s statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. AHe may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections.@

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) (AAlthough 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 C 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 Afailure to seize this opportunity demolishes his Sixth Amendment claim.@ The court observed that the defendant had a better opportunity to confront the victim Athan 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 C as is necessary to qualify a record under Rule 803(5) C and was subject to unrestricted cross-examination.

Waiver

Waiver found where defense counsel=s cross-examination opened the door for testimonial hearsay: ***United States v. Lopez-Medina,*** 596 F.3d 716 (10th Cir. 2010): In a drug trial, an officer testified about the investigation that led to the defendant. On cross-examination, defense counsel inquired into the information that the officer received from an informant C presumably to discredit the basis for the police having targeted the defendant. The trial court then allowed the government to question the officer and elicit some of the accusations about the defendant that the informant=s had made to the officer. The court found no error. It recognized that Aa confidential informant=s statement to a law enforcement officer are clearly testimonial.@ But the court concluded that the defendant Aopened the door to further questioning on Officer Johnson regarding the information he received from the confidential informant. Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic.@ The court observed that a waiver would not be found if there was any indication that the defendant had disagreed with defense counsel=s decision to open the door. But there was no indication of dissent in this case. ***Accord, United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (waiver found where defense counsel opened the door to testimonial hearsay). ***Contra, and undoubtedly wrong, United States v. Cromer,*** 389 F.3d 662, 679 (6th Cir. 2004) (Athe mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation@).

TAB 9

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Reporter's Memorandum

To: Advisory Committee on Evidence Rules

From: Dan Capra, Reporter

Re: Suggestion from member of the public for an amendment to the Evidence Rules, regarding partial waiver of Fifth Amendment privilege.

Date: April 1, 2016

The Committee is required to consider all proposals from members of the public for amendments to the Federal Rules of Evidence. Professor Ron Carlson, of the University of Georgia Law School, has submitted a proposal for the Committee's consideration. The premise for the proposal is that there is a risk that a criminal defendant will be found to have made a full waiver of his Fifth Amendment right when testifying at a trial, even if the defendant's direct testimony is limited to a discrete issue.

Here is the hypothetical used by Professor Carlson to illustrate his concern:[1] A defendant is charged with two separate bank robberies. He testifies that on the day of bank robbery One, he was in another state helping his sister move. He carefully limits the direct examination to bank robbery One. However, on cross-examination, he is asked about his whereabouts on the day of bank robbery Two. Professor Carlson posits that a court may find that the defendant, by testifying about one of the bank robberies, waived his Fifth Amendment privilege as to the other. Professor Carlson concedes that the defendant has waived his Fifth Amendment privilege with respect to questions about bank robbery One --- so the prosecution can, for example, ask about the details of the alleged moving day, why the defendant had so much money to spend the day after the robbery, and so forth. Professor Carlson calls this a permissibly-found "limited waiver" --- in contrast to a full waiver that would extend to bank robbery Two.

Professor Carlson's solution to this perceived problem is to add a provision to the Federal Rules of Evidence that is currently found in the Military Rules of Evidence as Rule 301(c). Military Rule 301(c) provides as follows:

[1] Professor Carlson's suggestion is more fully explicated in an article he has co-authored on the subject. See Carlson and Carlson, *Unconstitutionality and the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused*, 7 John Marshall L.J. 269 (2014).

Rule 301. Privilege concerning compulsory self-incrimination

(c) Limited Waiver. An accused who chooses to testify as a witness waives the privilege against self-incrimination only with respect to the matters concerning which he or she testifies. If the accused is on trial for two or more offenses and on direct examination testifies about only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. * * *

Professor Carlson recognizes that under Federal Rule 611(b), *all* witnesses are protected from a cross-examination that goes beyond the scope of direct. He notes, in a letter to the Reporter, that "[t]he unconstitutional choice which is posed to a defendant is not present in federal courts * * * as a result of Federal Rule 611(b)." His concern is mainly with those states (such as Georgia), that follow the English rule --- allowing cross-examination on any relevant matter, even if that matter was not addressed on direct. But in his letter to the Reporter, Professor Carlson explains his rationale for recommending the addition of Military Rule 301 to the Federal Rules, even given the presence of Rule 611(b):

> The reason [Military Rule 301(c)] may be valuable for the Federal Rules is that its inclusion will insure that in days and years ahead, in the event a future rules committee would move to amend Rule 611(b) in the direction of a wide-open rule, the rights of the accused will always be protected.

Reporter's Comment on the Proposal

Assuming Professor Carlson is right, and Rule 611(b) provides a criminal defendant all the protection from broadened cross-examination to which he is entitled, there is no need to amend the Federal Rules to include Military Rule 301(c). Amendments are disruptive and costly, and the policy of the Evidence Rules Committee is to propose amendments only when necessary to solve a real problem. The costs of an amendment are not justified by adding suspenders when there is already a belt.

It is not an amendment-worthy "problem" that a future Advisory Committee might amend Rule 611(b) in a way that would leave a criminal defendant subject to a loss of Fifth Amendment rights. Never has an amendment been proposed with the idea that it would be necessary to solve a problem created by a future amendment that would threaten constitutional rights. Under that kind of thinking, the Committee should now propose amendments to the hearsay rule that would protect criminal defendants, just in case a future Committee decides to do away with the hearsay rule.

It might be argued, though, that a version of Military Rule 301(c) would be useful if Rule 611(b), as presently constituted, is *not* sufficiently protective of a criminal defendant's Fifth Amendment rights. For example, in our bank robbery hypothetical above, would Rule 611(b) actually shield the defendant from cross-examination on bank robbery Two when he testifies to his alibi on bank robbery One? Rule 611(b) provides that "Cross-examination *should* not go beyond the *scope of direct* examination and *matters affecting the witness's credibility.*" And it further provides that the trial court "may allow inquiry into additional matters as if on direct examination."

There is some wiggle room in Rule 611(b). The rule is a "should" rule, not a "must" rule – a point emphasized by the second sentence, which gives the court discretion to allow wide-open cross-examination. Moreover, the term "scope" of direct examination is not defined, and creditable arguments can be made in most cases that when a criminal defendant testifies about innocence, pretty much everything is within the scope of that direct examination. See, e.g., *United States v. Brockenborrough,* 575 F.3d 726 (D.C. Cir. 2009) (in a wire fraud case, the defendant's testimony that his relationship with an alleged coconspirator was limited to doing her taxes, cross-examination on a sexual relationship between the two was within the scope of direct); *United States v. Vasquez,* 858 F.2d 1387 (9th Cir. 1988) (where defendant testified on direct that he had left an apartment, cross-examination about items found in the apartment was within the scope of direct); *United States v. Musk,* 719 F.3d 962 (8th Cir. 2103) (in a fraud case, where the defendant testified that his representations on certain transactions were truthful, he could be cross-examined about representations he made as to other transactions). It should be noted, though, that any attempt to open up cross-examination to *impeach* with unrelated bad acts is limited by Rule 608(b), which provides that "by testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for untruthfulness."

Even if Rule 611(b) (as limited by Rule 608(b)) can be construed to provide only limited protection against a broad cross-examination, it is unclear that the Military Rule provides much (or any) more. That rule states that "the accused may not be cross-examined as to guilt or innocence with respect to the other offenses *unless the cross-examination is relevant to an offense concerning which the accused has testified.*" It goes without saying that "relevant" is a permissive term. To go back to the hypothetical, a prosecutor could well argue that the facts of robbery Two are "relevant" to robbery One, in the same way that they would be under Rule 404(b), i.e., for intent, identity, etc. etc. It would seemingly be the rarest of cases in which a defendant could cabin his testimony so narrowly that he wouldn't open himself up to substantive cross-examination about other crimes charged, under the "relevant" standard. (Indeed, such a defendant who tried to testify so narrowly would risk a strategic backfire --- a negative inference from the jury that he was trying too hard to limit what he was saying.).

Yet this relative lack of protection in the evidence rules is completely understandable, because the case law on the subject of waiver by testifying is itself quite broad --- it is the broad

standard of "relevance." *Raffel v. United States*, 271 U.S. 494, 497-98 (1926), is the leading case.[2] It involved a defendant who, in a second trial on the same charges, testified on direct as to his innocence, denying that he made an incriminatory statement. He was cross-examined as to why he did not testify in the first trial. The Court found that his waiver of the Fifth Amendment privilege in the second trial extended to (opened the door to) questions about why he said nothing in the first trial. The Court defined and applied the relevant waiver standard as follows:

> The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. * * * His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.
>
> If, therefore, the question asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination they were proper questions, unless there is some reason of policy in the law of evidence which requires their exclusion.
>
> * * *
>
> We * * * do not think the questions asked of him were irrelevant or incompetent; for, if the cross-examination had revealed that the real reason for the defendant's failure to contradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own story, his answers would have a bearing on his credibility and on the truth of his own testimony in chief.[3]

Essentially, the standard of "relevance" set forth in Military Rule 301(c) codifies the relevance standard established by the Supreme Court in *Raffel:* the waiver extends to cross-examination on matters relevant to those raised on direct. See, e.g., *United States v. Ray*, 15 M.J. 808 (1983) (construing Military Rule 301 and concluding: "Having elected to testify voluntarily on the issue of guilt or innocence, an accused necessarily waives his privilege against self-incrimination as to

[2] *Raffel* is cited and relied upon in cases construing Rule 611(b). See *Musk, supra*, 719 F.3d at 965 (when defendant testified that certain statements to developers were not fraudulent, he was properly questioned about other representations made to developers, because *Raffel* holds that the waiver extends to all information relevant to the matters raised on direct).

[3] See also McGautha v. California, 402 U.S. 183, 215 (1971) (defendant who testifies cannot then claim a privilege from cross-examination "on matters reasonably related to the subject matter of his direct examination"); United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977) (defendant, by testifying that she was under duress during the time of the charged bank robbery, waived her Fifth Amendment rights regarding a later, uncharged crime in which she acted without duress). Compare Calloway v. Wainright, 409 F.2d 59 (5th Cir. 1968) (defendant who testified that his confession was coerced did not waive his Fifth Amendment right with regard to facts about the underlying crime).

any relevant matters reasonably raised by his direct testimony."). Query then whether --- even in a jurisdiction with wide-open cross-examination rules --- it is necessary to codify this case law.

It may be wondered, then, why the Military Rules contain a provision like Rule 301(c) while *also* implementing the American Rule of limited cross-examination in Military Rule 611(b). One can argue that it is simply a belt-and-suspenders approach, or a means of emphasizing the need for a court to be vigilant about protecting against an overbroad application of waiver. In any event, under the standards of necessity employed for proposing amendments to the Evidence Rules, belt-and-suspenders and extra emphasis would not seem to qualify as reasons for an amendment.

Conclusion

There appears to be no reason at this time to go forward with an amendment to the Evidence Rules that would include a provision like Military Rule 301(c). This is so for a number of reasons:

1. Rule 611(b), even as fuzzy as it is, already provides (together with Rule 608(b)) sufficient protection against an overbroad finding of waiver, and is consistent with the constitutional standards of relevance.

2. There is no reason to think that Rule 611(b) would ever be changed in such a way as to require a new rule to be implemented to protect testifying criminal defendants from overbroad waiver. In any case there is no reason to guard against such a possibility at this point.

3. The extent of a waiver is already governed by long-standing and uniform Supreme Court case law, and a new rule would do no more than codify that law --- which in any case is consistent with the existing Federal Rule 611(b).

4. The problem to which the proposal is directed is very unlikely to occur, because in most cases where a criminal defendant testifies, their denial of guilt on direct examination will in fact open the door to cross-examination about other charges, foundational issues, and the like.

If, however, the Committee determines that a possible amendment is worth further investigation, the Reporter will prepare a report, and possible language for an amendment, for the next meeting. Any amendment should probably be by way of an addition to Rule 611, as opposed to an independent rule. Logistically, the best approach would probably be to divide Rule 611(b) into two subparts, with the new language as the second subpart. Adding the new amendment as Rule 611(c) would upset electronic searches regarding the rule on leading

questions, which currently resides in Rule 611(c). And adding the new language as a new Rule 611(d) would mean that it is separated from the rule that essentially governs the same issue.

TAB 10

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To: Advisory Committee on Evidence Rules
From: Jayme Herschkopf, Supreme Court Fellow, Federal Judicial Center
Re: Academic Research on Morality and Civil Securities Fraud
Date: April 8, 2016

Each year, Supreme Court Fellows are placed in four different judicial agencies (Administrative Office of the Courts, Federal Judicial Center, Office of the Counselor to the Chief Justice, and U.S. Sentencing Commission), and engage in work relating to judicial administration, policy development, and education. Fellows are also expected to produce a work of academic scholarship and present their findings.[1] This memorandum outlines certain evidentiary findings of my paper.

Paper Summary

The paper argues that civil securities fraud should be considered a morally charged concept, and liability for civil securities fraud a pronouncement of moral blameworthiness. Doing so not only reflects the stated reasoning behind the securities laws and their later amendments by Congress, but also offers a path forward for courts to navigate the often messy legal landscape surrounding the laws' interpretation, particularly that surrounding whether and how recklessness qualifies as scienter, the mental element of civil securities fraud.

Evidentiary Ramifications

Legislative and jurisprudential developments regarding scienter are heavily intertwined with questions of evidence. Many scholars, notably Samuel Buell, have pointed out that when courts or Congress discuss the appropriateness of using recklessness to find defendants liable in fraud, the issue may well be evidentiary rather than something "constitutive about fraud."[2] But the moral component of civil securities fraud links evidentiary conclusions to the constitutive law, allowing judges to consider how their rulings fit into the broader purposes behind the securities laws' passage and amendment. Mental states are notoriously difficult to prove, and so judges are often tasked with reviewing evidentiary submissions with little guidance as to their appropriateness. Conceiving of securities fraud as morally charged offers a lens through which judges can view these evidentiary issues and make decisions with greater confidence. Two examples of the ways in which this moral lens can offer guidance on evidentiary issues are outlined on the next page.

[1] The views presented are my own and do not reflect those of the Fellows Program or Federal Judicial Center.
[2] Samuel W. Buell, *What is Securities Fraud?* 61 DUKE L.J. 511, 560 (2011).

1. Knowing versus Reckless Behavior in Securities Laws

- Whether "knowing" behavior under the securities laws includes recklessness has been rendered inconsistent in the statutory text
    - Congressional amendments in 2002 (Sarbanes-Oxley Act): "intentional or knowing conduct, including reckless conduct"
    - Congressional amendments in 2010 (Dodd-Frank Act): "knowingly or recklessly"
    - First phrase suggests recklessness is a type of knowing conduct, while second suggests it is a different standard

- Understanding securities fraud as a morally charged concept supports a presumption that recklessness is akin to intentional behavior when it appears in the securities laws
    - Little difficulty for those instances where the law now refers to reckless conduct as a type of knowing conduct
    - "Knowingly or recklessly" language inserted by Dodd-Frank must be read as a departure from that presumption: instances where Congress is allowing different types of evidence to be used to support an unchanged standard
    - Example: SEC can now bring actions against aiders and abettors who acted "knowingly or recklessly"[3]

2. Greed Allowed in Motive and Opportunity Evidence of Scienter

- Scienter established through "motive and opportunity": alleging facts evidencing the presence of a motive in tandem with an opportunity to commit fraud
    - Argument that evidence of greed should be allowed to show motive
    - Frequent disagreement among circuits regarding standard required

- Understanding scienter to imply moral wrongdoing counsels in favor of using greed as motive, but also offers guidance to parse truly blameworthy behavior from more general individualized and corporate motives
    - Link between greed and recklessness replete in legislative history, and lends support to evidentiary link. E.g.: "The greed and recklessness of Wall Street has cost Main Street dearly. Millions of jobs, hard-earned life savings were lost, and today American families are still recovering."[4]
    - Magnitude, timing, atypicality rubric put forward by Olazabal and Abril is helpful in this parsing exercise as well[5]

[3] 15 U.S.C. § 78t(e).
[4] 155 Cong. Rec. H14760 (daily ed. Dec. 11, 2009) (statement of Rep. Kilroy).
[5] Ann Morales Olazabal and Patricia Sanchez Abril, *The Ubiquity of Greed: A Contextual Model for Analysis of Scienter*, 60 FLA. L. REV. 401 (2008).